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In This Issue

OPEN Government Act Signed into Law

On Dec. 31, 2007, President Bush signed the OPEN Government Act (S. 2488), which includes long-sought reforms of the Freedom of Information Act (FOIA). Though some important provisions were dropped in order to reach bipartisan agreement in Congress, the bill creates incentives to reduce agency backlogs of FOIA requests, increases reporting requirements, and increases the scope of who can make requests and what entities are covered by FOIA.

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 the number of FOIA requests dropped 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 an effort to reduce 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 reported, "Despite increasing the numbers of requests processed, many agencies did not keep pace with the

volume of requests that they received." The OPEN Government Act, sponsored by Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX) in the Senate and Rep. Henry Waxman☼ (D-CA) in the House, seeks to resolve some of these problems.

Incentives for Improving Response Time

A long-standing and notorious problem with FOIA is the large backlog of requests and slow response times. The National Security Archive conducted a 2006 audit of FOIA that found agencies failing to make significant improvements to eliminate or reduce backlogs and reported on the ten oldest unanswered FOIA requests, several dating back to 1989. To help alleviate this problem, the OPEN Government Act penalizes agencies that fail to respond to FOIA requests within the required 20 days by barring them from collecting search or duplication fees from the requester. Moreover, the bill requires agencies to create a FOIA tracking system that would allow requestors to monitor the progress of requests on the Internet or by telephone. The OPEN Government Act also requires agencies to clearly state the amount of information deleted in its redactions and the exemption invoked for making each individual redaction. This may help to limit the number and scope of agency redactions.

Attorney Fees

Previously, attorney fees were only awarded to those complainants that succeeded with a FOIA case in court. A common criticism was that agencies would refuse to release information to requestors until a lawsuit was filed, but the agencies would comply with the request just before trial and thereby avoid paying attorneys fees. The OPEN Government Act expands awards of attorney fees to include cases where the agency makes a "voluntary or unilateral change in position" in the face of a lawsuit. Hence, agencies will no longer be able to avoid the cost of paying attorney fees if they force complainants to prepare cases against them.

Expanded Scope

Under FOIA, the news media does not pay collection or duplication fees, and the OPEN Government Act expands the definition of news media to possibly include bloggers. The bill defines members of the news media as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." This provision may greatly expand the audience using FOIA to collect information and research governmental issues, and through the exploding number of online political blogs, expand the number of people learning about their government.

Another provision expands the scope of who must respond to FOIA requests. In response to the fact that the government contracts out so many of its activities, the OPEN Government Act extends FOIA to include any information that "would be an agency record" that is maintained by "an entity under Government contract, for the purposes of record management." While the breadth of this provision is untested, it will surely serve to provide new access to information

held by contractors that store and manage government records and data.

Reporting Requirements

The OPEN Government Act also adds several important reporting requirements. The new provisions require agencies to report on the average, range, and median number of days for responding to requests. The number of responses made within the 20-day requirement, and in 20-day increments up to 200 days, also must be reported. Additionally, agencies are required to disclose the ten oldest active FOIA requests. Importantly, agencies are required to disclose the raw data regarding FOIA response times upon public request. In addition to the existing reporting requirements, this data will vastly improve oversight of agency practices regarding implementation of FOIA.

Missed Opportunity: Ashcroft Memo

The House passed the OPEN Government Act in March of 2007, but the Senate was held up due to various objections made by Republican senators and the White House. To address these concerns, a number of compromises and revisions were made. Unfortunately, one of these compromises was the removal of a provision which would have reversed the so-called "Ashcroft memo." On Oct. 12, 2001, Attorney General John Ashcroft issued a memo urging federal agencies to exercise greater caution in disclosing information, placing the presumption in favor of not disclosing information under FOIA. Many access advocates believe this policy shift has led to a significant reduction of information being released by agencies in response to FOIA requests.

In the coming months, agencies will translate the new FOIA law into reality, and much will depend on how the implementation of these improvements occurs. It is a practical certainty that many access advocate groups will be monitoring the agencies and testing compliance with the new law.

Big Farms to Get Free Pass in Reporting Air Pollution from Animal Waste

The U.S. Environmental Protection Agency (EPA) issued a Dec. 28, 2007, proposal in a second attempt to exempt farms from reporting air pollution caused by animal waste and to reduce information available about toxins at the local level.

In response to entreaties by the National Chicken Council, National Turkey Federation, and U.S. Poultry and Egg Association in 2005, EPA initially attempted to exempt only ammonia emissions from poultry farms. The new rule proposal extends the reporting loophole to all farms with *any* hazardous substance resulting from *any* animal waste released into the air. Farms must still report other water and land waste.

Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA) in

1986 in response to concerns about human and environmental health from toxic spills and pollution. National, state, and local emergency response teams were organized to ensure the immediate and well-planned reaction to any chemically dangerous situation. EPCRA details public notification as crucial for those emergency plans. In addition to requiring companies to report spills and pollution levels to the federal government, the law also also tasks companies with divulging specifics to emergency response teams, the Local Emergency Planning Committee (LEPC), and the State Emergency Response Commission (SERC). These entities are responsible for participating in response planning and providing information to the public to allow citizens to make their own risk evaluations.

The EPA explained that in developing this exemption proposal, it had reasoned that since the air releases are unlikely to trigger an EPA emergency response — having never done so before — mandatory reporting is an unnecessary administrative burden on both industry and government. However, EPA failed to consider the importance of publicly available information about local pollutants and exceedances of reportable quantities (RQs) — above which EPA considers there to be the "possibility" of harm. Currently, farms only have to report when pollution levels rise above a chemical's RQ, and farms routinely release hazardous substances above their RQs. The lack of consistent compliance suggests that no longer requiring information disclosure is an effort to sweep a messy problem under the rug. The intent of EPCRA was to act as preventative legislation, ensuring that sufficient information is disclosed and well-formed plans are created to prevent and properly respond to emergencies.

Government research has shown that animal waste causes significant environmental problems. The role of such waste in climate change and water pollution has also been well documented. The public health impacts from air pollution are also significant: multiple studies in North Carolina and Iowa have found respiratory and mental health problems in residents close to animal factories.

EPA has also recognized that current air monitoring practices, which limit investigations about the correlation between animal waste air pollution and human health, are inadequate. In attempts to determine farms' compliance with regulations, EPA initiated a two-year air emissions monitoring study in large animal farms in June 2007. Although some environmentalists believed the study to be little more than a stalling tactic, acknowledgement of the lack of basic air pollution data actually bolsters the argument that more information is needed rather than less. Instead, the proposed rule would weaken regulatory oversight and public accountability and ignores the central principal of EPCRA — that potential health concerns should be known publicly so that people can participate in protecting themselves.

EPA Denies State Efforts to Curb Global Warming

The Bush administration rejected an attempt by California and several other states to combat global warming by placing a cap on greenhouse gas emissions from vehicles. Stephen Johnson, head of the U.S. Environmental Protection Agency (EPA), announced the decision Dec. 19, 2007. Environmental advocates and members of Congress have sharply criticized the decision,

and several states have already filed suit in federal court hoping to overturn it.

In 2002, California Gov. Gray Davis (D) signed the California Clean Cars law. The legislation called for state regulators to impose strict emissions standards for new vehicles beginning with model year 2009.

In December 2005, California petitioned EPA to let the state enforce the Clean Cars law through regulation. Under the Clean Air Act, the federal government holds the express right to regulate emissions but may grant waivers to California. If EPA grants a waiver to California, other states may adopt California's regulations. "A total of 18 states, representing 45 percent of the nation's auto market, have either adopted" or pledged to adopt California's program, according to *The Washington Post*. EPA has never before denied a waiver request under the Clean Air Act.

In defending his decision, Johnson said a recently passed energy bill supplants the need for the states' programs. Bush signed into law Dec. 19, 2007, the Energy Independence and Security Act of 2007 (H.R. 6). Among other things, the law will raise the national fuel economy standard to 35 miles per gallon by 2020.

California's Clean Cars law does not mandate a change in fuel economy. Instead, the program caps vehicle emissions and provides automakers with latitude in choosing a strategy to meet the emissions limit, including improved fuel economy. Since both the newly passed law and the states' programs would effect a reduction in greenhouse gas emissions, Johnson contends the states' standards would be unnecessary.

However, a study by the California Air Resources Board finds the states' emission reduction programs would be significantly more beneficial than the federal fuel economy standard. The study finds the states' programs would reduce greenhouse gas emissions by 74 percent more than the federal fuel economy mandate for cars in California and be similarly beneficial for other states adopting the program.

Johnson also claims a single national standard is preferable to a "confusing patchwork of state rules." Johnson's rhetoric parrots that of auto industry spokespersons who have consistently called for a "50-state" or "nationwide" standard.

However, Frank O'Donnell, head of the nonprofit clean air advocacy group Clean Air Watch, believes this argument is misleading: "Under the Clean Air Act, there are only two possible standards for motor vehicles: federal standards, and potentially tougher California standards, which by law other states are permitted to adopt." O'Donnell adds, "That's hardly the makings of a quilt."

California and 15 of the states that intend to adopt California's standards filed suit on Jan. 2 against EPA. The states, joined by several environmental groups, filed the suit in San Francisco in the U.S. Court of Appeals for the Ninth Circuit. Governors and attorneys general from some of the states have been vocal in criticizing Johnson for denying California's request without a

scientific basis for doing so. *The Washington Post* reported the claims of anonymous sources inside EPA who said scientific, technical, and legal advisors at the agency recommended Johnson grant California's request, arguing that EPA would lose a lawsuit, if filed.

A report by the Congressional Research Service (CRS) supports the notion that EPA is on shaky legal footing in denying California's request for a waiver. CRS analyzed the four criteria California must meet in order to receive a Clean Air Act waiver ("whether the state has determined that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards; whether this determination was arbitrary and capricious; whether the state needs such standards to meet compelling and extraordinary conditions; and whether the standards and accompanying enforcement procedures are consistent with Section 202(a) of the Clean Air Act.") California's proposed regulations meet all four criteria, CRS found.

Two congressional committees are investigating EPA's decision. The House Oversight and Government Reform Committee and the Senate Environment and Public Works Committee — headed by Rep. Henry Waxman (D-CA) and Sen. Barbara Boxer☼ (D-CA), respectively — have requested all documents associated with the decision. Boxer's committee has scheduled a field briefing for Jan. 10, to be held in Los Angeles while Congress remains out of Washington. Johnson declined an invitation to attend the briefing.

EPA's general counsel has instructed staff to turn over all relevant documents and communications, including those to or from White House officials, according to the Associated Press. A recent investigation by the House Oversight and Government Reform Committee found senior officials from the White House as well as the Secretary of Transportation were involved in a campaign to lobby governors and federal lawmakers to oppose California's request for a waiver. Administration officials coordinated that campaign with auto industry lobbyists, the report also found.

Despite congressional oversight and the prospect of a court battle EPA will likely lose, the administration may still wind up achieving its intended goal of delaying government regulation of greenhouse gas emissions. Legislation granting the states the authority to regulate would likely be vetoed by Bush and have difficulty garnering the necessary two-thirds majority in both chambers. As for the court case, the CRS report states, "It is unlikely that EPA could be forced to grant a waiver through judicial means before the swearing in of a new Administration in 2009."

Congress Limps Toward Product Safety Reform

Despite a record number of consumer product recalls in 2007, Congress adjourned in December without agreeing on legislation to restore the federal government's safety system. The House passed new legislation that would vastly improve the Consumer Product Safety Commission's (CPSC) ability to regulate unsafe products. Weaker Senate legislation was

blocked by a lack of bipartisan agreement.

The House bill, H.R. 4040, passed Dec. 19, 2007, and includes numerous provisions that would enhance CPSC's authority to regulate the more than 15,000 products under its jurisdiction and ban industry-funded travel. In addition, the bill would:

- lower the levels of lead permitted in consumer products generally and especially lower lead levels in children's products;
- require independent third party testing of children's products;
- modify CPSC's procedures for issuing safety regulations;
- modify CPSC's public disclosure procedures as well as manufacturers' procedures for notifying the public about defective products; and
- authorize increased appropriations for both CPSC activities and for capital improvements to its research and testing facility.

The companion bill in the Senate, S. 2045, is not as extensive as the House bill. It excludes the travel ban and appropriates less money in the short term for CPSC activities. According to a Dec. 12, 2007, *Washington Post* article, there was not a single Republican sponsor for the legislation in the Senate, although there are negotiations to find a compromise. The article quotes the sponsor of the bill, Sen. Mark Pryor☼ (D-AR), as saying he is close to having a bipartisan compromise that would allow the Senate to take up the bill early in 2008. Both the Bush White House and the toy industry oppose some of the provisions in the Senate bill, so it is unclear if Pryor will be able to move the bill quickly.

Both consumer advocates and the toy industry were disappointed in Congress's inability to pass legislation. According to the *Post* story, the toy industry needs to have clarity about regulatory requirements by March or April because that is when toy manufacturers begin to finalize orders for the 2008 holiday season. The president of the Toy Industry Association, Carter Keithley, is quoted as saying, "Having legislation would provide [manufacturers] clarity as to what's required and give the public confidence."

Even if legislation passes both houses of Congress and President Bush signs a bill, there is no guarantee that consumers will be safer from the products they buy. Increased civil penalties, better notice and disclosure of product recalls, and an expanded CPSC will not achieve better consumer protections unless the agency wants to improve its performance. In a strongly worded op-ed published in the *Post* Dec. 23, 2007, a former CPSC statistician, Robin Ingle, argued that the agency "has lost the will to perform the function it was created for in 1972."

Appropriate public protections can only be built upon research, but over the last decade, the author writes, the agency has reduced vital research. For example, when she collected statistics on injuries and fatalities from all-terrain vehicle (ATV) accidents, the results indicated that in 2004, deaths and injuries were at a 20-year high. The general counsel at the agency tried to insert language into the executive summary of her report indicating the risk of riding these vehicles was decreasing. The general counsel at the time had been a lawyer for the ATV

industry.

The author provides two other examples of either products CPSC chose not to regulate or research indicating product dangers it chose not to release because the costs of buying those products would have increased slightly. She concludes the op-ed with this suggestion for improving the CPSC:

> It's easy to be outraged because the agency has allowed dangerous products to be imported from China, or because its chairman has taken trips paid for by the industries she regulates. But it's important to look more closely at CPSC and ask what really drives it and what currency it deals in. The agency was formed for one reason: to save lives. People of all ages die every day in incidents associated with some of the 15,000 products that it's meant to oversee. The agency should listen to its own scientists and stop silencing the life-saving research happening in its buildings.

Temporary and Targeted: The Basics of an Economic Stimulus Package

The release of dismal national jobs data on Jan. 4 has prompted rumblings from politicians in Washington about the need for an "economic stimulus package." On Jan. 7, President Bush and Treasury Secretary Henry Paulson delivered separate speeches on the state of the economy, in which they addressed the basic outlines of a fiscal policy designed to mitigate the effects of a possible recession. Bush announced he is taking a stay-the-course approach while economists from across the political spectrum are calling for some type of stimulus package. The president could still offer a plan in his State of the Union speech at the end of January.

During his speech at the Union League Club of Chicago on Jan. 7, Bush reiterated the importance of continuing his current policies to address what he calls recent economic "challenges." However, he emphasized that new initiatives are unnecessary to address the damage from the housing and financial crises. Bush called for extending his first-term tax cuts, few of which, if any, would have any impact on current economic signals.

Meanwhile, Paulson, in his speech before the New York Society of Security Analysts, Inc., said the administration would consider an economic stimulus package but would not provide any details. This is why some speculated that Bush might announce something during the State of Union address.

In order for an economic stimulus to be successful in its goal of shortening — or even preventing — a recession, it must quickly put money into the hands of individuals most likely to spend it. According to the Bureau of Economic Analysis, the U.S. economy is primarily driven by consumer spending, which accounts for approximately two-thirds of the economy. Thus, if there was a stimulus that incorporated tax cuts, it should be targeted to low- and middle-income families, who not only would benefit most from an increase in their take-home pay in the face of rising health care and energy costs, but would also be most likely to spend the

money immediately. Extending the Bush tax cuts, which largely benefit the wealthiest in the country, would have little stimulative impact, even if they could be felt immediately.

While individual saving and investing are desirable goals of fiscal policy, they would do little to provide short-term and immediate economic stimulus. Writing in the *Financial Times*, Harvard University professor and former Clinton Treasury Secretary Larry Summers stated, "[P]oorly provided fiscal stimulus can have worse side effects than the disease that is to be cured." He believes policymakers should design a stimulus package with the following characteristics:

- Timeliness: The package should be enacted by the middle of 2008, and its benefits should be felt immediately.
- Targeted: Tax spending should be directed at low- and middle-income families whose incomes have recently fallen and who would benefit the most from a tax cut.
- Temporary: A tax cut that increases the deficit for more than one year will be counterproductive, as the resulting upward pressure on long-term interest rates will attenuate the Federal Reserve Bank's ability to stimulate the economy through monetary policy.

While tax cutting can nominally fall under the rubric of "fiscal stimulus," not all cuts are the same: A $100 billion deficit hike can be more or less effective depending on how the tax cuts are designed. In his Jan. 7 column in the *New York Times*, Princeton economics professor Paul Krugman notes the contradiction in rhetoric the Bush administration has deployed in defense of its fiscal policies.

> [U]ntil just the other day Bush administration officials were in denial about the economy's problems. They were still insisting that the economy was strong, and touting the "Bush boom" — the improvement in the job situation that took place between the summer of 2003 and the end of 2006 — as proof of the efficacy of tax cuts.

As a series of charts on Krugman's blog illustrates, the Bush tax regime has not been a stellar jobs creation program.

Congressional Budget Office Director Peter Orszag underscored the importance of the duration of budget deficits when, as co-director of the Brookings-Urban Tax Policy Center, he said, "I want to emphasize at the beginning that temporary budget deficits can be beneficial in providing a jump start to a weak economy. Ongoing, sustained budget deficits are a different story.... The bottom line is that a larger budget deficit and lower national saving today reduce income in the future."

It is important that policy makers ignore calls for a repetition of the failed 2001-2003 Bush tax cuts and adhere to sound economic principles as described by Summers and Orszag. Even worse would be calls for extension of those same tax cuts as a short-term solution for current fiscal problems. Permanent tax cuts for the wealthy and corporations would do little to immediately stimulate the economy or direct economic aid to those most affected by an

economic slump while ultimately putting a drag on the economy in the long term through sustained budget deficits.

At this point, Democratic leaders in Congress have not put forward a stimulus plan. However, there has been discussion that such a plan might incorporate targeted, short-term tax cuts combined with targeted, short-term spending increases. With Congress returning prior to the State of the Union speech, it is expected that Democrats will begin advocating for a stimulus plan of some type.

Parts of Patriot Act Definition of Support for Terrorism Held Unconstitutional

On Dec. 10, 2007, the U.S. Court of Appeals for the Ninth Circuit ruled several provisions of the Patriot Act unconstitutional. The portions of the 2001 law in question criminalized any support for nonviolent activities of groups deemed by the Bush administration to be "terrorist organizations."

In the ruling — *Humanitarian Law Project v. Mukasey* — Judge Harry Pregerson held the language of the law is too vague because a person of ordinary intelligence would not be able to distinguish which types of activities or behaviors are illegal. In his opinion, Pregerson wrote, "Vague statutes are invalidated for three reasons: 1) to avoid punishing people for behavior that they could not have known was illegal; 2) to avoid arbitrary and discriminatory enforcement by government officers, and 3) to avoid any chilling effect on the exercise of First Amendment freedoms."

The provisions of the Patriot Act of concern in this case are amendments to the Antiterrorism and Effective Death Penalty Act (AEDPA), which enabled the U.S. Secretary of State to identify any group as a "foreign terrorist organization." Additionally, the law made it a crime — punishable by up to ten years in prison — for anyone to support even the nonviolent activities of such designated groups. The recent judgment upholds a 2005 ruling in which a U.S. District Court judge in Los Angeles, CA, found the parts of the law defining provision of training, expert advice or assistance, personnel, and service to be unconstitutional because there is "no apparent limit" to presidential authority to label groups as terrorist organizations. The 2005 judgment stopped the federal government from putting these provisions into effect against the groups named in the plaintiffs' complaint.

In their original complaint, the Humanitarian Law Project (HLP) asserted that the law compels an unfair guilt by association standard under which innocent individuals could be punished for supporting the good works of an organization that also engages in illicit activities. HLP contended it had been forced to stop its human rights and conflict resolution training for the Kurdistan Workers Party in Turkey and the Liberation Tigers of Tamil Eelam in Sri Lanka out of fear of legal sanctions because the groups have been designated as terrorist organizations. Both engage in wide range of nonviolent, humanitarian activities as well as violent ones. The plaintiffs argued that, as such, the enforcement of the law violated their First and Fifth

Amendment rights.

IRS Issues Final Version of New Form 990

On Dec. 20, 2007, the Internal Revenue Service (IRS) released the final version of its updated Form 990, the informational return for public charities and other tax-exempt organizations. The new form marked the first revision since 1979 and will be used for the 2008 tax year (returns filed in 2009). The IRS expects to release draft instructions for the 2008 Form 990 later in January. Although the new Form 990 incorporated many suggestions made in public comments on the draft version, the IRS did not make key changes to clarify and simplify reporting of advocacy-related activities.

During the 90-day comment period following the June 2007 IRS release of the Form 990 Discussion Draft, the agency received approximately 700 e-mails and letters totaling approximately 3,000 pages of comments. The final version of the form retains the Discussion Draft's structure of a core form and a series of schedules. Small nonprofits will have a grace period to transition to the new form, when they will be allowed to file Form 990-EZ instead of Form 990. Beginning in the 2010 tax year, all charities with gross receipts of $200,000 or $500,000 in total assets will be required to file Form 990-EZ. Nonprofits with less than $25,000 in gross receipts that are currently required to complete an e-Postcard (Form 990-N) will be required to continue doing so. By 2010, the threshold for those filing postcards will be adjusted to $50,000.

In OMB Watch's comments on the Form 990 Discussion Draft, we recommended several changes. In a recent analysis of the new 990, OMB Watch determined the IRS incorporated only one of the changes we suggested: using a separate box to report "doing business as" names for organizations so such information will be searchable on the web. The IRS retained the combined Schedule C for reporting lobbying and election activities despite concerns that mixing lobbying and political campaign activities in one form is likely to cause substantial confusion. All nonprofits — 501(c)(3), 501(c)(4), 527 organizations, for example — will be required to file Schedule C if engaged in either lobbying or political activity. Charities (501(c)(3) organizations) are not permitted to engage in partisan political activity but are permitted to engage in nonpartisan voter activities; the new form could cause confusion for those organizations.

However, Part IV (listing Required Schedules) of the new Schedule C does define the term "political" so that nonpartisan voter engagement work clearly is not included. Another problematic area is the definition of lobbying in the instructions for filling out Schedule C. The draft instructions used a definition that is inconsistent with the tax code. However, the IRS has not yet provided its version of the final instructions, leaving it uncertain what charities will be told to do in completing the form.

Independent Sector, which represents larger national nonprofits and various foundations, expressed satisfaction with the new form in a statement posted on its website, asserting,

"Independent Sector is pleased that the revised Form allows organizations to describe their exempt purpose and accomplishments on the first two pages of the Form, and that the IRS has made many of the improvements we requested in financial, compensation, and governance information, as well as in other specific schedules."

According to the IRS's overview of their Form 990 redesign, the major changes to the Discussion Draft include:

- A revised summary page that eliminates the ratios, percentages, and other metrics included in the draft, and incorporates a two-year summary of financial information comparing the current and prior years;
- A reordered core form that moves the organization's description of its program service accomplishments to page 2, immediately after the summary;
- A new checklist of schedules that shows which schedules the filing organization must complete;
- More opportunity throughout the form to provide supplemental information;
- Retention of group returns for affiliated groups with a joint exemption;
- Revised governance and compensation sections;
- Modified schedules for hospitals, tax-exempt bonds, non-cash contributions, and supplemental financial statements; and
- Reduced burden throughout the form and schedules, including increased or new reporting thresholds for several of the schedules.

It is surprising the speed with which the IRS proceeded to make changes to the annual tax form. Many organizations wrote to IRS that it should proceed slowly, testing proposed changes. The IRS took comments on its draft until Sept. 14, 2007, but had announced that it intended to publish a final version by the end of the year. Given the complexity of Form 990, some hoped that the IRS would provide a second round of comments. But it was rumored that the IRS staff needed to make quick decisions if they hoped to move the form into electronic formats. The information technology staff within the IRS had a limited opening to work on the Form, forcing the agency to finalize action by the end of 2007 or wait several years before staff could digitize the form.

The next step will be to review instructions on how to fill out the form. IRS has said the instructions will be coming shortly, possibly in installments.

Court Says Evidence Must Tie Charities to Terrorist Attack, Overturns $156 Million Judgment

On Dec. 28, 2007, the U.S. Court of Appeals for the Seventh Circuit overturned a $156 million judgment against several U.S.-based charities accused of supporting terrorism. The court ruled that the 2004 award against several charities that required payment of damages to the family of David Boim, who was shot to death in the West Bank in 1996 in an attack attributed to Hamas, must be based on evidence that the charities were directly connected to the murder.

The case was sent back to the lower court where there may be a new trial. The case could have a significant impact on the long-term fate of charitable funds seized by the government as part of its financial war on terror.

The Boim family was living in Jerusalem in 1996 when their 17-year-old son David was shot by two men identified as members of the militant Palestinian group Hamas, which the U.S. government has designated as a terrorist organization. In 2000, the Boims filed suit against Muhammad Salah, a former Hamas military director then living outside Chicago, and three U.S.-based Islamic charities suspected of funneling money to terrorist groups. The Boims wanted to make sure that that no money raised in the U.S. by Islamic charities was actually used to support terrorists in the Middle East. In 2004, a jury found the defendants responsible for providing financial support to Hamas, granting $52 million in damages, which was later tripled to $156 million as required under U.S. anti-terrorism law.

The appellate court decision said the trial court did not require the Boims to present credible evidence proving a causal connection between Hamas and the activities of the Holy Land Foundation for Relief and Development (HLF), the American Muslim Society, the Quranic Literacy Institute, and fundraiser Muhammad Salah. Furthermore, the trial court improperly allowed the Boims to rely on hearsay evidence and out-of-court statements, including websites attributed to Hamas.

The ruling also said the lower court should not have held that the links between HLF and Hamas were "incontrovertible" based on classified government evidence used by the Department of Treasury to designate HLF as a supporter of terrorism because HLF never had the opportunity to see or contest the evidence. The court drew a distinction between a civil dispute between private litigants and one involving national security with the government as a party, which are for different purposes and use different standards. In the Boim case, Judge Ilana Diamond Rovner wrote, "Belief, assumption, and speculation are no substitutes for evidence in a court of law."

The opinion went on to state, "The district court mistakenly believed that an organization or individual that contributed money or other support to Hamas with the intent to support its terrorist activities could be liable to the Boims even in the absence of proof that the money or support given to Hamas was a cause in fact of David's death, so long as the murder of David was foreseeable to the donor individual or organization."

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In This Issue

Bipartisan Consensus on Stimulus Package Gathers Momentum

Amid slumping capital markets and real estate values, a jump in unemployment, and a growing chorus of economists forecasting a recession in the U.S., a consensus has rapidly developed in Washington during the first few weeks of the year that a fiscal stimulus package is in order. The watchword in Washington has been "bipartisanship," and President Bush and the congressional Democratic leadership have already made concessions. Some questions remain regarding the optimal structure and size of the package, but indications point to its enactment in a matter of weeks.

Discussion of a fiscal response to the economic slowdown began in earnest when former Treasury Secretary Lawrence Summers wrote in a *Financial Times* op-ed in November 2007, "Three months ago it was reasonable to expect that the sub-prime credit crisis would be a financially significant event but not one that would threaten the overall pattern of economic growth. This is still a possible outcome but no longer the preponderant probability ... the odds

now favor a US recession."

Summers' pessimism — or prescience — was confirmed on Jan. 4 when December 2007 employment figures showed a jump in the jobless rate from 4.7 to 5 percent and net private sector job losses. On Jan. 6, Summers wrote a follow-up op-ed, "Why America must have a fiscal stimulus": "Six weeks ago my judgment in this newspaper that recession was likely seemed extreme; it is now conventional opinion and many fear that there will be a serious recession .... Fiscal stimulus is appropriate as insurance because it is the fastest and most reliable way of encouraging short run economic growth ... to be effective, fiscal stimulus must be *timely*, *targeted*, and *temporary*."

Summers advocated "a program of equal payments to all those paying either income or payroll taxes combined with increases in unemployment insurance benefits for the long-term unemployed and food stamp benefits [in] a $50 - $75 billon package." Ten days later, on Jan. 16, the Joint House-Senate Economic Committee held the first congressional hearing on the issue, "What Should the Federal Government do to Avoid a Recession." At the hearing, a consensus on the committee emerged that a stimulus package along the lines of Summers' recommendations to the committee should be adopted, and that "[a]s long as a fiscal stimulus program is temporary and does not create expectations of future spending or tax cuts it does not make a large economic difference whether or not it is offset by specific future fiscal actions."

The next day, Jan. 17, in testimony before the House Budget Committee, Federal Reserve Chairman Ben Bernanke offered a wholesale endorsement of Summers' suggestions, further remarking that extraneous items, such as an extension of the cuts, would vitiate the effectiveness of a stimulus package. "A fiscal program that increased the structural budget deficit would only make confronting those challenges more difficult," Bernanke said.

On Jan. 18, President Bush weighed in on the issue, saying he favored a package of one percent of gross domestic product, or between $140-150 billion. Bush's proposal reportedly featured $800 rebates for individuals and $1,600 for households, available only to income taxpayers, along with a "bonus depreciation" to allow companies to deduct 50 percent of business investments made in 2008. Surprisingly, the plan eschewed increases in unemployment insurance or food stamp benefits, a commonly cited aspect of a short-term stimulus. At the time, Bush emphasized his desire to reach bipartisan agreement on a package within short order, perhaps in time to announce it during his State of the Union Address on Jan. 28.

The willingness of both Congress and the president to arrive at a compromise on the package quickly is a radical departure from the rancorous debate, veto threats, obstruction, and delay that characterized discourse in Washington on almost every fiscal issue during 2007. One of the keys to this willingness was Bush's commitment to not seek an extension of his 2001 and 2003 tax cuts and Democrats' agreement to waive PAYGO requirements.

Some key issues remain to be resolved. But Treasury Secretary Henry Paulson has retreated from his insistence that the tax rebate go only to citizens who pay income tax, telling the U.S.

Chamber of Commerce on Jan. 22 that "the package must reach a large number of citizens," indicating a willingness to extend the tax rebate to those who pay little to no income taxes. The administration is also considering an increase in the earned-income and child tax credits and is warming up to increasing spending on unemployment insurance and food stamps despite philosophical concerns.

Analysts have been quick to evaluate the efficacy of the various stimulus components under discussion, with the majority supporting widespread rebates and spending measures. According to Mark Zandi, chief economist of Moody's Economy.com, the measures that produced the biggest "bang for the buck" were increases in unemployment benefits, which produced about $1.73 in additional demand for every dollar spent. Tax rebates to all citizens generated about $1.19 for every dollar spent, while reductions in tax rates produced only 59 cents per dollar. Further evidence supporting the need to have rebates extended to all citizens was Congressional Budget Office Director Peter R. Orszag's testimony to the Senate Finance Committee on Jan. 22 that the "most effective types of fiscal stimulus ... are those that direct money to people who are most likely to quickly spend the bulk of any additional funds provided to them."

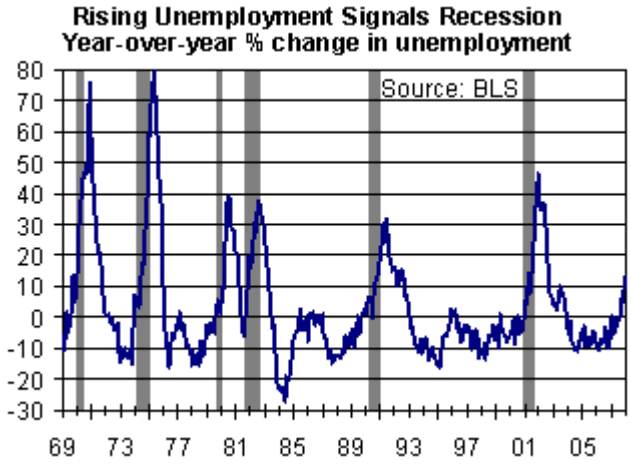
Fiscal Economic Bang for the Buck

One year $ change in real GDP for a given $ reduction in federal tax revenue or increase in spending

Tax Cuts	
Non-refundable lump-sum tax rebate	1.02
Refundable lump-sum tax rebate	1.26
Temporary tax cuts	
Payroll tax holiday	1.29
Across the board tax cut	1.03
Accelerated depreciation	0.27
Permanent tax cuts	
Extend alternative minimum tax patch	0.48
Make Bush Income Tax Cuts Permanent	0.29
Make Dividend and Capital Gains Tax Cuts Permanent	0.37
Cut in Corporate Tax Rate	0.30
Spending Increases	
Extending UI Benefits	1.64
Temporary Increase in Food Stamps	1.73
General Aid to State Governments	1.36
Increased Infrastructure Spending	1.59

Source: Moody's Economy.com

One other concern is the timing of the stimulus. Even if Congress acts quickly on a package that includes some form of tax rebates, it will be difficult for the Treasury Department to swiftly send out checks to citizens. This could have a bearing on how effective the stimulus is in minimizing the economic decline.



While many of the details of the final package have yet to be worked out, it is encouraging that Congress and the president have moved with alacrity toward a consensus that now is the time for stimulus and that it should be targeted and temporary. Now, they need to decide to whom it should be targeted to and how temporary it should be.

Lack of Resources and Poor Policies Hurt IRS Mission

A lack of enforcement resources, misplaced priorities, and inefficient policies at the Internal Revenue Service (IRS) are among the factors perpetuating the federal tax gap, according to a new OMB Watch report released Jan. 15. The report, *Bridging the Tax Gap: The Case for Increasing the IRS Budget*, illustrates why the IRS has had such a difficult time recovering the more than $300 billion in federal taxes that go unpaid every year and offers some practical solutions to the problem.

The most recent data on the gross tax gap comes from the IRS National Research Project, which evaluated tax returns from FY 2000. It put the gross tax gap at between $312 billion and $353 billion annually, or about 16 percent of all taxes owed.

The OMB Watch report argues Congress has given considerable lip service to doing something about the tax gap for years but has done little to actually give the IRS the tools to make significant progress in closing it. According to the report, in FY 1995, IRS had $4.43 billion in its budget for enforcement activities. By FY 2006, this budget had only risen to $4.65 billion — less than a five percent increase. During the same period:

- Inflation had eroded the value of this funding by 36 percent;
- The size of the economy grew 42 percent;
- The number of tax returns the IRS processed increased 11 percent, from 205 million to 228 million; and
- Hundreds of changes to the IRS's authority and tax laws gave the agency more work.

The funding shortage has also impacted the number of staff the IRS can hire. Over the last ten

years, the workforce has shrunk 18 percent, according to IRS statistics. The number of revenue agents and officers — IRS employees who perform audits — has decreased even faster, by 40 and 30 percent, respectively.

Despite these facts, Congress has demanded the IRS close the tax gap without making more resources available for the agency to do so. Thus, the IRS has been forced to make difficult choices as to how to use the limited resources it has been allocated, choices that often end up hurting tax collection and taxpayer rights.

OMB Watch focuses on three areas of policy at the IRS in need of immediate improvement: audits, particularly at the upper end of the income spectrum; tax collections; and tax preparation services for low-income taxpayers eligible for the Earned Income Tax Credit (EITC).

One of the most disturbing trends in enforcement policy over the last ten years has been a sharp decline in audits, which are an essential tool in the fight against unpaid taxes. In the last decade, there has been a general decline in most types of audits. In FY 1996, the audit rate for all individual income tax returns was 1.67 percent. In FY 2006, the rate had dropped to 1.0 percent of all individuals, after reaching a low of 0.5 percent in 2000. Audits of corporations of all sizes have also dropped significantly, and more recent data cited in the report shows the audits that are being done are poorly targeted and inefficient.

For both individuals and corporations, the IRS is increasingly relying on correspondence audits rather than more intensive face-to-face audits. This trend is problematic because correspondence audits are less effective than face-to-face ones, partly because the IRS can only spot problems that are evident from information submitted by the taxpayer during correspondence audits.

Another area in need of improvement and additional funding at the IRS is tax collection. The report cites former IRS Commissioner Charles Rossotti, who in 2002 reported an annual investment of under $400 million in IRS collections could generate over $11 billion each year. Instead of providing these additional resources, Congress has authorized the IRS to outsource the responsibility of collecting small tax debts to private collection agencies (PCAs). This program has so far shown itself to be wasteful and a danger to sensitive taxpayer information. According to the report, initial data on the program for the first year of operation shows PCAs averaged a 4.5:1 return on investment (ROI), collecting $29 million, from which they were paid $6.34 million. These data are far below both the IRS' ROI levels and initial revenue projections for the program.

In addition, numerous experts continue to worry PCAs might violate taxpayer rights. Indeed, anecdotal evidence of this was heard during congressional oversight hearings on the program in 2007, and despite recommendations otherwise, there remain few safeguards in place to prevent these abuses.

Finally, the IRS has taken an approach to enforcing the EITC that relies far too much on audits

and not enough on services. Mostly by congressional mandate, the IRS has taken a punitive approach to EITC error reduction, including disproportionally high audit rates and unique certification requirements. The examination rate for EITC recipients was 2.25 percent, compared to 1.0 percent for all individual income tax returns, and 1.3 percent of all individuals making over $100,000. Yet EITC audits yield only a fraction of the total revenues recovered by IRS examinations. EITC audits identified nearly $1.5 billion in excess payments, resulting in a yield of only $2,895 per audit — the lowest rate of return for any type of audit performed by the IRS.

The report concludes this is the wrong approach to fixing the problems with the EITC. As much as 50 percent of all tax returns with errors are thought to be unintentional and have been linked to the complexity of EITC eligibility requirements. There is also good evidence showing that providing services and assistance to low-income tax filers who claim the EITC sharply reduces error rates.

Unfortunately, the IRS is moving in the opposite direction, deciding to reduce the quantity and quality of services available to low-income filers through cuts to their network of Taxpayer Assistance Centers (TACs). Already understaffed, the IRS further attempted to close almost 20 percent of the TACs in 2005 before Congress intervened.

The tax gap is an eminently solvable problem. The report posits that if Congress were to prioritize funding for IRS examination, collection, and tax preparation services, it would drastically reduce the tax gap. So long as the IRS is underfunded, it will be forced to enforce the tax code unfairly and punitively. However, if the IRS is properly funded and administered correctly, the federal government will have the opportunity to make substantial progress in reducing the tax gap and to ensure the tax system is as progressive in practice as it is in law.

2008 Regulatory Policy Agenda: Congress Debates, States Act

In the current political climate, it is unlikely that Congress will succeed in passing legislation that protects the public from the range of regulatory failures we experienced in 2007. The barriers to substantially improving public health, worker safety, and environmental quality seem too high in this election year, especially given President Bush's willingness to use his veto power. What Congress can accomplish in 2008 is establishing legislative and oversight priorities over numerous health, safety, and environmental issues. In many instances, however, we will see states move ahead with a variety of actions designed to improve public protections. The executive branch will also play an increasingly important role as the Bush administration comes to a close.

Regulatory improvements or delay will come from federal agencies, and states will have to react to federal actions or inactions as they push their individual programs. In the next issue of *The Watcher*, we will provide an assessment of executive branch actions to watch out for. So what are some items on the consumer, health, and safety agenda for Congress?

Job Safety

On Jan. 16, the House passed coal mine safety legislation, H.R. 2768, that immediately received a veto threat. (See the accompanying article "Miner Safety Bill Clears House, Bush Veto Looms") It would, among other things, enhance the federal Mine Safety and Health Administration's (MSHA) regulations.

MSHA, however, does not support the legislation, according to a Jan.11 BNA article (subscription required) quoting the acting director of MSHA, Richard Stickler. Instead, MSHA is going back to basics. The agency has increased its enforcement efforts in the last year, and it hired 273 inspectors between July 2006 and September 2007. Because it takes 18 months to train the new inspectors, 49 percent of the inspection staff is still in training.

The Occupational Safety and Health Administration (OSHA) has come under fire for its lack of attention to workplace issues and enforcement during the Bush administration. Two high profile actions occurred in late 2007 that will be part of OSHA's 2008 agenda: 1) issuing a new standard for the food additive diacetyl, which can cause a fatal lung disease in factory workers exposed to it, and 2) implementing rules issued in November 2007 regarding employers' obligations to pay for personal protective equipment (PPE) for workers. There is a good chance that industry will challenge the PPE rule, resulting in significant delays in its implementation.

Two other workplace issues have the attention of the House Education and Labor Committee, according to BNA. The Committee may hold hearings regarding OSHA's lack of citations of ergonomics violations and questionable reporting of workplace injuries and illnesses. Labor proponents think there is considerable underreporting by employers, in part because workers fear retaliation for reporting accidents and illnesses.

Meanwhile, many states that administer OSHA-approved plans are addressing these same issues through their health and safety programs. For example, California is implementing its own diacetyl exposure rule for workers, and it is considering proposals to regulate other food additives, according to a Jan. 11 BNA article on states' plans. Michigan, Minnesota, and Washington State have initiatives regarding certification of construction crane operators. In some instances, these initiatives are prompted by accidents that highlighted the need for improved safety.

Consumer Product Safety

In the Jan. 8 issue of *The Watcher*, OMB Watch described how Congress was limping toward enhancing the regulatory authority of the Consumer Product Safety Commission (CPSC). The bills before Congress now will vastly increase resources in future years for the agency, and the omnibus appropriations bill for FY 2008, passed in December 2007, includes an increase of $17 million in the agency's budget. The latter is being used by CPSC to station more staff at ports of entry for imports, increase inspections of retailers, and target higher-risk products, especially children's products.

Environmental Quality

Congress is likely to spend considerable time on a variety of greenhouse gas (GHG) emissions bills, although the chances for passage seem remote in 2008. Sens. Joseph Lieberman (I-CT) and John Warner (R-VA) have introduced cap-and-trade legislation, S. 2191. This bill will probably be debated, and senators are staking out their positions, according to a Jan. 18 BNA article. The prospects for getting 60 votes to pass the bill are slim, but the outlines of legislation could be decided during this process. Democrats failed to introduce a similar measure in the House, although Rep. John Dingell☼ (D-MI), chair of the House Energy and Commerce Committee, is expected to do so later this year.

Most GHG activity is taking place through regional coalitions of states. The initiatives, such as the Regional Greenhouse Gas Initiative in the Northeast, are proposing cap-and-trade and emissions tracking programs coupled with setting emissions limits.

Climate change issues are driving drinking water concerns as well, according to BNA. For example, carbon sequestration — injecting carbon dioxide from power plants deep underground — has the potential to affect drinking water sources. The U.S. Environmental Protection Agency (EPA) is likely to propose a rule this year regulating this practice, but the impacts of sequestration are not well known.

Other drinking water issues scheduled for EPA action in 2008 include upgrading the nation's infrastructure and a decision on whether to regulate perchlorate, a chemical found in rocket fuel and linked to thyroid problems in children. EPA estimates that $277 billion will be needed to upgrade the infrastructure between 2003 and 2022, BNA reported in a Jan. 18 article. States and local water utilities argue that Congress has not appropriated enough money to help rebuild an infrastructure not quite at a crisis stage.

EPA has been debating a perchlorate standard since 1998 and is expected to make a decision early in 2008. Legislation has been introduced in both chambers of Congress to require a perchlorate standard. It is unlikely any bill will get through Congress and past a presidential veto.

Scientific Integrity

Congress held several hearings in 2007 focused on the contentious strategy of the Bush administration 1) to declare science uncertain on some policy questions ranging from global warming to drug safety and 2) to suppress government scientists' speech. According to the Union of Concerned Scientists' (UCS) Scientific Integrity Program, Congress addressed the erosion of the appropriate use of science in several bills. For example, Congress passed and the president signed the Food and Drug Administration Revitalization Act, which will help ensure that the best available science is used in decisions by the Food and Drug Administration. Legislation moving through Congress to enhance the authority of CPSC, as mentioned above, would extend whistleblower protections for CPSC scientists.

In addition, the House passed The Improving Government Accountability Act, which would provide more independence to inspectors general (IGs) at federal government agencies. IGs investigate waste, fraud, and corruption, which can include the misuse of science. The bill would allow agency scientists to challenge scientific misconduct in a confidential manner. According to UCS, the bill has bipartisan support in the Senate.

Workers Threatened by Decline in OSHA Budget, Enforcement Activity

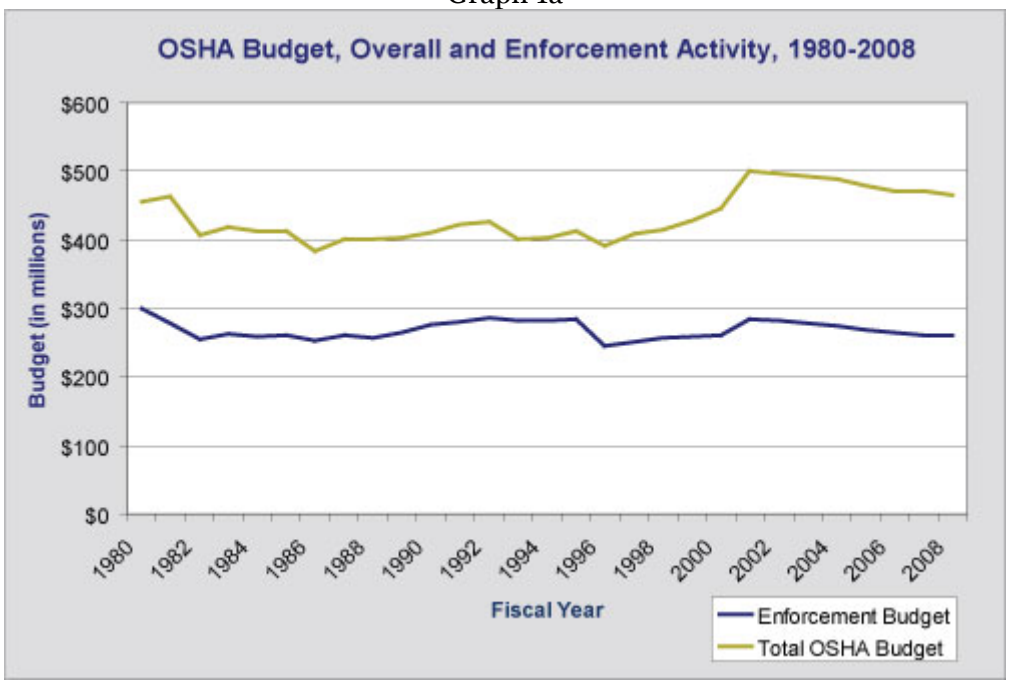
The consolidated appropriations bill passed by Congress and signed by President Bush in December 2007 cuts the budget of the U.S. Occupational Safety and Health Administration (OSHA) for Fiscal Year 2008. OSHA, like many other federal agencies, already faces budget constraints that make it more difficult for the agency to achieve its mission. Over the past three decades, OSHA's budget, staffing levels, and inspection activity have dropped while the American workforce has grown and new hazards have emerged.

In 1970, Congress passed the Occupational Safety and Health Act (OSH Act), creating OSHA. OSHA is responsible for assuring the safety and health of America's workforce, primarily by setting workplace safety standards through regulation and enforcing those standards.

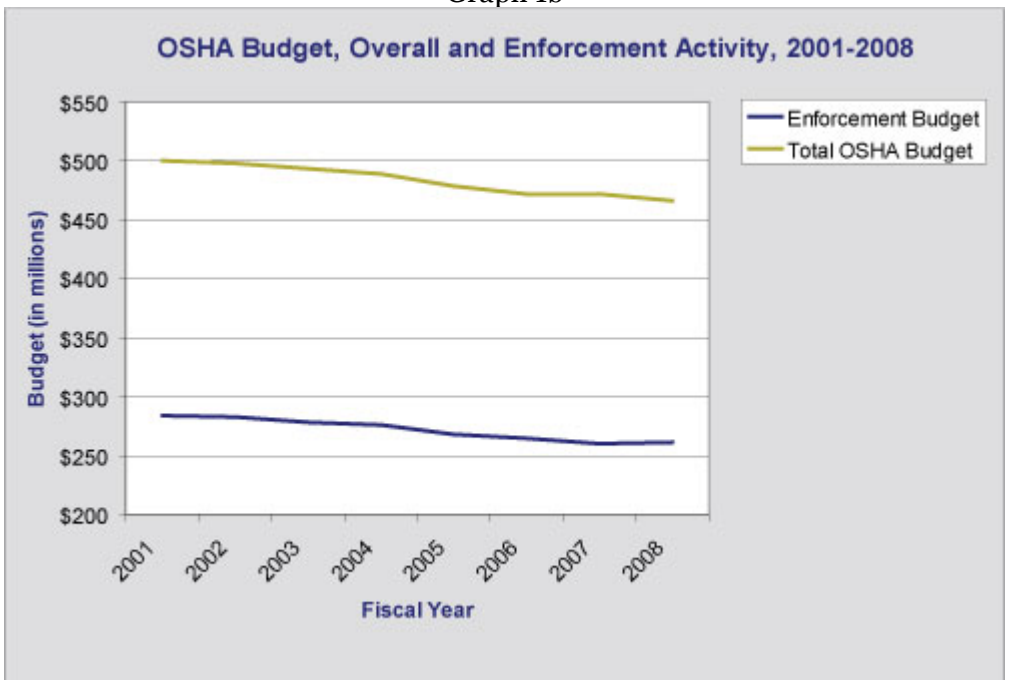
Long-term trends

By the end of the Carter administration, OSHA was up and running and operating at resource levels that would turn out to be 20-year highs. In 1982, OSHA's budget was cut sharply and remained near those levels throughout the Reagan administration. OSHA's budget rebounded slightly during the George H.W. Bush administration but fell again in FY 1993. The budget grew during the last years of the Clinton administration and, by FY 2001, reached an all-time high. (See Graph 1a.) Since then, OSHA's budget has been cut every year when adjusted for inflation. (See Graph 1b.)

Graph 1a



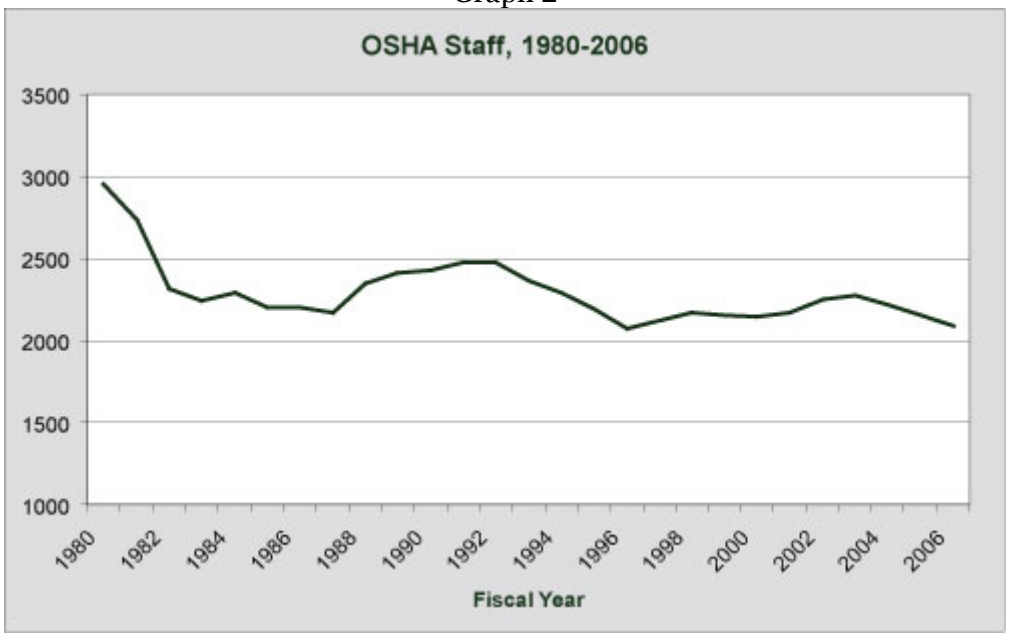
Graph 1b



As OSHA's budget has ebbed and flowed, so too has its staffing level. In FY 1980, OSHA's staffing level hit its peak — 2,950. For FY 2006, OSHA had a staff of only 2,092, the second-lowest level in 30 years. (See Graph 2.) In 1980, OSHA had approximately three staff members

for every 100,000 American workers. For FY 2006, staffing levels had been cut in half for every 100,000 American workers — to only 1.5 staff members.

Graph 2



However, looking at overall appropriations and staffing does not provide adequate insight into whether OSHA is fulfilling its mission to protect American workers. The bulk of OSHA's work is in enforcement. The federal budget for federal and state enforcement activity has declined more sharply over time than the overall OSHA budget. Subsequently, the number of workplace inspections conducted by both OSHA and state agencies has fallen dramatically.

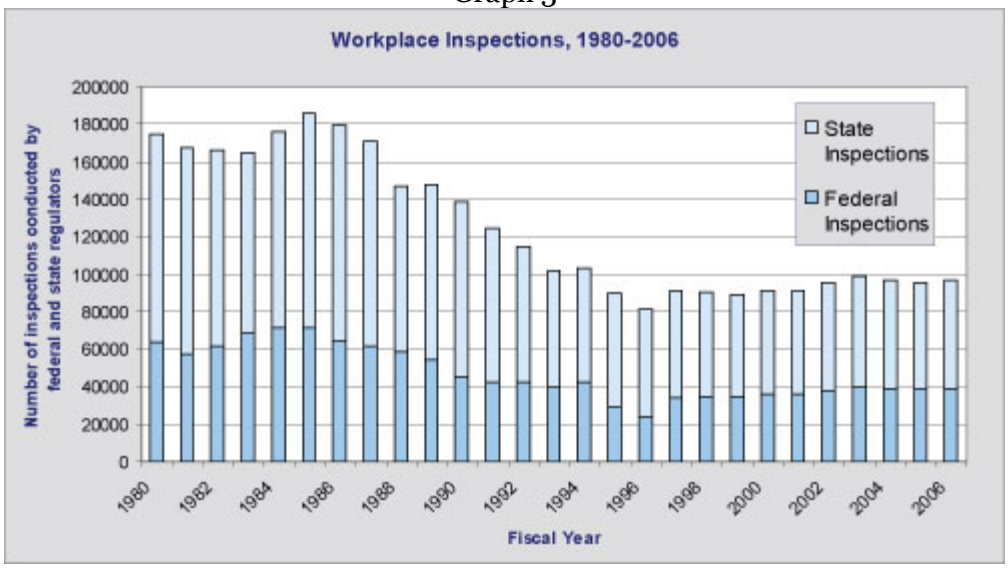
The federal government funds inspections conducted by both OSHA inspectors and state workplace safety inspectors. Under the OSH Act, the federal government provides grants of up to 50 percent of the total costs of state enforcement programs. Currently, 21 states have their own workplace safety programs, which have been approved by OSHA and receive federal grants. The enforcement budget referenced here includes both federal inspection funding and state grants from the federal government.

OSHA's budget for enforcement activity is currently 12 percent lower than it was in FY 1980. (See Graph 1a.) OSHA was appropriated $264 million for enforcement activity for FY 2006, compared to $301 million in FY 1980 when adjusted for inflation.

Inspection activity has suffered at least in part due to budget constraints. The number of workplace inspections conducted by federal and state regulators has rebounded since falling to all-time lows during the Clinton administration. However, regulators are still conducting far

fewer inspections than they did throughout the 1980s and early 1990s. In FY 1980, federal and state inspectors made more than 174,000 visits to American workplaces. In FY 2006, fewer than 97,000 inspections were conducted. (See Graph 3.)

Graph 3



When adjusted for the growing size of the American workforce, the drop in inspection activity is even greater. In 1980, OSHA and state regulators conducted 1.77 inspections per 100,000 workers. By 2005, OSHA and the states conducted only 0.668 inspections per 100,000 workers — a 62 percent drop.

Although the data indicate a correlation — and not necessarily a cause-effect relationship — between inspection rates and fatalities, as inspection activity has dropped, progress in reducing workplace fatalities has slowed. Since the passage of the OSH Act and the creation of OSHA, workplace fatality rates have plummeted. In 1970, the year Congress passed the OSH Act, the fatality rate was 18 deaths per 100,000 workers, according to the best available data. By 2006, that rate had fallen to 4.[1] (See Graph 4.)

Graph 4

Still, 5,703 workers died on the job in 2006 — an average of more than 15 every day. In recent years, the once-consistent rate of reduction in the fatality rate has slowed. From 1996 to 2005, the fatality rate dropped by 0.8. For the period 20 years earlier, 1976-1985, the fatality rate dropped by 3. Perhaps most disturbingly, in 2004, the fatality rate rose for only the second time since OSHA's creation.

Recent trends

OSHA's budget has been cut each year President Bush has been in office, when adjusting for inflation. Since reaching an all-time high in FY 2001, OSHA's overall budget has fallen more than five percent under Bush.

Funds appropriated for enforcement activity fell almost 8 percent from FY 2001 to FY 2008. (See Graph 1b.) Although money appropriated for enforcement activity has fallen during the Bush administration, the number of inspections conducted by OSHA and state regulators has remained consistent.

While the overall budget and enforcement budget at OSHA have declined, the budget for compliance assistance has risen. OSHA compliance assistance programs allow federal regulators to work with businesses to promote voluntary compliance and assist in understanding federal regulations.

Peg Seminario, director of safety and health for the AFL-CIO, said in testimony before a Senate worker safety panel that the budget shifts are reflective of the Bush administration's attitude toward workplace regulation. She said the Bush administration has "[r]epeatedly favored voluntary compliance over enforcement and programs directed at employers over those for workers."

Although Seminario recognizes the problems associated with resource constraints, the real

problem, she says, has been in OSHA's management. In the area of enforcement, Seminario points out Bush's OSHA, unlike previous administrations, "hasn't had high-profile focused initiatives on major hazards." As a result, "There is no sense of overall presence," she adds.

Outlook

Even if a new administration chooses to make worker safety a priority and revitalize OSHA management, resource constraints will still present a challenge. Considering nearly three decades of budget and staffing cuts and sharp declines in the number of workplace inspections, future administrators, however well intentioned, will have difficulty jump-starting progress in improving workplace safety.

Moreover, federal funding is an important signal of our priorities as a nation. The inability of multiple presidents and congresses to consistently fund OSHA at the levels necessary to keep up with emerging hazards and a growing workforce sends the wrong message to the American people — that their safety at work is not a priority.

Endnotes:

All data for fiscal years 1980-2006 are from the Budget of the U.S. Government appendices, fiscal years 1982-2008. These volumes are the president's request to Congress and contain final budget numbers and program data from two fiscal years prior. Budget data for fiscal years 2007-2008 comes from final versions of appropriations bills passed by Congress and signed by the president (H.J. Res. 20 and H.R. 2764, respectively).

[1] Fatality data and workforce size data are taken from *Death on the Job: The Toll of Neglect*, AFL-CIO, April 2007. Available at: aflcio.org/issues/safety/memorial/doj_2007.cfm

Miner Safety Bill Clears House, Bush Veto Looms

The House passed the Supplemental Mine Improvement and New Emergency Response Act (S-MINER) on Jan. 16. The bill aims to improve mine safety and the responsiveness of the federal government's chief mine regulator, the U.S. Mine Safety and Health Administration (MSHA), in response to the Crandall Canyon mine collapse and other recent disasters. White House officials have indicated President Bush will veto the bill.

The S-MINER bill (H.R. 2768) passed the House in a 214-199 vote, largely along party lines. The bill creates additional federal protections for miners and clarifies provisions of the Mine Improvement and New Emergency Response Act of 2006 (MINER Act), which Congress passed in the wake of the Sago, Aracoma, and Darby mine disasters of 2006.

Rep. George Miller (D-CA), the S-MINER bill's primary sponsor and the chairman of the House Education and Labor Committee, said further improvements to mine safety are needed and blamed the Bush administration for not being more responsive: "Even after these recent tragedies, even after the MINER Act of 2006 was enacted, we continue to see neglect from this Administration."

The bill requires MSHA to tighten federal standards for retreat mining — the controversial technique in which miners remove support pillars in order to intentionally collapse areas of the mine no longer in use. Currently, MSHA must approve retreat mining plans before a mine can engage in the technique. The bill would require MSHA to perform a more thorough review of those plans and perform on-site monitoring of retreat mining to ensure compliance.

Retreat mining was used in Utah's Crandall Canyon mine. In August 2007, the Crandall Canyon mine collapsed, trapping and killing six miners. Days later, three workers were killed during a rescue attempt. Prior to the collapse, MSHA had approved a plan for the use of retreat mining at Crandall Canyon.

The bill would also expand MSHA's ability to deal with mine owners and operators who are in violation of federal regulations. One provision allows the Secretary of Labor to halt production at mines if operators refuse to pay civil penalties. The bill also provides MSHA with the power of subpoena.

The bill also requires MSHA to take interim steps to improve emergency response technologies while permanent regulations, required by the MINER Act, are being finalized. MSHA would have to enhance communications technology that could be used in the event of a collapse while wireless technology is being developed. The S-MINER Act also requires mines to provide miners with breathable air sources (such as air cylinders) while MSHA finalizes regulations on refuge chambers.

The bill aims to reduce the prevalence of black lung, a severe lung disease caused by exposure to coal dust. In the 1960s, growing concern over the disease caused the federal government to act to limit exposure. Progress was made in combating the disease, but recent studies show the reverse is now happening. The S-MINER bill requires mine operators to use better technology for measuring coal dust exposure and cuts in half the federal exposure limit for coal dust.

The bill also calls for a National Academy of Sciences (NAS) report examining the effect that various analytical requirements impose on MSHA regulators. The bill explicitly asks NAS to review the impact of the Regulatory Flexibility Act, the Data Quality Act, White House memos on cost-benefit analysis and risk management, and Executive Order 12866 as amended by Executive Order 13422. The bill asks NAS to "[q]uantify to the extent possible the costs to miners of the aforementioned requirements."

The White House Office of Management and Budget (OMB) announced Jan. 15 that President Bush would likely veto the S-MINER bill if Congress approves it in its current form. OMB states the bill would jeopardize progress currently being made in the implementation of the MINER Act, arguing, "Several of the regulatory mandates in the S-MINER bill would weaken several existing regulations and overturn regulatory processes that were required by the MINER Act and are ongoing."

The United Mine Workers of America (UMWA) called the vote, "A tremendous victory for coal miners throughout America." UMWA President Cecil Roberts also counters OMB's argument,

saying the MINER Act is largely aimed at making improvements after accidents have occurred while the S-MINER Act intends to prevent accidents, injuries, and illnesses.

Roberts also challenged Congress to finish work on the bill despite Bush's veto threat: "President Bush has threatened to veto the S-MINER Act. I say, put it on his desk and make him do it."

The S-MINER bill will now move to the Senate. Sen. Edward Kennedy☼ (D-MA), chairman of the Senate Health, Education, Labor, and Pensions Committee, has expressed support for the bill and said in a statement, "I intend to see that the Senate acts as soon as possible."

Public Interest Board Attempts to Improve Declassification

On Jan. 9, the Public Interest Declassification Board (PIDB) released a report, *Improving Declassification: A Report to the President from the Public Interest Declassification Board*, outlining a series of recommendations to improve the declassification of government information.

The report primarily addresses the challenges posed by Executive Order 12958's requirement to automatically disclose classified information 25 years or older. The report recommends improving the efficiency of the system and respecting the historical importance of documents. Moreover, the PIDB report discusses the need to prepare for future challenges — in particular, the need to archive and review electronic records.

The PIDB was formed in 2000 to create more transparency and greater access to declassified documents, but it was not operational until 2006 because Congress provided no funding for the board until then. For the past two years, the board reviewed the current status of declassification procedures and heard testimony from a number of government agencies and private and public sector experts.

Efficiency

The government's efficiency in releasing documents is severely hampered by the magnitude of requests and documents agencies must process. Executive Order 12958, issued by President Bill Clinton in 1995, requires the release of all classified documents 25 years or older unless a department or agency exempts them from disclosure. The executive order, Freedom of Information Act requests, and Mandatory Declassification Review requests have overwhelmed the limited resources that agencies have committed to preview information for possible disclosure and have created enormous backlogs. Moreover, the National Archives is experiencing difficulty keeping up with the large amount of information that agencies are successfully declassifying.

According to the PIDB report, there were 36.4 million pages declassified over the five-year period from Fiscal Year 2002-2006, as compared to 139.8 million pages in the previous five-

year period (Fiscal Year 1997-2001).

To remedy the situation, PIDB recommends:

- Establishing a National Declassification Program under the Archivist of the United States, a Deputy Archivist for Declassification Policy and Programs, and a National Declassification Center (NDC)
- Requiring the NDC to issue guidelines to govern declassification at all agencies
- Consolidation of control for all declassification activities within agencies into one office
- Recording every declassification decision on a centralized computer system and making the database public within five years

Historical Importance

In the report, PIDB notes that government is missing a notion of the public interest in classified documents and that there is "no common understanding among agencies of what 'historically important' information is, nor any common understanding of how such information can be treated once identified as such." Information that has historical importance is essentially lost in the declassification process and not prioritized, despite the importance of its disclosure.

PIDB recommends:

- Establishing a system for identifying historically important information and giving such documents a higher priority in their release and disclosure
- Creating a board of historians to identify records of likely historical importance
- Requiring all agencies with significant classification activity to create historical advisory boards

The PIDB also makes several recommendations related to modern challenges of information management that government agencies face. For instance, the report recommends improvements on handling electronic records, increasing the resources devoted to declassification, and improving problems related to re-review. Similar to points made for historically important documents, the PIDB report also recommends prioritizing and streamlining the review and disclosure of presidential records.

Declassification, the report notes, is a fundamental aspect of a well-informed citizenry and active democracy. "Without historic understanding, the mistakes of the past are destined to be repeated; the triumphs, unappreciated." The PIDB sent the report and recommendations to President Bush on Jan. 3.

SBU Gets New Letters and Maybe a Better Policy

The Department of Defense (DoD) is finalizing policies to streamline categories used to restrict technically unclassified documents. The new policy to eliminate the multiple agency-specific "Sensitive But Unclassified" (SBU) procedures and replace them with a common set of "Controlled Unclassified Information" (CUI) standards is currently under presidential review.

Since 9/11, federal agencies have been extremely cautious in sharing information with other agencies, the public, and the private sector. The multitude of SBU categories, agency subjective definitions, and unclear disclosure policies create a breeding ground for unchecked government secrecy. Adding to the confusion are category names used at multiple agencies but with different meanings and dissemination standards. For example, the Law Enforcement Sensitive (LES) category is used in ten agencies with different levels of restriction on disclosure. Given that designations do not include an indication of the source agency, it is frequently difficult to accurately determine the correct level of protection information should receive. The goal of the CUI standards is to establish a system that will be simple, "easily understood," and identical across agencies.

Standardizing SBU categories has long been in the making.

- In December 2005, President Bush issued a memorandum specifically directing that SBU procedures be standardized across the government.
- In April 2006, the Government Accountability Office issued a report that highlighted the lack of consistency both within and among agencies.
- In April 2007, Information Sharing Environment (ISE) program manager Amb. Thomas E. McNamara testified before Congress that over 100 SBU categories exist, many redundant and/or contradictory.
- In December 2007, the ISE issued a memorandum to prepare government officials for this administrative overhaul.

The focus thus far has been on eliminating inefficiencies and enabling smoother government operations with little concern for public access to the information. An overhaul of the SBU procedures could also greatly increase the public's access to information previously withheld from the public because of confusion and uncertainty over the handling of SBU information. The lack of clarity about disclosing SBU information has caused agencies to be overly conservative, restricting many documents unnecessarily. Though not mentioned in government information sharing plans, the new CUI standards could correct some of these problems.

President Bush is expected to approve the new policy shortly.

Supreme Court Asked to Hear Challenge to New FEC Rule on Issue Ads

In December 2007, Citizens United, a 501(c)(4) organization, filed a lawsuit against the Federal Election Commission (FEC) in the U.S. District Court for the District of Columbia claiming that television ads for its film, *Hillary: The Movie*, should not be subject to donor disclosure requirements under FEC rules. On Jan. 15, a three-judge panel ruled against the group. The organization has since asked the U.S. Supreme Court to consider its case. The suit is a response to the FEC's new rule implementing the Supreme Court's *Wisconsin Right to Life* (WRTL) decision that allows genuine issue broadcasts to air in the period before federal elections.

The Citizens United suit contends that its ads for a film about Sen. Hillary Clinton☼ (D-NY) are purely commercial, that the film itself is no different from documentaries seen on television, and that it should be exempt from any type of regulation. Additionally, the group argues that FEC donor disclosure and disclaimer requirements are unconstitutional as applied to its three advertisements for the movie.

The FEC issued a new electioneering communications rule defining exemptions from the general ban on corporate funding for broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary, in order to comply with the WRTL decision. The rule allows broadcasts of genuine issue ads but requires disclosure of donors who contribute $1,000 or more to pay for the ads. It also requires a disclaimer as to who is responsible for the ad content. The rule also includes an exemption for commercial messages.

The district court rejected two major arguments put forward by Citizens United. First, the court ruled that the group could not run ads for its film without complying with the donor disclosure requirements. The court said that any exception to disclosure requirements for TV ads for the movie would have to be granted by the Supreme Court. "Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say." In addition, they offered no evidence that disclosing donors would lead to retaliation.

Second, the court determined that the film was not a constitutionally protected discussion of issues, under the test the Supreme Court established in the WRTL case, because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." The three-judge panel said the film does not address legislative issues but criticizes Clinton's positions and record, comparing her to "a European Socialist." Consequently, the film and its ads were deemed "electioneering communications."

The Associated Press detailed the exchange in the court room: "What's the issue?" asked Judge A. Raymond Randolph. Citizens United attorney James Bopp replied, "That Hillary Clinton is a European Socialist. That is an issue." Judge Randolph further responded, "Once you say,

'Hillary Clinton is a European Socialist,' aren't you saying vote against her?" Bopp disagreed because the movie did not use the word "vote."

Citizens United has filed a notice with the U.S. District Court that it will be taking its challenge to the Supreme Court. They have asked for an expedited decision, requesting the Court consider the case at its Feb. 15 conference so that the group could air the ads during the election season if the Supreme Court rules in its favor.

Primary Season Generates Complaints about Church Engagement in Partisan Activities

The 2008 presidential campaign is in full swing, and so is the debate over what charities and religious organizations can say or do without violating the tax code's ban on partisan electoral activity. The Internal Revenue Service (IRS), which enforces the law through its Political Activities Compliance Initiative (PACI) program, has already received numerous requests for investigations, and one church has challenged it to investigate a 2006 sermon. The controversy reflects a healthy interest in public affairs within the nonprofit sector, as well as an unhealthy uncertainty about what is allowed in many election-related activities.

The Texas Freedom Network (TFN), a government watchdog group that promotes religious freedom, has asked the IRS to investigate whether a private foundation, the Niemoller Foundation, improperly funded the Texas Restoration Project's efforts to mobilize members of conservative Christian churches in Texas to support Gov. Rick Perry's (R) reelection campaign in 2006. According to the TFN press release, the Texas Restoration Project held six "Pastors' Policy Briefings" in 2005 with "thousands of pastors and their spouses" present "at a time when Republicans Sen. Kay Bailey Hutchison☼ and state Comptroller Carole Strayhorn were considering seeking their party's nomination for governor. They sponsored a seventh event to celebrate Gov. Perry's inauguration in 2007. Gov. Perry spoke at all seven 'briefings.' No other candidates or potential candidates for governor in 2006 received invitations to speak."

The TFN press release also states that "before the gubernatorial election in November 2006, the Texas Restoration Project sent e-mails to pastors on its mailing list, encouraging them to participate in a statewide conference call . . . to 'discuss what we can do this election cycle to motivate our pews to vote their values.'"

Similar initiatives are occurring elsewhere, modeled after the Texas Restoration Project's efforts. For example, the Florida Renewal Project planned a series of "pastors' policy briefings" in advance of Republican primaries in several states, including South Carolina, California, and Florida. The South Carolina Renewal Project and Iowa Renewal Project have also hosted speeches by Republican presidential candidate Mike Huckabee, and he is the only presidential candidate to speak at any of the pastors' briefings. In a 2007 Revenue Ruling, the IRS made it clear that charities and religious organizations must give all candidates an equal opportunity to appear at events they sponsor.

In another allegation of partisan activity, Americans United for Separation of Church and State (AU) has asked the IRS to investigate a Nevada church for a possible endorsement of Democratic presidential candidate Barack Obama. According to the AU press release, "Obama spoke during services at the Pentecostal Temple Church of God in Christ in Las Vegas on Jan. 13 in what the *Las Vegas Review-Journal* described as a 'surprise appearance.'" Obama's appearance occurred six days before the Nevada caucuses. Pastor Leon Smith told the congregation, "If you can't support your own, you won't get anywhere. . . . The more he [Obama] speaks, the more he wins my confidence, and . . . if the polls were open today, I would cast my vote for this senator." Whether or not these statements amount to an endorsement that violates the law depends on how the IRS interprets the "facts and circumstances" test of the case.

After numerous accusations of improper partisan activity, one church has decided to challenge what it feels are unnecessary and mistaken IRS constraints on pastors. The Calvary Assembly of God Church, in Algoma, WI, ran an advertisement in *The Wall Street Journal* written in the form of an open letter to the IRS declaring, "We're writing today to call your bluff," challenging the IRS to investigate the church and a November 2006 sermon for possible campaign intervention.

The ad was paid for by the Becket Fund for Religious Liberty, an interfaith, public-interest law firm. The Becket Fund's National Litigation Director said the law firm is basing its legal arguments on the church autonomy doctrine, which prohibits states from interfering with the way a church is governed. They charge that the IRS is misinterpreting federal tax law to censor sermons about political figures and political issues. The Becket Fund's press release argues that "clergy speaking to their congregations is not the same as a church, as a legal entity, endorsing a candidate." The press release also has a video of the sermon in question.

The letter references the All Saints Episcopal Church case that ended without the church losing it tax-exempt status despite an IRS finding that they did in fact intervene in the campaign. "But now you've all but admitted that you can't enforce these rules against the All Saints Episcopal Church in Pasadena, California. We're happy to see that, after some hemming and hawing, you finally dropped your offensive investigation into that church."

AU has responded, considering the letter "mocks the IRS and dares the federal agency to investigate his church for a supposedly political sermon he delivered in 2006. . . . the ad is based on inaccurate information and could lead unwary religious groups to violate federal tax law, encounter fines and lose their tax exemptions."

Convictions Based on Publications Raise New Questions for Nonprofits

On Jan. 11, three former leaders of an Islamic charity based in Boston were convicted of tax fraud and making false statements because they did not include a description of their newsletter and its content in their tax-exempt status application and annual Internal Revenue

Service (IRS) Form 990 filings. The prosecution argued that the now-defunct group, Care International, supported jihadist movements in articles in its newsletter and postings on its website. The defense argued that no funds went to jihadist groups and that the leaders were being prosecuted for expressing unpopular political views. The convictions, which could result in prison terms of up to five years, are being appealed. The circumstances of the case, combined with public statements of the prosecutors, raise questions about the free expression rights of nonprofits and the level of detail required when reporting to the IRS.

Care International was formed in 1993 and collected $1.7 million over a ten-year period for "providing assistance to victims of natural and man-made disasters..." The criminal case began in May 2005 with an indictment charging Muhamed Mubayyid and Emadeddin Muntasser with concealing material facts from the IRS, conspiring to defraud the United States, filing false tax returns, and making false statements to the FBI. A third defendant, Samir Al-Monia, was charged later. The factual basis of the charges was that the group raised funds for publications supporting jihad, as well as its humanitarian operations, and that it concealed the fact that it was an outgrowth of another nonprofit, Al-Kifah, whose Brooklyn branch had been linked by the media to the World Trade Center bombing in 1993. The defense argued that the Boston branch of Al-Kifah was separate and that the defendants started Care to break away from the New York group.

Although the prosecutors spoke broadly that Care used its funds to "support" jihad, the only evidence they presented related to publications, including their newsletter, *Al-Hussam*, which was also the name of Al-Kifah's newsletter. According to a Nov. 28, 2007, *Worcester Telegram* article, prosecutors read lengthy articles from the newsletter to the jury, while the judge frequently warned them that the defendants had the right to hold and publish their views. The convictions were for the technical crime of not informing the IRS that the group would publish such articles. However, in an FBI press release after the conviction, prosecutors made statements that indicate their motivation in bringing the case was to discourage such publications. U.S. Attorney Michael J. Sullivan said, "Today's convictions should be a warning to organizations or persons who intend to fund their support of any militant organization or goal, including mujahideen and jihad, by abusing our nation's tax laws, that they will be proactively investigated and prosecuted to the fullest extent of the law."

The *Worcester Telegram* reported that on Jan. 18, Judge F. Dennis Saylor, who presided over the trial, disputed the government's claim that the case was about terrorism, saying there was no evidence of terrorism presented in the trial. During the trial, Judge Saylor banned references to terrorism and repeatedly reminded the jurors that the case was about tax fraud. The judge later heard arguments on whether to release the defendants on bail until their sentencing and said there would be a decision soon.

The case leaves open the question of when a nonprofit could be prosecuted for advocating views the FBI deems "militant." Charities and religious organizations are not limited to providing services to qualify for tax exemption under Sec. 501(c)(3) of the tax code. In fact, 26 D.F.R. 1.501(c)(3)-1(d)(2) explicitly states that:

[t]he fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) …."

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In This Issue

The Bush Budget Legacy: Misleading Claims and Misguided Priorities

On Feb. 4, President Bush laid out, in a rather slender volume, his federal budget proposal for Fiscal Year 2009, which begins on Oct. 1. Unfortunately, Bush has made little progress toward constructing an honest, fiscally responsible budget that meets the needs of America's communities. In fact, criticisms identical to those levied a year ago against his FY 2008 budget are still quite suitable in their application today — Bush's assumptions about war spending and Alternative Minimum Tax (AMT) reform are unrealistic if not outright spurious. His attempt to balance the budget by 2012 requires massive cuts to Medicare, Medicaid, and other popular domestic investments Congress will certainly not enact. His proposal to terminate or radically cut 151 federal programs is fantastical — wholesale cuts to popular discretionary programs are not only unlikely but are irresponsible in the face of worsening economic conditions.

Most emblematic of the Bush approach to budgeting is found in his deficit forecast for FY

2008. The projected $410 billion deficit is just shy of the record-setting $413 billion deficit set in 2004 only by virtue of a simply unrealistic economic growth forecast. Assuming GDP growth at a full percentage point higher than CBO's assumption (and a half-point higher than Wall Street's), the president was able to avoid printing a headline-grabbing, record deficit number.

It is this kind of dodge that sets the tone of this year's budget proposal. Rather than accept the fiscal challenges of the next few years — the wars in Iraq and Afghanistan, the AMT's reach into the middle class, and basic economic security for potentially millions more jobless workers — Bush has decided to "phone it in" this year and hand off to his successor a budget that is a simple retread of his disastrous policies. He has failed to provide a roadmap to resolving the nation's many fiscal problems and thereby has continued chipping away at our fiscal security. As the latest and last iteration of his fiscal policy record, President Bush's FY 2009 budget proposal has cemented his legacy as a spendthrift whose priorities have eroded middle-class security and left low-income families to fend for themselves in a volatile economy while burying future generations under ever-larger mountains of debt.

Bush Slashes Key Discretionary Investments

While discretionary funding for defense and homeland security receive an eight-plus percent increase this year, President Bush severely cuts back most other areas of discretionary spending, effectively undermining crucial investments in low- and middle-income communities around the country. In sum, non-defense, non-homeland security programs will see only a 0.3 percent increase in this budget (to $393 billion) — a real cut in funding since that increase is far below the rate of inflation and population growth. And these cuts will deepen each year, as the president proposes to freeze this level of funding through the subsequent four years.

The president's proposed FY 2009 cuts are spread out across a host of agencies but particularly target programs at the Departments of Education and Agriculture, which account for more than half of the 151 programs that would be drastically cut or eliminated under the president's budget. The Department of Education would see 47 programs eliminated, including programs that seek to prevent alcohol abuse, improve teacher quality, increase family literacy, and mentor children. Funding for after-school education programs funded through the 21st Century Learning Opportunities program would be cut by 26 percent. The Department of Agriculture would lose 19 programs. The Department of Health and Human Services would see its budget cut by 2.1 percent (4.2 percent when adjusted for inflation).

The Bush administration has again included cuts to several programs that have historically been quite popular in Congress. Major community investments made through the Community Services Block Grant and the Social Services Block Grant would disappear, along with a job training program for migrant and seasonal farm workers and funding for rehabilitating severely depressed public housing units — called the HOPE VI program. The president has tried to eliminate the HOPE VI program every year since moving into the White House, but the program is extremely popular among lawmakers in Congress, who recently voted to renew the program for eight years.

The Commodity Supplemental Food Program, which is designed to improve the health and nutrition of senior citizens, pregnant women and postpartum mothers, infants, and children and feeds close to 500,000 people each month, would be eliminated, and grants to health professionals and rural health care centers would be severely reduced (by 69 and 86 percent, respectively). Further, the Low-Income Home Energy Assistance Program (LIHEAP), which helps low-income families pay their heating bills, would be cut by almost 25 percent, even though at current funding levels, the program only serves one in five eligible households. (Ironically, Senate Democrats are trying to increase funding for LIHEAP in the economic stimulus bill currently being considered.)

All of these proposals have appeared before in President Bush's budgets and have been rejected by multiple Congresses on different occasions. Given many of the proposals have already been met with harsh criticism from members of Congress and outside advocacy groups, it's very unlikely any of these cuts will be instituted this year, further throwing the president's budget deficit projections out of balance.

Massive Impending Spending Once Again Omitted

When President Bush took office in 2001, the national debt was $5.7 trillion and was projected to decline. Seven years later, that number is over $9.2 trillion. Like in FY 2008, the president's FY 2009 budget is an attempt to sweep under the rug this massive run-up of debt by misdirecting attention to what he claims will be a balanced budget in 2012. Yet the only way the president shows a balanced budget on paper is by omitting two huge and almost certain spending items.

The president makes two critical but highly dubious assumptions — that Congress will not reform the AMT and that spending on the wars in Iraq and Afghanistan will be less than $100 billion in 2009, with no war funding at all allocated thereafter. While a complete overhaul of the AMT is not certain, it is likely Congress will continue to make annual changes to the AMT to prevent millions of middle-class taxpayers from falling into AMT liability. These types of changes would cost $168 billion from 2010-2012, according to the Brookings-Urban Tax Policy Center. If the Bush tax cuts are made permanent, this estimate jumps to $243 billion. These costs are unacknowledged in Bush's budget.

A similarly irresponsible assumption about war spending is made in the president's budget: war spending will not exist beyond 2009. Since the president has ruled out a complete withdrawal of troops from Iraq and Afghanistan in the coming year, his exclusion of funding for the wars beyond 2009 is an act of fiscal negligence that serves only to help show a balanced budget. If history is any indication, war costs will be significant for many years to come. From 2001 through 2007, $602 billion has been appropriated for the wars in Iraq and Afghanistan. The Congressional Budget Office projects if the number of military personnel deployed for both wars dropped from around the current level of 200,000 military personnel to 30,000 at the start of FY 2010, it would still cost the Treasury $570 billion through 2017.

President Bush has chosen to ignore these highly probable expenditures in his projections, which destroy his claims of reaching a balanced budget. It is further an indicator of the

seriousness with which he has approached annual budget making since the inception of his presidency. From artificially inflated deficit estimates that allow for pats on the back when they fail to materialize to politically unrealistic plans for billions of dollars in cuts from Medicare, Medicaid, SCHIP, and Food Stamps, the president has been more prone to making political statements through the budget rather than actually submitting to Congress a workable spending blueprint. This budget is no exception.

Balanced Budget Gimmicks Enable Case for Making Tax Cuts Permanent

The drastic level of cuts in non-defense discretionary spending in this budget, especially in the out years of the budget window, along with unrealistic assumptions about the costs of the wars in Iraq and Afghanistan and AMT reform, are proposed in order to show, at least on paper, a world where the president's 2001 and 2003 tax cuts can be extended without imperiling his projection of balanced budgets in 2012 and 2013.

In fact, extension of those tax cuts is tremendously expensive and underscores the magnitude of cuts the president is proposing in his new budget. In the Treasury Department's Blue Book, which is a detailed explanation of the administration's revenue proposals for FY 2009, Treasury Secretary Henry Paulson argues the reduced marginal income tax rates and other provisions of the 2001/2003 tax cuts (due to expire at the end of 2010) should be made permanent. Paulson makes no effort to disguise the enormous costs associated with extending these tax cuts — over $2 trillion.

He would have us believe, however, the federal budget can absorb these additional costs, the bulk of which would appear in 2012 and 2013. In those years, the president's budget projects extending the 2001/2003 tax cuts would cost $237 billion and $255 billion, respectively. When the budget's unrealistic assumptions about war and AMT reform costs, as well as politically infeasible cuts to popular programs, are factored in, the idea that the federal budget could come anywhere near balance within the five-year window covered by the proposal requires the willing suspension of disbelief.

Despite the massive cost and questionable economic benefits of the first-term tax cuts, the FY 2009 budget continues to recklessly advocate for their permanent extension without offsets, giving additional benefits almost entirely to the wealthiest in America and continuing to drive massive build-ups of debt. Extending the tax cuts through the budget window would cost $665 billion over the next five years and almost $2.2 trillion over the next ten years, according to the president's budget. These are costs the country is unable to bear.

Effect of Making Permanent 2001 and 2003 Bush Tax Cuts
(millions of dollars)

2008	2009	2010	2011	2012	2013	2009-2013	2009-2018
-422	-2,077	-13,095	-158,453	-236,584	-255,388	-665,597	-2,185,294

Bush Continues Misguided Budget Proposals

Rather than laying out a realistic path toward fiscal sustainability with his final budget proposal, Bush has chosen once again to offer a panoply of program cuts and expensive tax cuts. The signature proposal in this budget — $195.7 billion in cuts to Medicare and Medicaid over the next five years — has already been rejected by many in Congress, including Senate Finance Committee Chairman Max Baucus (D-MT), whose committee oversees those programs. The call for an extension of his 2001/2003 tax cuts is also likely to be a non-starter in this Democratic Congress. In fact, even some Republicans have been quick to acknowledge the implausibility of Bush's request. Senate Budget Committee Ranking Member Sen. Judd Gregg☼ (R-NH) commented, "Let's face it. This budget is done with the understanding that nobody's going to be taking a long, hard look at it."

Seven years of Bush fiscal stewardship has resulted in an economy teetering on the brink of recession, falling worker wages, exploding income inequality, and an impending record-setting budget deficit. Because of this, it is not surprising Bush would prefer his successor and Congress to make the hard choices necessary to tidy the fiscal house. This passing-the-buck attitude is readily apparent in the president's $70 billion war funding request the White House acknowledges would "certainly [not] cover all of FY 2009." Instead of a budget that meets the needs and priorities of the country's citizens, the president has drafted a spending plan that is simply a gambit to graft the façade of fiscal responsibility onto his legacy.

Stimulus Status: The Eye of the Storm

Momentum in Congress to pass a fiscal stimulus plan has halted for the moment, with the nation's political attention focused on the biggest primary day ever and, to a lesser degree, on the release of the president's FY 2009 budget proposal. Indeed, because Super Tuesday has three senators hop-scotching around the country, Senate leaders have put off an expected showdown over the plan until Wednesday, Feb. 6.

In a 385-35 vote on Jan. 29, the House approved H.R. 5140, the Recovery Rebates and Economic Stimulus for the American People Act of 2008, a $146 billion economic stimulus package worked out by House and administration negotiators. The package features just under $100 billion in tax rebates that would provide checks of up to $600 for individuals and $1,200 for families filing jointly. The rebate would be available to taxpayers earning over $3,000 in wages and would be phased out for individuals earning over $75,000 and families earning over $150,000. The package also provides tax credits for businesses totaling roughly $50 billion.

On the same day, Senate Finance Committee Chair Max Baucus (D-MT) held a hearing on his version of an economic stimulus, which would provide for:

- An extension of unemployment insurance benefits for 13 weeks, and 13 weeks on top of that for states with a sustained unemployment rate of 6.5 percent or more. This was not included in the House bill.
- Broadening the definition of income to include not just wages, as in the House bill, but

also self-employment income, veterans' disability payments, and Social Security benefits — making an additional 250,000 veterans and 20 million seniors eligible for rebates
- An increase in the phase-out points to $150,000 for individuals and $300,000 for families

On Jan. 30, in a 14-7 vote, the committee approved a slightly modified version of Baucus' proposal.

But when Senate Majority Leader Harry Reid (D-NV) sought to schedule a vote on the Finance Committee's stimulus bill, Minority Leader Mitch McConnell (R-KY) objected, saying the committee had taken a "Christmas tree approach" that will delay economic growth. McConnell threatened to filibuster, preventing the Senate from voting on Baucus' proposal or on amendments to the House bill. 2007 proved time and again the difficulty of prevailing in the face of McConnell's filibuster threats in such a closely divided Senate. While three Republicans voted to approve the Baucus proposal in the Finance Committee, even if all 51 Democrats support that version, six additional Republican votes would be needed to permit the Senate to consider the proposal.

Despite this, there are two factors that point increasingly in favor of adoption of an expanded version of the stimulus package. As Sen. Debbie Stabenow (D-MI) said on Feb. 4, "[P]ressure from outside groups... a huge coalition, from business to workers to seniors and veterans to environmentalists that favor the Finance package is helping sway senators." Furthermore, the most recent Bureau of Labor Statistics report showed the economy lost 17,000 jobs in January, the worst tally in more than four years. Over the past three months, an average of only 42,000 jobs were created each month, compared with 169,000 in the same period a year ago.

This new data has led to calls for modifications to the House-passed stimulus bill. A Feb. 3 editorial in the *New York Times* argued for the extension of federal unemployment benefits for those workers who have exhausted their state benefits as the most plausible addition to the House stimulus bill:

> The White House is wrongly insisting that lawmakers stick with a bill it negotiated with House leaders before the new data was released. That version omits jobless benefits and centers instead on — what else? — tax cuts. In the Senate, which may vote this week on its own stimulus bill, Republicans are blocking a Democratic push for jobless benefits. Their objection: Extended unemployment benefits encourage idleness....

Some, including Vice President Dick Cheney, warn against changing the House plan, saying that stimulus delayed is stimulus denied. But, as the Center on Budget and Policy Priorities, among others, has pointed out, the machinations of how the rebate checks would be sent out by the IRS give a cushion for further consideration of and refinement to the current stimulus proposals. Because the IRS will use 2007 tax returns to determine the size of individual rebates and requires 60 days to reprogram its computers, regardless of when Congress acts, the checks cannot be mailed before the middle of May. In fact, including unemployment benefits would

likely accelerate the delivery of stimulus rather than slow it down as those benefits would be available to those who need it before the rebate checks are on their way.

At the end of the week of Jan. 28, the Democrats appeared ready to accept defeat in the Senate because they did not have the 60 votes to bring the Finance Committee bill to a vote. Yet on Feb. 4, Reid announced new energy to get a vote on the Finance Committee package and even added $1 billion for low-income heating assistance to sweeten the package for Republicans. However, McConnell threatened to use all 30 hours of debate to stall consideration of the bill and claimed he had 41 votes to stop a vote. Nonetheless, the Senate voted 80-4 on Feb. 4 to proceed with debate on the House bill. Reid now plans a series of votes on potential amendments to the House bill, including the Finance Committee package, low-income heating assistance funds, a proposal to raise conforming loan limits for Fannie Mae, Freddie Mac, and Federal Housing Administration-backed mortgages, increases in food stamp benefits, and tax breaks for renewable energy production.

Reid argues he has the 60 votes to get a version of the Finance Committee stimulus passed in the Senate, but by all counts, it will be a close call.

Product Safety Regulator Hobbled by Decades of Negligence

The nation's premiere consumer product regulator, the U.S. Consumer Product Safety Commission (CPSC), has been crippled by budget cuts and staffing losses that now span decades. Every president since Gerald Ford has proposed cutting the agency's budget at least once, and Congresses controlled by both parties have obliged. Recent attention surrounding massive product recalls prompted Congress at the end of 2007 to give the agency one of its biggest funding boosts, and lawmakers are considering additional legislation to ensure consistent long-term funding. President Bush's FY 2009 budget request, announced Feb. 4, proposes level funding for the agency.

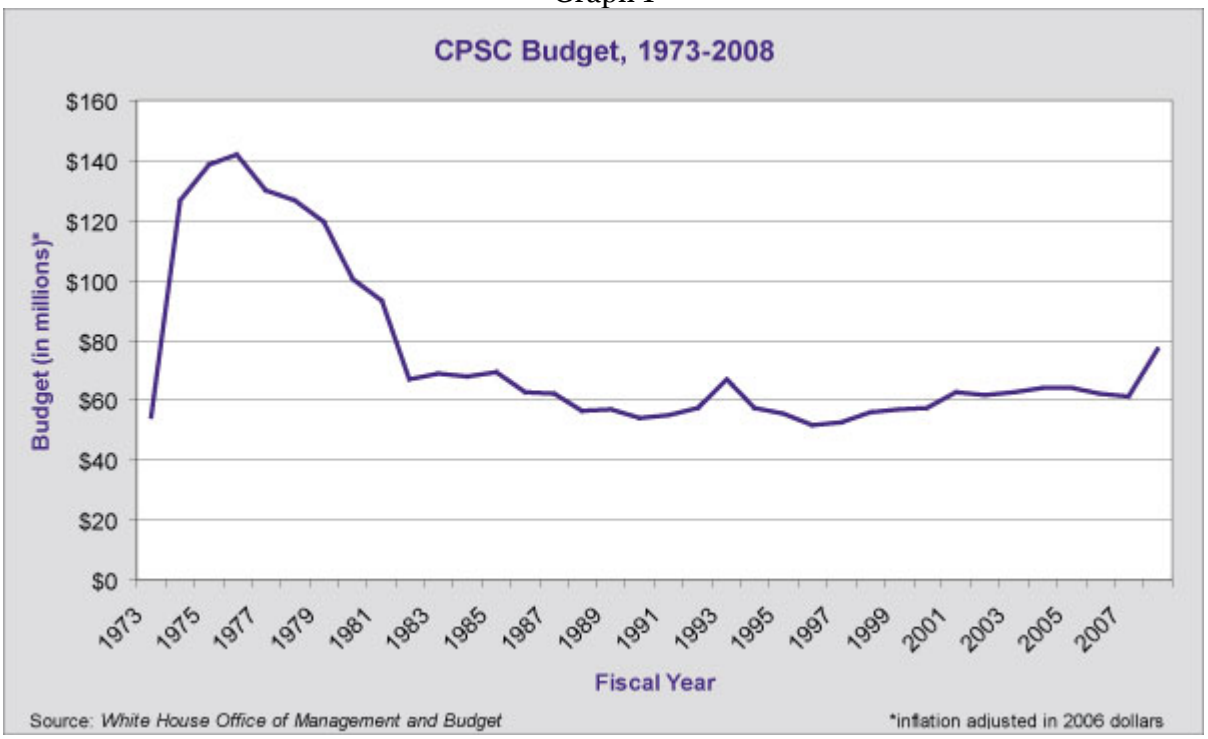
In 1972, Congress passed the Consumer Product Safety Act, which created CPSC. CPSC began operating in 1973 as an independent federal regulatory agency to protect the public from product risks and reduce injuries and fatalities associated with the use of those products. CPSC now regulates more than 15,000 kinds of consumer products.

Over the past year, CPSC has been in the news more than at any time in recent memory. Unfortunately, it has been for all the wrong reasons: massive product recalls, misconduct by agency commissioners, and toothless enforcement practices, to name a few. Congress, the media, and the public interest community have traced many of the agency's woes back to resource shortfalls.

From FY 1974, when the agency first became fully operational, to FY 2008, CPSC's budget has been cut almost 40 percent when adjusted for inflation.* (See Graph 1.) Employment at the agency has been nearly halved over the same period. However, the overall trend does not paint an accurate picture of how the agency's budget has been abused by numerous presidents and

congressional appropriators.

Graph 1



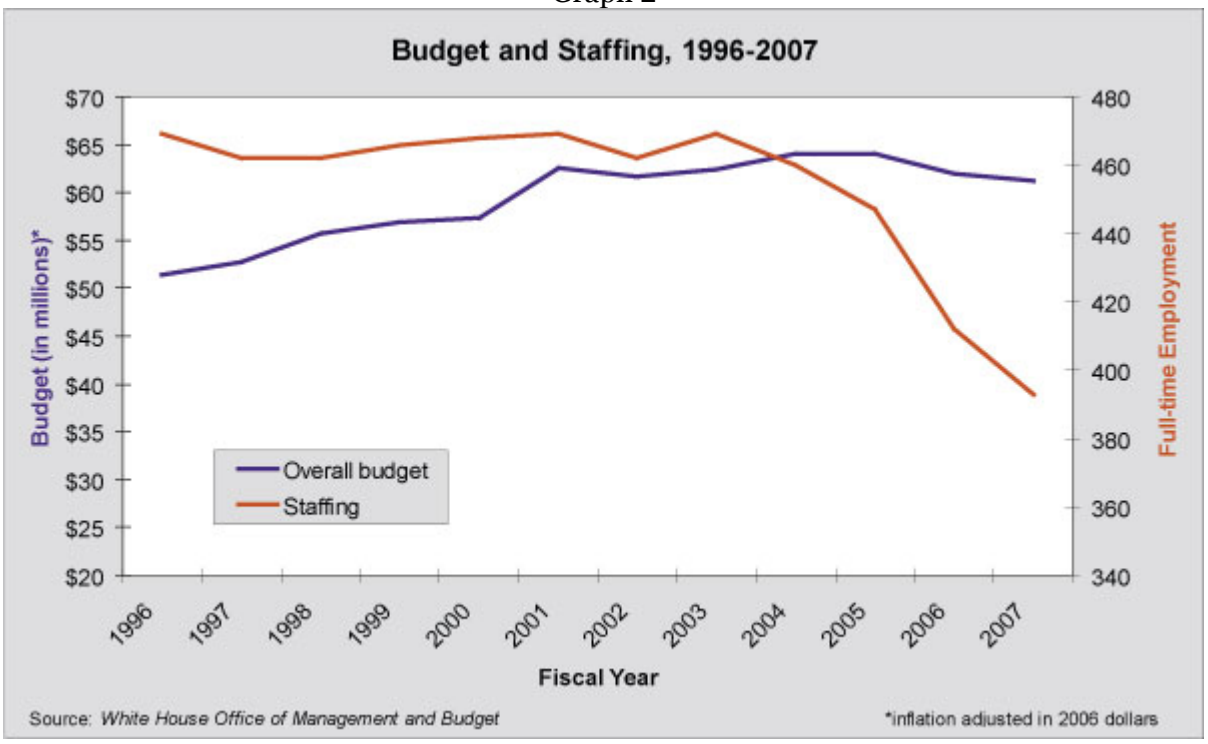
CPSC's budget and staffing levels reached their peak in 1976, only the agency's fourth year in existence. During the final years of the Ford administration, throughout the Carter administration, and into the Reagan administration, CPSC faced budget cuts every fiscal year. The trend reversed in the final years of the George H.W. Bush administration, when the agency received a 17-percent inflation-adjusted increase — the largest increase in nearly two decades.

However, that good was quickly undone. In the first budget of his presidency, President Bill Clinton proposed a 15 percent cut for the agency. Congress fulfilled Clinton's request and then cut the agency's budget even further the next year. Clinton subsequently proposed a budget increase for CPSC for FY 1996, but by then the political landscape had shifted dramatically as a new Republican-controlled Congress sought to shrink the size of administrative government. Congress rejected Clinton's request for an increase and imposed another budget cut. CPSC's budget was lower then than at any point in the agency's history — little more than a third of what it was in FY 1976.

Even though CPSC's budget increased in the late 1990s and under the watch of George W. Bush in the early 2000s, employment levels struggled to grow and, since FY 2004, have dropped sharply. From FY 1996, when the agency's budget reached its historical nadir, to FY 2007, the agency's budget grew 19 percent when adjusted for inflation. However, staffing levels did not follow a similar trend. For the same period, employment fell to 393 full-time

employees from 469 full-time employees — a 16-percent drop. (See Graph 2.)

Graph 2



As CPSC Shrinks, Industries Grow

While CPSC has diminished in size and capacity, the industries it regulates have grown. Two examples — toys and all-terrain vehicles (ATVs) — illustrate the difficulty CPSC has faced in keeping pace with the regulated community and fulfilling its mission to reduce hazards and injuries.

Recalls of children's products made national news throughout 2007. Excessive levels of lead — a toxin known for decades to pose a danger to children — were found in toys, clothes, and children's jewelry. As the federal regulatory body in charge of ensuring children's product safety, CPSC came under scrutiny and was consistently shown to be ineffective, largely as a result of the decades-long erosion of its budget and staff.

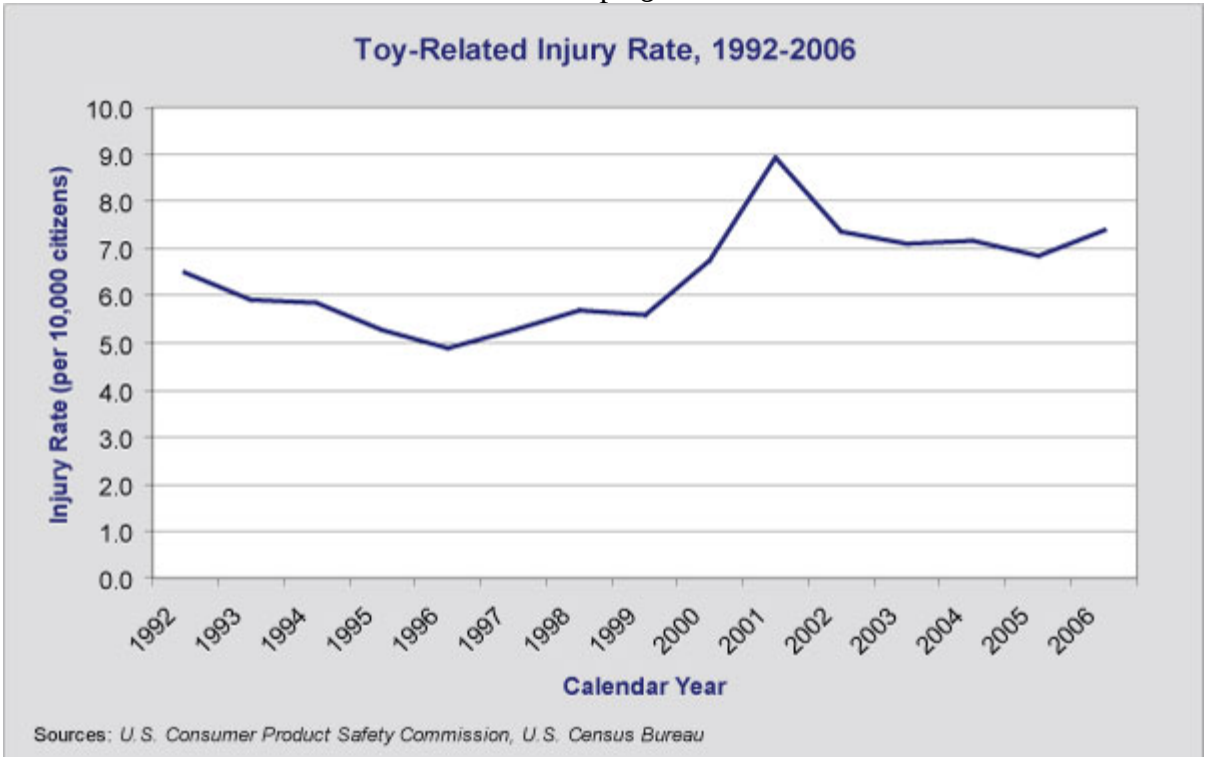
CPSC has recently been announcing more toy recalls than at any other time in its history. In FY 2007, CPSC announced 58 toy recalls — the most ever. In FY 2008 (beginning Oct. 1, 2007), CPSC has already announced 40 recalls. The number of toy recalls in FY 2008 is the second-highest in agency history and is likely to surpass the record set in FY 2007.

The rise in recalls is not surprising, as the number of toys, especially imported toys, is increasing. The value of toys imported into the U.S. has increased 16-fold since 1974, even when adjusted for inflation, according to a report by Public Citizen. Since 1992, the value has

nearly doubled. More and more of those imports are coming from China. Nearly 80 percent of toys on U.S. shelves are made in China, Public Citizen found.

As the number of toys in the marketplace has grown, so too has the number of toy-related injuries. CPSC estimates the number of toy-related injuries jumped from about 130,000 in 1996 to about 220,000 in 2006 — more than 600 injuries every day. Even when adjusted for population growth, the rate of toy-related injuries has increased significantly since the 1990s (see Graph 3.)

Graph 3

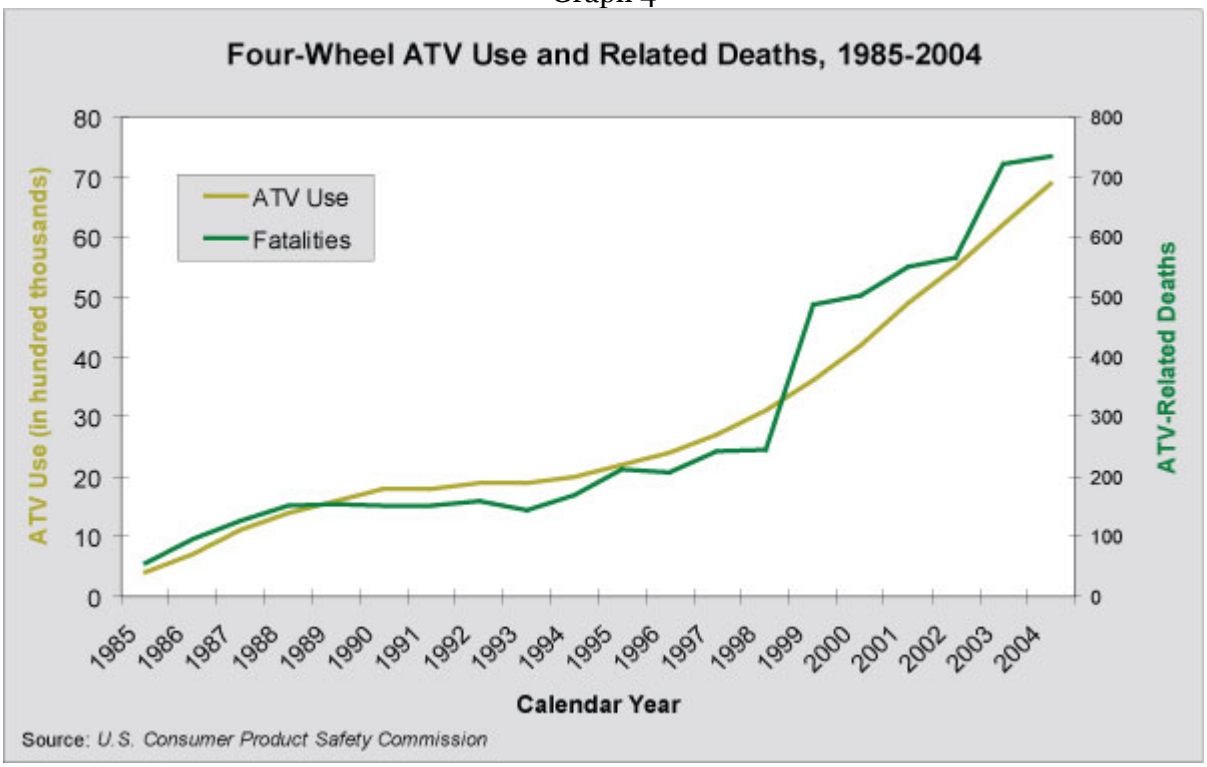


While the popularity of ATVs has grown in recent decades, CPSC has actually rolled back regulations on the recreational vehicles. In December 2007, a former CPSC staff statistician, Robin Ingle, wrote in *The Washington Post*, "In the 1990s, the industry had been bound by strict regulatory agreements with CPSC, but they had expired in 1998." Since then, CPSC has stalled new regulations and suppressed reports on the dangers associated with ATVs, according to Ingle.

As the ATV industry has grown, ATV-related deaths have skyrocketed. From 1985 to 2004, four-wheel ATV use increased 17-fold, according to CPSC statistics. CPSC estimates show a steady rise in ATV-related deaths over the same 20-year period, from 55 in 1985 to 734 in 2004. The sharp rise in fatalities and similar trends in injury rates prove CPSC has made little or no progress in reducing the risks associated with ATVs, even when accounting for their

proliferation. (See Graph 4.)

Graph 4



Ingle's column points to the culture inside CPSC as the reason for the agency's lack of progress. But even with a shift in attitude, diminishing resources have left a skeletal staff which would face difficulty in reducing risk by regulation. In 1988, when CPSC began regulating ATVs after settling a lawsuit with manufacturers, the agency employed more than 36 staff members for every 100,000 four-wheel ATVs in use. By 2004, CPSC employed fewer than seven staff members for every 100,000 ATVs.

As the risk associated with products like ATVs and toys continues to rise, CPSC will face increasing difficulty making long-term progress in reducing injuries and fatalities, especially if resources are not increased to match the challenges the agency faces.

Outlook

For FY 2008, Congress responded to increasing public concern over the ability of CPSC to ensure product safety and increased appropriations for the agency by approximately 25 percent. Acting CPSC Commissioner Nancy Nord has promised to use the additional funds to begin upgrading CPSC laboratories, hire additional staff, and enhance product inspection at American ports, according to BNA news service (subscription).

However, even with the substantial budget increase, CPSC's budget is lower than it was in the

early 1980s when adjusted for inflation. More importantly, the agency will need steady increases in appropriations for years in order to restore the employment levels necessary for the agency to fulfill its mission.

Legislation passed by the House in December 2007 and pending in the Senate would increase CPSC's budget authority over the next decade. The House bill, H.R. 4040, the Consumer Product Safety Modernization Act, would expand the agency's budget authority to $100 million by FY 2011 and provide an additional $60 million over the next three fiscal years for capital improvements. The Senate bill, S. 2045, the CPSC Reform Act of 2007, would expand the authority to more than $141 million by FY 2015 and provide an additional $80 million over the next two fiscal years for capital improvements.

Even if such legislation were to be enacted, CPSC and the public would need a commitment from the next administration that the agency's budget would not be subject to such volatility as it has been in the past.

In his FY 2009 budget request released Feb. 4, Bush proposed level funding for the agency, a budget cut when adjusted for inflation. It will now be up to Congress to decide its commitment to increasing CPSC resources during what will likely be a contentious appropriations battle this fall.

Endnotes:

All budget and staffing data for fiscal years 1980-2007 are from the Budget of the U.S. Government appendices, fiscal years 1982-2009. These volumes are the president's request to Congress and contain final budget numbers and program data from two fiscal years prior. Budget data for Fiscal Year 2008 comes from the final appropriations bill passed by Congress and signed by the president (H.R. 2764).

* All inflation-adjusted figures are expressed in 2006 dollars. Inflation adjusting is based on the Bureau of Labor Statistics Consumer Price Index, available at: ftp.bls.gov/pub/special.requests/cpi/cpiai.txt

2008 Executive Branch Regulatory Agenda: Building an Administrative Legacy

In 2007, President Bush used administrative decrees — such as issuing a new regulatory executive order and giving new powers to executive branch offices — to impact the regulatory process. The administration is likely to continue pursuing administratively what it cannot accomplish legislatively or does not wish to do in the light of day.

Suppressing Science

For the last seven years, the Bush administration has systematically suppressed scientific evidence, discounted scientific and technical studies, and suppressed the right of agency scientists to talk publicly about their work in order to delay or prevent new regulations. In

2008, there is evidence that this practice will continue.

For example, the U.S. Environmental Protection Agency (EPA) waited two years before denying California's Clean Air Act waiver request to implement the state's program to reduce greenhouse gas emissions from vehicles. The Senate Committee on Environment and Public Works held a hearing Jan. 24 to uncover the reasons why EPA Administrator Stephen Johnson denied California's waiver request. Johnson's decision marked the first time California had ever been denied such a waiver.

The chair of the committee, Sen. Barbara Boxer (D-CA), noted in her opening statement that "EPA has failed to fully respond to our request for information, has limited access and censored documents, and has left open-ended the timeline for compliance with this Committee's request. This failure to cooperate with the oversight committee is unacceptable and must be corrected." Since then, EPA has permitted some congressional staff to view the documents but generally claims agency documents leading to the decision to be exempt from congressional or public inspection.

On Jan. 23, the EPA's Clean Air Scientific Advisory Committee (CASAC) released a letter expressing its "serious concerns" about EPA's implementation of a new process for reviewing National Ambient Air Quality Standards (NAAQS) for air pollutants. The process includes a "policy assessment" that is supposed to contain underlying scientific justifications and supporting data. During the application of this new process to the review of lead standards by CASAC, the policy assessment 1) omitted "the fundamental scientific rationale" for considering the range of policy options, and 2) expanded the range of options to include those that had already been "dismissed on scientific grounds" earlier, thus "unavoidably" slowing down the review process.

Institutionalizing Management Practices

In its last year, look for the administration to institutionalize certain management practices that narrow the definition of agency success and expand the definition of agency failure. For example, on Nov. 13, 2007, Bush issued Executive Order 13450, Improving Government Program Performance. The order solidifies the Performance Assessment Rating Tool (PART) as the evaluation mechanism for government programs. PART has been widely criticized by Congress, agencies, and performance management experts. (Read OMB Watch's article on the new order here.)

On Jan. 31, the National Research Council (NRC) released a report critical of the Office of Management and Budget's (OMB) use of PART as a tool for rating the efficiency of research programs. EPA asked an NRC panel to evaluate ways to better measure the efficiency "[a]fter experiencing difficulty meeting OMB's requirements to demonstrate the efficiency of its research programs," according to an NRC press release.

The report criticized PART for focusing on ultimate outcomes — measuring lives saved, for example — instead of immediate outcomes such as whether the research resulted in

disseminating new tools or added to a body of knowledge. The report also criticized OMB for its lack of consistency in applying efficiency standards to research programs across government. This management by numbers approach ignores questions of whether an agency's research agenda is the right one, whether the research is of high quality, and whether the program is sufficiently flexible to allow mid-course corrections based on new information. OMB's response to the report and changes to its PART practices is something OMB Watch will be following closely.

OMB Watch identified another management practice the administration recently began in our December 2007 review of regulatory news. The Small Business Administration's (SBA) Office of Advocacy now provides industry officials and anti-regulatory lobbyists with a new vehicle to voice their complaints with federal regulations through its Regulatory Review and Reform Initiative, or "r3". SBA launched the initiative in July. The r3 initiative 1) includes uniform recommendations for the conduct of agency reviews and 2) solicits from the business community recommendations on which existing rules agencies should review.

On Jan. 10, the SBA issued its first list of more than eighty regulations that businesses and lobbyists want agencies to review. According to its press release, the Office of Advocacy "will transmit the Top 10 list to agencies in the spring and will work to ensure that the listed rules will be reviewed and reformed. In order to track agency progress, the recommended reforms will be posted on Advocacy's website and an update on the status of reforms will be published twice a year." Of the 82 submissions, 37 of them deal with environmental, consumer, or workplace protections. Institutionalizing a regulatory hit list and pushing agencies to reform regulations according to businesses' wishes places the Office of Advocacy in the position of actively advocating against the missions of regulatory agencies and may further decrease agency discretion. We expect more attempts by the administration in 2008 to diminish the role of regulatory agencies.

Circumventing the Law

Look for the Bush administration to explore ways to avoid legal restrictions that result in policies inconsistent with its priorities. Three such attempts are already underway. The first is a move by the administration to reverse the 2001 Roadless Area Conservation Rule (Roadless Rule) forest by forest. On Jan. 25, a new forest management plan was released for the Tongass National Forest in Alaska, which would open the area to logging and road building, according to a press release by the Natural Resources Defense Council (NRDC). The new plan was ordered more than two years ago after a court found that an earlier plan to open the Tongass under a 2003 Bush exemption to the Roadless Rule was inadequate and unjustified.

Bush has tried to overturn the Roadless Rule, which protects more than 58 million acres of national forest lands from development, since the beginning of his administration. Stymied by court decisions supporting the rule, the administration is apparently trying to overturn the restrictions on timber company activity on public lands by developing forest plans that allow logging in protected areas. According to NRDC, plans similar to the Tongass forest plan have

been issued for forests in Idaho and Colorado.

The second example of the administration sidestepping the law is a Jan. 16 Food and Drug Administration (FDA) proposed change to a rule regarding the labeling of drugs and medical devices. FDA's long-standing rules have permitted drug and device manufacturers to change or add to their labels any new consumer safety information without waiting for FDA approval. The proposed rule would "drastically limit the situations in which a manufacturer is permitted to make add [sic] or strengthen a contraindication, warning, precaution, or adverse reaction in the absence of FDA approval unless there is 'evidence of a causal association'", according to a letter sent to FDA by several House and Senate committee chairs.

The legislators argue that the proposed rule ignores language in the Food and Drug Administration Amendments Act of 2007 which preserves the responsibility of the manufacturers to "promptly update their own product labels to reflect the most current safety information available." Both the law and Congress's intent regarding the labeling responsibilities are clear, the letter states, and FDA has not provided any rationale for the change. To the signatories, the rule ignores this provision to accomplish another end — FDA's rule is intended to protect pharmaceutical and device manufacturers against liability for marketing unsafe products.

The third example addresses the recently enacted modifications to the Freedom of Information Act that includes creation of an ombudsman-like office in the National Archives. Even though the president signed the legislation into law, in his FY 2009 budget, he proposes defunding the office and moving it to the Justice Department, which has authority for implementing FOIA. Thus, Bush would have the fox guarding the hen house, as critics have complained that the Department of Justice has become overly politicized since 2001. These types of strategies may be employed often in 2008 by the Bush administration to protect the special interests that have had special access to regulators for years. We can likely expect more delay, interventions to publish weak rules when required, and the institution of procedures that the Bush administration hopes will continue into the next administration.

New FOIA Law Already in Trouble

Buried deep within an appendix of President Bush's $3.1 trillion budget proposal is an effort by the administration to rewrite the newly minted OPEN Government Act of 2007, which seeks to improve agency implementation of the Freedom of Information Act (FOIA). Despite clear language in the OPEN Government Act requiring that a new Office of Government Information be established at the National Archives and Records Administration (NARA), the Bush administration has proposed shifting the new office to the Department of Justice (DOJ).

The OGIS was created to oversee disputes over FOIA. The new ombudsman at NARA would monitor the way DOJ implements FOIA and could help avoid unnecessary litigation by giving the public an alternative method for resolving complaints with agencies.

The proposed change is hidden deep in the budget appendix under Department of Commerce, on page 239 of the 1,314-page appendix. Only those with a careful eye and good knowledge of the U.S. Code designations would notice it.

The budget proposes:

> "The Department of Justice shall carry out the responsibilities of the office established in 5 U.S.C. 552(h), from amounts made available in the Department of Justice appropriation for 'General Administration Salaries and Expenses'. In addition, subsection (h) of section 552 of title 5, United States Code, is hereby repealed, and subsections (i) through (l) are redesignated as (h) through (k)."

Sen. Patrick Leahy (D-VT), one of the original cosponsors of the OPEN Government Act, made a floor speech the week of Jan. 28, before the budget was released, strongly opposing the Bush administration's plan to shift OGIS to another agency. "Such a move is not only contrary to the express intent of the Congress, but it is also contrary to the very purpose of this legislation — to ensure the timely and fair resolution of American's FOIA requests," Leahy stated in the speech. Sen. John Cornyn☼ (R-TX), the other co-sponsor of the new law, also opposed the funding allocation that would place the FOIA ombudsman in DOJ.

The OPEN Government Act specified NARA as the location for OGIS in an effort to establish the office at an objective agency with a good reputation for records management. Since DOJ defends agencies accused of inappropriately withholding documents, the Department is viewed as having a bias toward federal agencies. Leahy also noted DOJ's "abysmal record on FOIA compliance" over the past seven years as another reason the agency makes a poor choice for the location of OGIS.

Advocates for government transparency who worked hard supporting the legislation through several years and difficult negotiations are upset with the proposed shift and are organizing to oppose the move.

The president's budget proposal is not a legally binding document and instead is merely used as a guide by congressional committees in planning the various appropriations bills that allocate federal funds to government agencies and programs. The administration hopes that the language that shifts the location of OGIS will be incorporated into the appropriate bill and passed by Congress. Until that happens, the legal requirement to establish OGIS at the National Archives remains in place. Of course, if no funds are allocated to NARA to create and operate the new office, it is unlikely that the agency will be able to accomplish much.

Implementation of a law can be a complex and problematic process during which the final programs and policy can wind up looking fairly different from what lawmakers intended. However, it is rare that implementation would include breaking from clear instructions contained within unambiguous legislative language.

FISA Fight Heats Up in Senate

The Senate is continuing its debate on the Foreign Intelligence Surveillance Act (FISA). On Jan. 31, President Bush signed a 15-day extension of the Protect America Act (PAA) to allow the Senate to further debate and vote on a modified extension of PAA. A provision providing immunity to telecommunications companies remains a contentious issue.

On Aug. 6, 2007, 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.

In October 2007, in response to concerns about the overly broad authorities of the PAA, the Senate Intelligence Committee passed the FISA Amendments Act of 2007 (S. 2248), which included provisions that would provide immunity for telecommunications companies that participated in the administration's warrantless wiretapping program. The following month, the Senate Judiciary Committee passed a different version of the FISA Amendments Act without the immunity provisions.

Senate Majority Leader Harry Reid (D-NV) chose to consider the Intelligence Committee version on the floor but to allow a number of amendments, including proposals to strip telecom immunity and other changes seeking to improve the bill. Last week, Reid reached a compromise with several members who were threatening a filibuster. Five amendments will be considered, each requiring at least 51 votes to pass:

- Sens. Chris Dodd (D-CT) and Russ Feingold's (D-WI) amendment to strike telcom immunity
- Feingold's amendment to prohibit the use of illegally obtained information
- Feingold's amendment to limit bulk collection of intelligence
- Feingold's amendment to prohibit targeting foreigners with the purpose of collecting information on American citizens.
- Sens. Arlen Specter (R-PA) and Sheldon Whitehouse's (D-RI) amendment to substitute the government as the defendant in suits against telecommunications companies for allegedly participating in illegal surveillance

Four other amendments will also be considered that will require a supermajority of 60 votes:

- Whitehouse's amendment to increase oversight of the intelligence community's minimization procedures
- Sen. Ben Cardin's (D-MD) amendment to decrease the sunset of the bill from six to four years
- Sen. Dianne Feinstein's (D-CA) amendment that states that FISA is the exclusive means of conducting electronic surveillance
- Feinstein and Sen. Bill Nelson's (D-FL) amendment to move lawsuits against telecommunications companies to the Foreign Intelligence Surveillance Court

Voting and debate is expected to continue the week of Feb. 4 and perhaps into the coming weeks. The Senate may pass a 30-day extension in the meantime, but Bush opposes that option.

Government Offers Refunds for Katrina Trailers

On Jan. 17, the Federal Emergency Management Agency (FEMA) announced refunds for potentially toxic trailers purchased between July 2006 and July 2007, the period trailers manufactured in response to Hurricane Katrina were sold.

According to FEMA, 864 disaster victims living in the trailers bought them directly from the agency, while the General Services Administration (GSA) sold 10,839 in online auctions. FEMA stopped selling trailers on July 31, 2007, due to concerns about formaldehyde contamination and poisoning. At last count at the end of November 2007, 47,000 families were still living in trailers and mobile homes in the Gulf Coast region.

Questions remain over whether the refund offer can really shift people out of toxic living conditions and into safer residences. While offering refunds is a positive development, the average trailer only cost $6,936, and that is unlikely to be enough for a down payment on a new mortgage or house repairs. Another problem is that FEMA is requiring buyers to apply for the refund within 60 days. The likelihood is low that families will find adequate replacement housing in just two months with just a few thousand dollars to spend. Though FEMA has offered assistance in finding alternate housing, many of those still in the trailers at this point will probably be stuck in the substandard housing because of a lack of options.

The issue of formaldehyde in the trailers reared its ugly head in March 2006, seven months after Hurricane Katrina struck the Gulf Coast. After testing only unoccupied trailers, FEMA declared them safe using a health standard for able-bodied workers assuming eight hours or less of exposure. When private testing and personal accounts told a different story, public outrage ultimately prompted a July 2007 congressional oversight hearing. FEMA implemented a hotline and program to place occupants with health concerns in immediate alternate temporary housing. The first comprehensive formaldehyde study began in December 2007 and will test a sample of 500 occupied trailers by the end of February. A report is expected in May, providing many Gulf Coast residents with long-awaited answers on whether their homes are a hazard to their families' health.

Two and a half years is too long to wait for such information. In the meantime, trailer residents may be slowly poisoned on the government's watch.

Polar Bears Get Their Day in Congress

At a Jan. 17 hearing, the Select Committee on Energy Independence and Global Warming questioned the true motives behind the U.S. Fish and Wildlife Service's (FWS) delay in

deciding whether to list the polar bear as a threatened species.

Testimony at the hearing suggested the delay would enable impending oil and gas lease sales in the middle of polar bear habitat to go forward without meeting the habitat conservation standards required under the Endangered Species Act (ESA). If this is true, it is another example of exploitation of science and environmental regulation at the behest of industry concerns.

The Department of the Interior's Minerals Management Service (MMS) manages oil and gas leases on the Alaskan Outer Continental Shelf (OCS), which includes the Chukchi Sea. On Feb. 6, MMS will hold lease sales in the Chukchi Sea for 30 million acres, all of which is polar bear habitat. On Jan. 7, FWS announced that they would not meet the Jan. 9 court-stipulated deadline for the polar bear listing determination.

This wasn't the first missed deadline in the polar bears' dealings with FWS. Environmental groups filed suit when FWS was late in submitting the initial 90-day review. The Center for Biological Diversity filed for the polar bear listing Feb. 16, 2005, but FWS took an entire year to complete the 90-day review, which was finished in February 2006. After a September 2007 U.S. Geological Survey (USGS) report unequivocally predicted habitat destruction resulting in the loss of two-thirds of the world's polar bear population, the listing was delayed twice more to extend the comment period and incorporate this new information into the decision.

Randall Luthi, director of MMS, testified that environmental impact statements have concluded "no jeopardy" to polar bears. However, a species status change to "threatened" would require a review with a higher conservation bar, likely changing previous determinations. Thus, if the sales go through before the polar bear is listed as a threatened species, companies could start their drill plans, and critical habitat damage could occur. Even with the restrictions a later listing would require, scientists are clear that the polar bears' situation is so tenuous that no further habitat destruction can be tolerated. Representatives from three conservation groups and the Polar Bear Team Leader of USGS, Dr. Steven Amstrup, all testified to that effect. Luthi and FWS Director Dale Hall, the remainder of the hearing panel, did not find the polar bears' situation as dire or weighed energy concerns more heavily.

The mounting evidence demands timely action to preserve polar bear habitat, and any delay in doing so is not supported by science. FWS is already mired in other scandals, such as the one involving former Deputy Assistant Secretary of the Interior Julie McDonald, where politically motivated science manipulation compromised listing determinations. At the very least, since the court-ordered deadline for the final listing determination preceded the sale date of the oil and gas leases, conservationists say the sale should be placed on hold until FWS makes its final determination.

Rep. Edward Markey (D-MA) recently introduced legislation to prohibit any leases until the polar bear listing is complete.

More Blurry Lines: IRS Warns on Web Links, Primaries Continue to Generate Complaints to Agency

The Internal Revenue Service (IRS) has warned that links from 501(c)(3) organization websites to other sites may be considered partisan if the facts and circumstances of the link indicate support or opposition for candidates. In addition, Americans United for Separation of Church and State (AU) lodged new complaints about possible partisan intervention in elections, which involve voter guides and the content of a newsletter.

Under federal tax law, charities, religious organizations, and all other 501(c)(3) organizations are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. Violations could cost such groups their tax-exempt status. The IRS interprets the ban on a case-by-case basis, using a "facts and circumstances" test. Vagueness about what constitutes prohibited partisan electioneering has resulted in uncertainty for 501(c)(3) organizations wishing to engage in voter activities.

On Jan. 18, Judith Kindell, a senior official in the IRS Exempt Organizations Division, told a meeting of the American Bar Association's Section of Taxation that links on websites sponsored by 501(c)(3) organizations could be considered prohibited intervention in elections, saying 501(c)(3)s are responsible for where their websites lead visitors. However, this does not bar all links to information about candidates: she said the IRS will continue to rely on the facts and circumstances test to determine if certain links are regarded as political intervention.

For example, a factor that could be considered is how closely the organization monitors the links on its site. But Kindell said a 501(c)(3) site that explains an organization's position on an issue and then links to candidates' positions on that issue could be problematic. This raises questions about a 501(c)(3) organization that has a link to a 501(c)(4) organization that in turn has a link directly to a candidate's website. Kindell's comments raise uncertainty about how IRS will view web links, which could have a chilling effect on how 501(c)(3) organizations use links to help educate their users.

Kindell also indicated the IRS will look at 501(c)(3) policies for monitoring bloggers that may endorse a candidate on a charity's site, as well as how speech from outside contributors should be treated. A disclaimer that a 501(c)(3) does not support or oppose candidates would only be one factor in the IRS facts and circumstances analysis, she said.

In Rev. Rul. 2007-41, issued by the IRS in 2007, the agency indicated, "Links to candidate-related materials, by themselves, do not necessarily constitute political campaign intervention.... The facts and circumstances to be considered include, but are not limited to, the context for the link on the organization's website, whether all candidates are represented, any exempt purpose served by offering the link, and the directness of the links..."

Rev. Rul. 2007-41 is the most current available guidance for 501(c)(3)s that want to educate voters and avoid partisan intervention. It leaves many fact situations in gray areas, however, which has created confusion and contributes to an increasing number of complaints to the IRS.

In the past few weeks, the *Columbus Dispatch* quoted the Rev. Harold Hudson, pastor of Calvary Tremont Missionary Baptist Church in Columbus, as saying, "Let's be honest. Everybody's afraid of the Internal Revenue Service." In addition, the article suggests that the candidates are actually competing for endorsements of black pastors. Candidate appearances in churches are common, and the question of when and how personal endorsements from religious leaders are permissible is not clearly answered by IRS guidance. For example, as the *Dispatch* article notes, "Hillary Clinton picked up an endorsement from the Rev. Calvin O. Butts III outside his Baptist church in New York City. And Obama is eagerly seeking support from black ministers in advance of Saturday's key primary in South Carolina."

AU filed a complaint with the IRS calling for an investigation into two tax-exempt groups that allegedly produced biased voter guides for the 2008 Republican presidential primary. According to AU, a voter guide from the American Family Association of Tupelo, MS, and WallBuilders of Aledo, TX, are intended to support Republican presidential candidate Mike Huckabee. The voter guides in question are actually the same document, with minor differences in how the issues are defined. The guides list the candidates and their positions on issues, such as "traditional marriage" and "moral education." Since only Huckabee has a "yes" on all of the issues, AU argues that the groups are guiding voters to vote for Huckabee. An AU press release quotes Executive Director Barry Lynn as saying, "These guides are not voter education, they're partisan propaganda."

Lynn said the organizations seem to have given the candidates "no opportunity to respond to the issues and instead assigned stances based on the organizations' own 'research' and subjective analysis. Footnotes supposedly documenting the candidates' stances are often irrelevant or old. In several cases, the guides reference sources from 1994 and 1996." According to the IRS, voter guides "may be distributed with the purpose of educating voters; however, they may not be used to attempt to favor or oppose candidates for public elected office."

AU also challenged the legality of a Jan. 21 newsletter article in the Southern Baptist Convention's (SBC) official news outlet, the *Baptist Press*. President Frank Page was quoted as saying that he agrees with James Dobson of Focus on the Family that a united front against Giuliani is needed and that "evangelicals can realistically defeat him." Even a ticket with Giuliani on top and Huckabee for vice president "would be problematic for Dr. Dobson and myself." AU advised Page in a letter that the use of tax-exempt resources to support or oppose candidates for public office is prohibited. Since there was no indication that Page was speaking as an individual as opposed to an official within the church, it could possibly be construed that the church's resources are being used to oppose Giuliani. Rev. Rul. 2007-41 provides an example in its section on individual activities of organizational leaders (Situation 4) that clearly indicates statements of personal partisan preferences in an organizational newsletter constitute campaign intervention, even if the individual pays for the space.

Charity Charged with Violating Economic Sanctions in Grants to Orphanage

The Islamic American Relief Agency (IARA-USA) and five of its leaders have been charged with engaging in prohibited transactions with Gulbuddin Hekmatyar, an Afghan rebel leader who was designated as a terrorist in 2003. IARA-USA, which was shut down in October 2004, was funding an orphanage in the Shamshatu Refugee Camp in Pakistan that is located on land belonging to Hekmatyar. The defendants are not charged with supporting terrorism. The leaders, along with a former member of Congress, Mark J. Siljander, have also been charged with misappropriating funds from a federal grant to pay for Siljander to lobby for IARA-USA's removal from a Senate list of organizations suspected of supporting terrorism. The trial is scheduled for November.

IARA-USA, its former executive director, and other leaders were originally indicted in March 2007 for violating economic sanctions against Iraq. The new indictment, issued by a federal grand jury in the Western District of Missouri on Jan. 16, adds eight new charges relating to the orphanage in Pakistan, as well as charges of money laundering, conspiracy, and obstruction of justice relating to the alleged lobbying payments to Siljander.

The indictment says IARA-USA provided financial support to the orphanage between 2002 and 2004 by sending payments to the Pakistan account of the Islamic Relief Agency (ISRA). A Department of Justice (DOJ) press release said the payments to ISRA were "purportedly for an orphanage housed in buildings owned and controlled by Hekmatyar." After Hekmatyar was designated as a terrorist in early 2003, eight more payments were sent to ISRA, from March 2003 to August 2004, totaling $130,000. The indictment says these payments were "for the benefit of Gulbuddin Hekmatyar..."

DOJ's announcement included the following statement: "It is important to note that the indictment does not charge any of the defendants with material support of terrorism, nor does it allege that they knowingly financed acts of terror. Instead, the indictment alleges that some of the defendants engaged in financial transactions that benefited property controlled by a designated terrorist, in violation of the International Emergency Economic Powers Act." This raises the question of when a nonprofit must withdraw support for a charitable project when someone with an indirect relationship is designated as a terrorist. In this case, Hekmatyar appears to have owned the land the orphanage and refugee camp are located on, but payments did not go to him.

The indictment also alleges that IARA-USA failed to return $84,922 from a United States Agency for International Development (USAID) grant that was cancelled in December 1999. It further charges that IARA-USA officials used $50,000 of these funds to pay Siljander, a Republican member of Congress from Michigan between 1981 and 1987, to lobby the Senate Finance Committee to take IARA-USA off a list of charities being investigated so it could have its USAID funding reinstated. In interviews with the FBI, Siljander denied the payments were for lobbying, leading to an additional charge of obstruction of justice. Siljander said the

payment was to support a book, due for publication in June, on Muslim-Christian relations.

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In This Issue

Assessing the Fiscal Stimulus Package

President Bush signed a two-year, $168 billion fiscal stimulus package on Feb. 13 — the largest legislative initiative ever designed to ease an economic slowdown. Although it was passed by overwhelming margins in the House (385-35) and Senate (81-16), there was considerable debate on how to structure the package so as to maximize its efficacy and stimulative impact on the economy.

According to the Congressional Budget Office (CBO), the goal of a fiscal stimulus is to boost economic activity by increasing short-term aggregate demand. The purpose is to generate sufficient demand to engage more of the economy's existing productive capacity. This requires the plan be implemented quickly, that its benefits go to those hurt most by the economy's problems, and that these benefits not damage longer-term fiscal conditions.

A study by Economy.com's Mark Zandi, "Washington Throws the Economy a Rope," evaluates

the stimulative value of most elements of the plan just signed. Zandi assigns a "bang for the buck" value for the major aspects of the package, rating them according to which generates the most immediate and stimulative spending — consumer purchases:

Fiscal Economic Bank for the Buck *One year $ change in real GDP for a given $ reduction in federal tax revenue or increase in spending*	
Tax Cuts	
Non-refundable lump-sum tax rebate	1.02
Refundable lump-sum tax rebate	1.26
Temporary tax cuts	
Payroll tax holiday	1.29
Across the board tax cut	1.03
Accelerated depreciation	0.27
Permanent tax cuts	
Extend alternative minimum tax patch	0.48
Make Bush Income Tax Cuts Permanent	0.29
Make Dividend and Capital Gains Tax Cuts Permanent	0.37
Cut in Corporate Tax Rate	0.30
Spending Increases	
Extending UI Benefits	1.64
Temporary Increase in Food Stamps	1.73
General Aid to State Governments	1.36
Increased Infrastructure Spending	1.59
Source: Moody's Economy.com	

One of highest impact parts of the package is the individual tax rebate, returning $1.26 of increased economic activity for every $1 spent, according to Zandi. This impact is due to the structure of the rebate (it has a low income eligibility requirement; a relatively high phase-out at $75,000 for individuals; $150,000 for couples) and the likelihood the rebate will be spent quickly by most recipients. Since the majority of American households save little, have modest if any net worth, and probably have very short-term financial needs, they are likely to spend any tax benefit they receive quickly.

The business tax cuts included in the stimulus package, however, offer less stimulative value. A 2006 paper published by the Federal Reserve Board shows that the economic bang for the buck of "bonus depreciation" for businesses is very modest. Per Zandi: "... of all the tax and spending policies considered, it provides the least amount of stimulus. Such incentives offer a limited boost because many businesses have difficulty quickly adjusting long-planned capital budgets."

Weighting the stimulative, or "Zandi," value of each of the major elements of the just-passed stimulus plan according to its share of the $168 billion in spending, we can come up with an overall (rough) measure of the effectiveness of the plan as a stimulus tool.

Rebates for Individuals:
$116.7 billion — 69.5 percent of package, $1.26/Zandi value, or $147 billion

50 Percent Bonus Depreciation:
$49.5 billion — 29.4 percent of package, $0.27/Zandi value, or $13.4 billion

The all-in weighted Zandi value of the package comes out to $160.4 billion, or $7.6 billion less

yield slightly less in short-term consumer purchases than it removes from the economy in the long-run in terms of additional debt, and considerably less when interest expense is factored in.

An aspect of the plan much less discussed — perhaps because it came without a price tag — was the provision raising the maximum size of mortgages that government-sponsored mortgage companies Fannie Mae and Freddie Mac can purchase and market as securities, from $417,000 to as high as $729,750 in expensive parts of the country such as New York and California. CBO estimated that the agency could back $10 billion in additional loan guarantees through 2008 with higher limits — a tiny fraction of the more than $2 trillion in new mortgage loans made last year. According to the *Long Beach* (CA) *Press-Telegram*, "the biggest winners in the economic rescue plan President Bush signed last week are likely to be Americans with more expensive homes who will be able to refinance their home loans at cheaper rates." While it costs taxpayers nothing, this aspect cannot be expected to stimulate any additional short-term consumer spending, either.

Also not included in the plan were some standard, high-leverage stimulus provisions, such as extension of federal unemployment insurance for jobless workers ($1.64 to the dollar) and an increase in food stamps ($1.73).

While it does contain some well-crafted provisions, the overall stimulus package is not optimally structured to provide the economy with a targeted short-term fiscal boost. But what it may lack in qualitative value, it may make up for in terms of sheer size. A February report in the Stanford Institute for Economic Policy Research concludes:

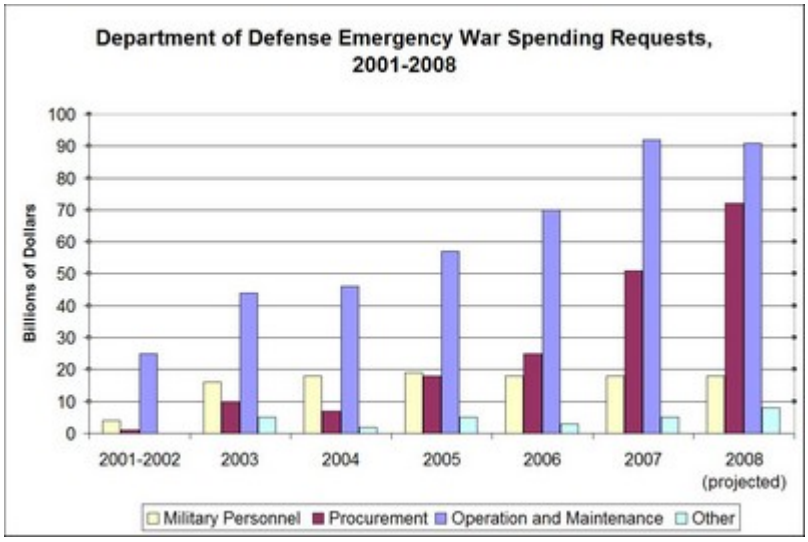
> Without success in targeting funds to those consumers that are not able to save and need to spend all their income on consumption, the effect of tax relief will dissipate quickly... Real GDP would then increase by 0.15 percent in the first quarter and return to its original level over the following three quarters.

Emergency War Spending Lacks Transparency, Increasingly Used for Non-Emergency Items

The Bush administration's emergency supplemental spending requests for the wars in Afghanistan and Iraq have lacked the transparency that normally accompanies the appropriations process, according to a new report from the Congressional Budget Office (CBO). In addition, the CBO war spending report, however constrained by available data, revealed the composition of the war funding requests has been evolving into broader Defense Department spending initiatives, such as acquiring next-generation aircraft and replacing aging aircraft.

If Congress fully funds the Bush administration's FY 2008 emergency war spending request, supplemental Defense Department spending on the wars in Iraq and Afghanistan since 2001 will exceed $750 billion. The CBO report examined requests submitted before 2007 — requests

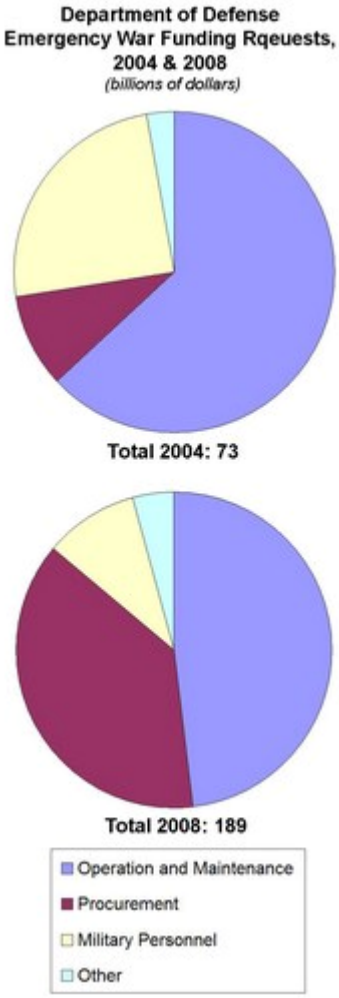
totaling some $384 billion — and found they "contained little detailed information on war expenses," which made "a detailed analysis of the changing patterns of spending impossible." The report also found that a rapidly growing portion of this funding has expanded from ongoing war costs to long-term military expenditures unrelated to the war effort. This has caused a shift in the way supplemental funds are being spent from replacing equipment damaged or destroyed in combat toward acquiring new weapon systems, replacing aging aircraft, and facilitating longer-term military projects.



The overuse of the supplemental funding mechanism has obscured important details about how war funding is spent. During the regular appropriations process, agencies submit detailed documents, known as "budget justification materials," and budget committees openly debate the appropriateness of the requests. While budget justification materials provide Congress with substantial details explaining how a given agency plans to spend its appropriation request, CBO found that:

> The Administration's requests for supplemental appropriations have generally lacked the detail and consistent format necessary to undertake a comprehensive analysis of the changes in [Operations and Maintenance] costs. In addition, significant portions of the funding provided to pay for the operating support costs associated with the war have been provided as emergency appropriations in the regular defense appropriation bills, with little detailed information documenting the intended use of such funds.

For its analysis, CBO disaggregated supplemental defense spending into several categories, with the vast majority of spending falling into three main ones: Operations and Maintenance (O&M), Procurement, and Military Personnel.



O&M: This category includes, among other items, spending on operating, maintaining, and repairing military equipment; running and maintaining base infrastructure; and health care for military members and their dependents. These expenses have increased from $46 billion in 2004 to $92 billion in 2007 and account for over half of all war funding since 2001. Yet, because of the lack of transparency in how these funds were spent prior to 2007, CBO could not explain how large portions of this account were expended. An excerpt from the CBO report:

About 75 percent of the Army O&M request is identified as "operating forces, additional activities," a classification lacking enough explanation to be helpful in this analysis. Also, certain detailed documents that accompany the regular budget request — which would contain information on fuel costs, travel expenses, and civilian personnel costs, for example — are not provided with the request for war-related appropriations.

Procurement: Procurement expenditures are those used to acquire equipment and weapon systems. Since 2003, procurement funding levels have increased from $10 billion to a requested $72 billion for 2008. The CBO report found that this five-fold growth has been the result of "loosened ... criteria for the type of programs whose funding could be requested in supplemental budget submissions."

After 2005, supplemental requests included not only replacing equipment damaged or destroyed in combat and acquiring equipment that would be immediately deployed to combat theaters, but also increasing equipment inventories that were lacking prior to the wars, upgrading weapon systems to newer versions, and accelerating the retirement of older equipment. In FY 2008, the Bush administration has requested funding for 45 aircraft and over 80 helicopters, only half of which are to replace equipment damaged or destroyed during the war. CBO found the remaining funds would be used to speed up the acquisition of new equipment to replace systems that were obsolete even before the war began.

In addition to replacing aging aircraft, the military is also expending emergency funds to reorganize and increase its size. As part of an effort to "improve their capabilities and to make [Army and Marine Corps units] easier to deploy," the Defense Department included $5 billion its FY 2005 and FY 2006 emergency supplemental requests. Of this $10 billion, about $8 billion was used to acquire new equipment. In 2007, the Army and Marine Corps requested $7 billion to increase the size of their forces by 65,000 and 27,000, respectively.

In fact, emergency funding is now a significant source of military procurement. According to

the CBO report, about 40 percent of Defense Department procurement budgeting in 2007 was through emergency appropriations. Additionally, the FY 2007 emergency supplemental funds:

- More than 50 percent of the Army's total procurement budget;
- About 75 of the Army's ground equipment purchases; and
- Almost 90 percent of the Marine Corps' ground equipment procurement

Under the regular annual appropriations process, Congress not only holds spending to pre-determined limits — limits established with much input and debate — but it demands a thorough justification from the requesting agencies. Emergency supplemental funding, on the other hand, dispenses with these transparency and accountability safeguards. When Congress is pliant and generous with its spending authority, one would expect any administration to seize as much budgetary authority for its priorities as it desires — priorities that will not receive a proper vetting before the public.

This is exactly what CBO's report found — unjustified and extraneous appropriations for the Department of Defense that have escaped congressional and public scrutiny until after the funds have been spent. Continued funding of the wars in Afghanistan and Iraq through emergency appropriations will only push a larger proportion of federal appropriations into a budgetary no-man's land in which spending decisions are opaque and consequences are ignored.

Coal Mine Safety Shortchanged by Years of Budget Cuts

Congress created the Mine Safety and Health Administration (MSHA) in 1977, placing a new federal focus on miner safety and health. However, the agency's budget and staffing levels have been cut over the past three decades. The budget for MSHA's coal mine safety and health program has been particularly abused. In the past two years, a spike in coal mine fatalities and high-profile coal mine disasters have prompted many Americans and Congress to look to MSHA to improve miner safety, but years of budget cuts and the loss of qualified employees have left the agency struggling to fulfill its mission.

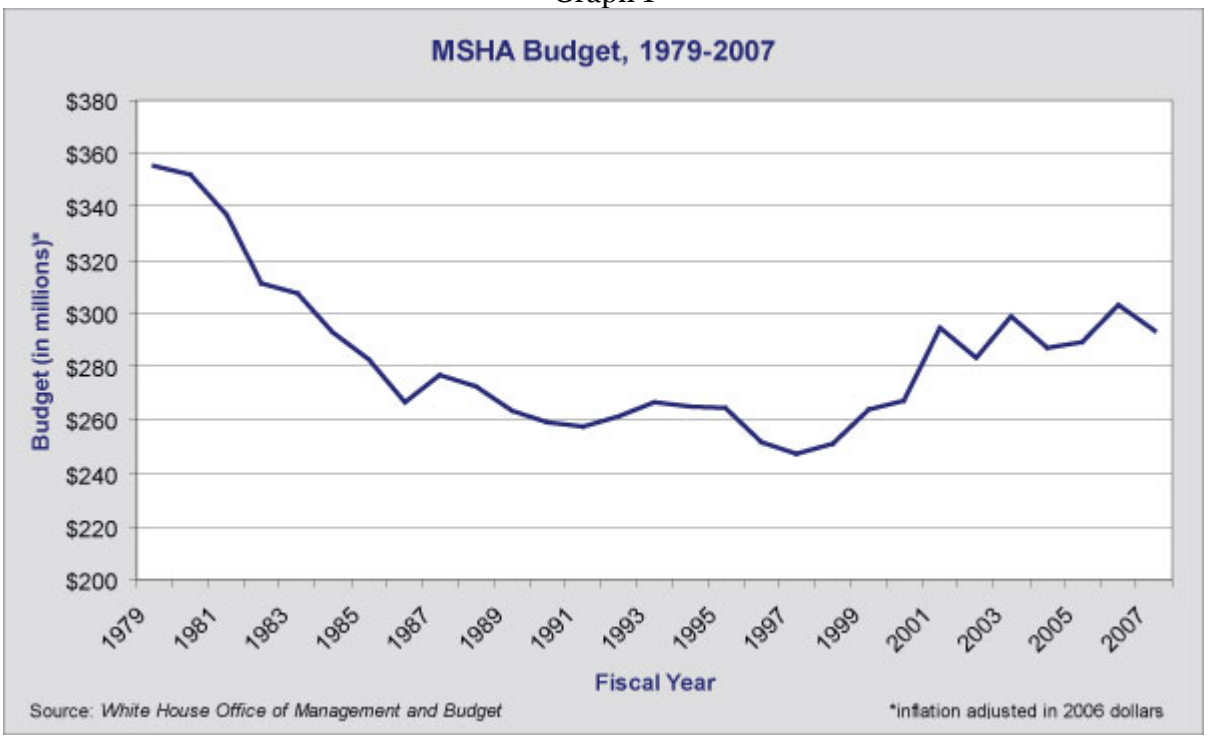
In 1977, Congress passed the Federal Mine Safety and Health Act (Mine Act), which created MSHA. MSHA is responsible for setting and enforcing regulations to protect workers in thousands of surface and underground mines across America.

In 1979, two years after the formation of the mine regulation agency, MSHA's budget peaked at an inflation-adjusted $355 million, when it became a fully operational agency. By 2007, despite recent increases in spending, the budget had dropped 15 percent to $294 million after adjusting for inflation.

After 1979, there was a steady decline in spending for MSHA. By 1986, spending had dropped 25 percent to $267 million, after adjusting for inflation. By 1997, when only $247 million after adjusting for inflation was appropriated, funding had dropped 30 percent. Starting in 1998,

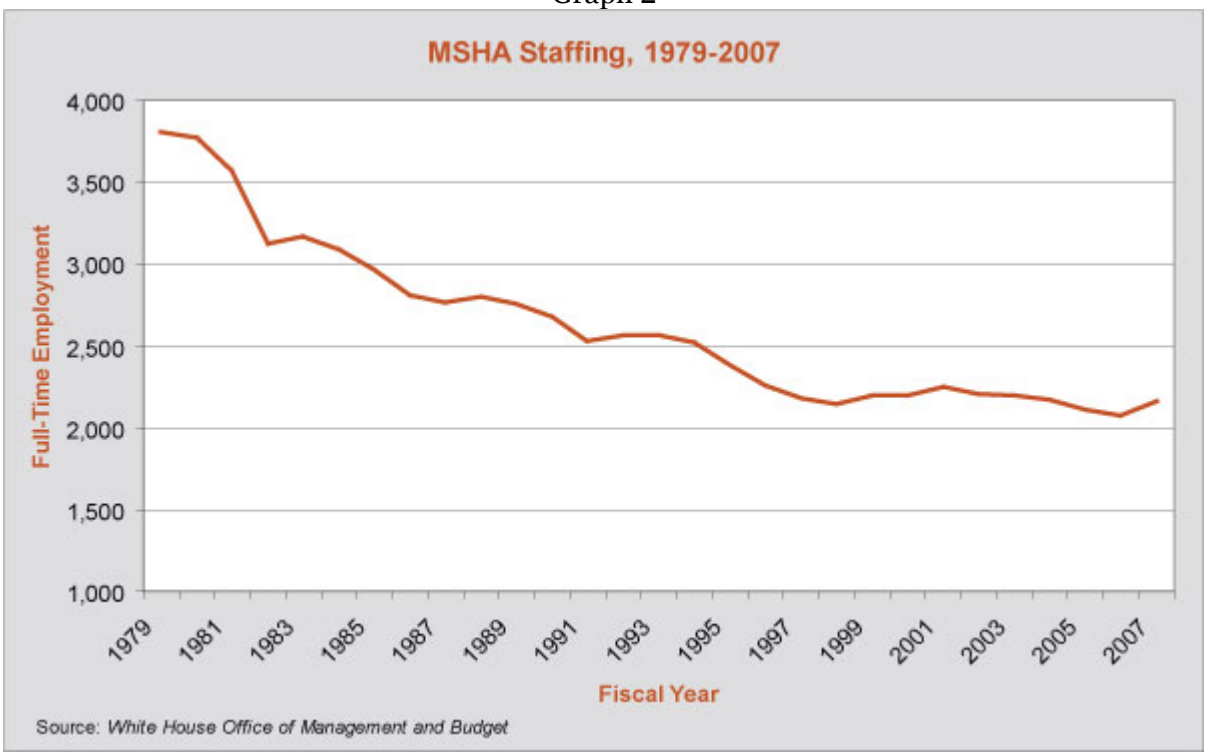
there were increases in spending for the agency, but not nearly enough to offset the massive drop in spending when compared to 1979. In fact, spending today is on par with 1984 levels. (See Graph 1.)

Graph 1



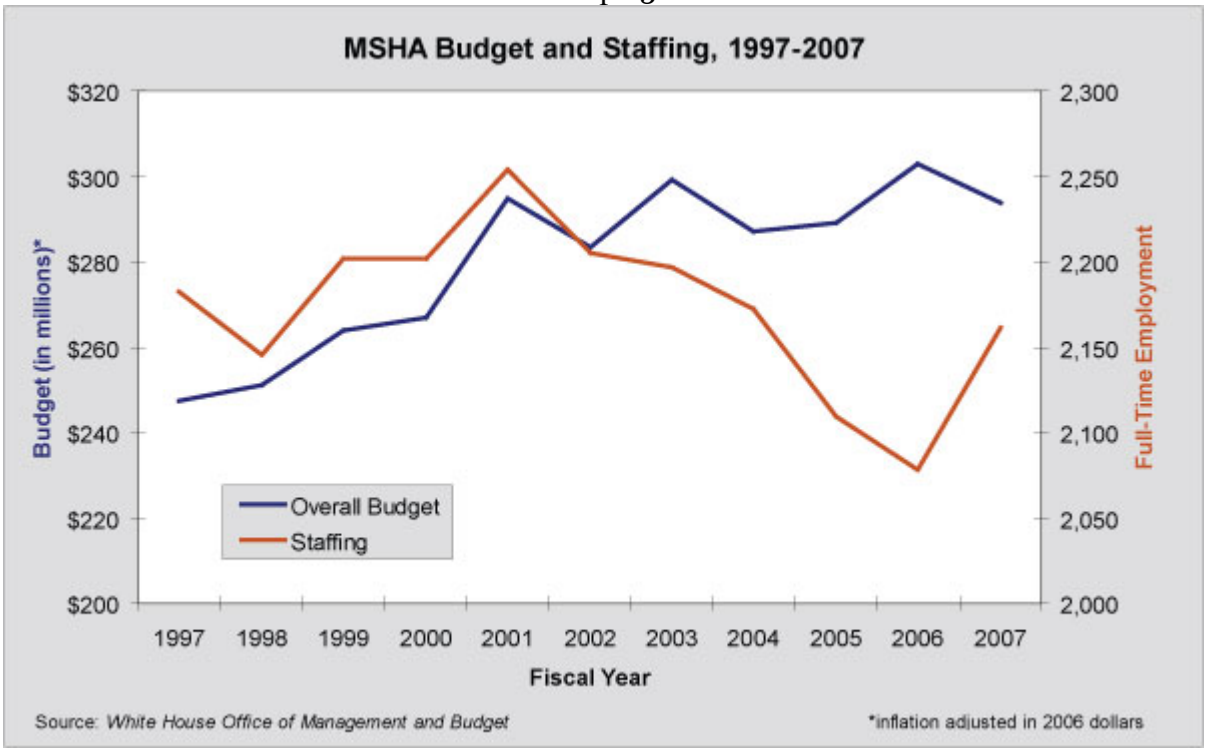
Unlike MSHA's budget, which has increased over the past several years, the number of MSHA employees (also known as "full-time equivalents," or FTEs) has experienced a virtually uninterrupted decline during the agency's existence. From its 1979 peak of 3,811 FTEs, the number of workers carrying out mine regulation and oversight declined by 45 percent to 2,161 FTEs in 2007. (See Graph 2.)

Graph 2



Even though MSHA's budget increased in the late 1990s and in the early 2000s, employment levels struggled to grow, and since FY 2001, have dropped. From FY 1997, when the agency's budget reached its historical nadir, to FY 2007, the agency's budget grew almost 19 percent when adjusted for inflation. However, staffing levels did not follow a similar trend. In FY 2006, MSHA's staffing level reached an all-time low of 2,078. From FY 2001 — the first of the Bush administration — to FY 2006, MSHA's staffing level fell eight percent. (See Graph 3.)

Graph 3



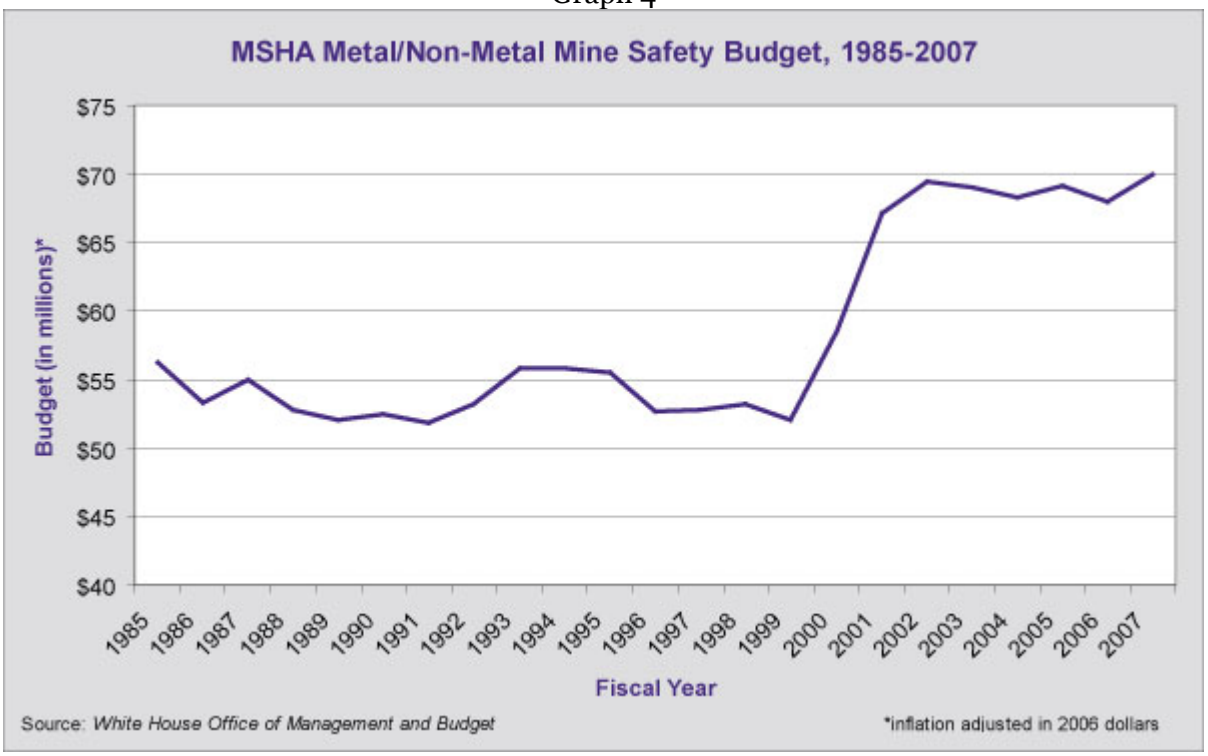
Coal vs. Non-coal: Fatalities and Budgets

Since MSHA's creation, the fatality rate for mine workers, both coal and non-coal, has improved dramatically. However, in recent years, the safety of America's coal mines has come into question as a downward trend in the coal miner fatality rate has reversed and numerous coal mine disasters have drawn national attention. A more in-depth look at MSHA's budget shows the federal government has neglected to provide adequate funds to MSHA for its coal mine safety program.

MSHA divides its mine safety enforcement program into two components: coal mine safety and health and metal and nonmetal mine safety and health. Both programs are statutorily required to inspect all underground mines under their jurisdiction at least four times per year and all surface mines under their jurisdiction at least twice per year. Both programs conduct additional inspections at their discretion.

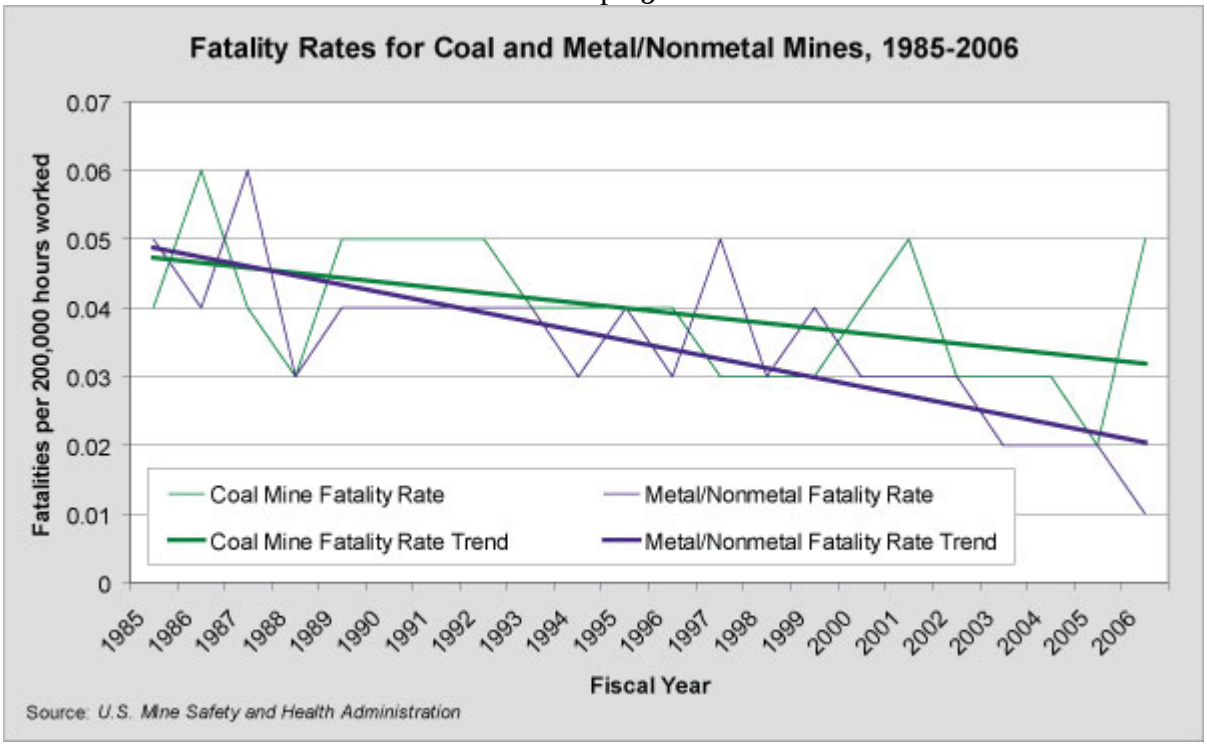
Since FY 1985, the budget for MSHA's metal and nonmetal mine program has increased significantly — nearly 25 percent through FY 2007. (See Graph 4.) As a result, the program has increased the number of metal and nonmetal mine operations inspected each year as the number of those mines has increased. Meanwhile, the fatality rate for workers in metal and nonmetal mine operations has dropped significantly.

Graph 4



The fatality rate for coal miners has declined since MSHA was created, but the progress has been marginal when compared to the rate for metal and nonmetal miners. Since 1985, the fatality rate for coal miners has improved little more than half as much as the rate for metal and nonmetal miners. (See Graph 5.)

Graph 5

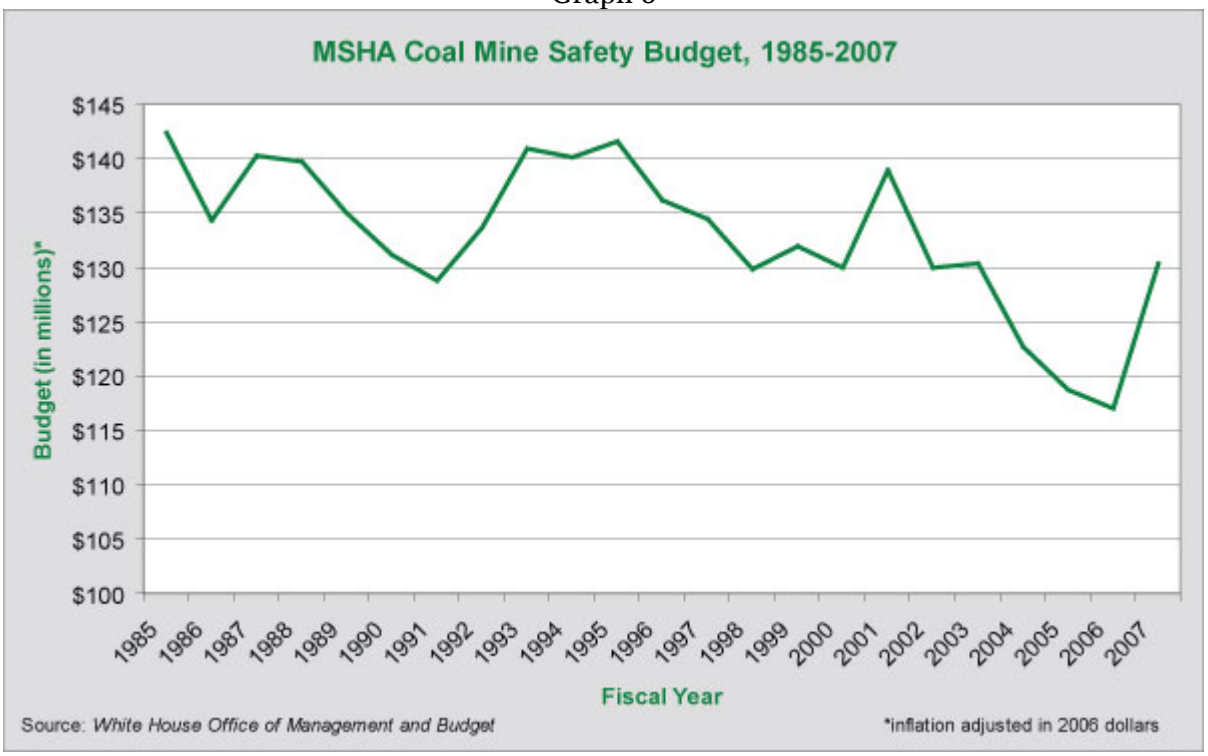


In 2006 and 2007, the number of coal mine fatalities rose abruptly. From 2002-2005, the number of coal mine fatalities was at or below 30. The number of coal miner fatalities reached an all-time low in 2005 (22). But in 2006, the number of coal mine fatalities spiked to 47 — the highest number since 1995. In 2007, 33 coal mine workers died on the job.

Several high-profile coal mine disasters contributed to the rising fatality rate and thrust coal mine safety into the national spotlight. In January 2006, an explosion at the Sago mine in West Virginia killed 12 miners. Later that year, explosions at the Aracoma Alma mine in West Virginia and the Darby mine in Kentucky killed two and five miners, respectively. In August 2007, the Crandall Canyon mine in Utah collapsed , trapping and killing six miners. Three rescue workers were killed days later during a second collapse.

Despite the slowed progress in coal miner safety, past administrations and congressional appropriators have not made coal mine safety a high priority. From FY 1985 to FY 2006, MSHA's coal safety program budget was cut 18 percent when adjusted for inflation. (See Graph 6.) The consistent decline in coal program funding has reversed only recently. With national attention focused on high-profile mine disasters, Congress and President Bush have made efforts to bolster the program's budget. However, it is still lower than it was throughout the 1980s.

Graph 6



Resource Constraints Hinder Performance

A direct correlation between MSHA's budget and coal mine safety may not exist, but recent evidence indicates resource constraints are making it more difficult for MSHA to conduct oversight and enforcement activity and to write the rules that protect miners.

While the number of coal mines under MSHA's jurisdiction has declined, the number of inspections conducted by the coal safety and health program has declined even faster. In 1985, MSHA conducted 88,182 inspections at 5,024 mines, more than 17 inspections per mine. In 2007, MSHA conducted only 15,566 inspections at 2,120 coal mines, approximately 7.34 inspections per mine.

A recent report by the Department of Labor's Inspector General underscores this growing problem. The IG's report looked at inspections required by the Mine Act (and not those MSHA chooses to do at its discretion) and found MSHA's rate of inspection for coal mines to be dropping. According to the report, MSHA's coal program inspectors missed 147 required inspections at 107 underground coal mines — about 15 percent of the mines within the program's purview — in FY 2006. The IG report noted resource constraints as one reason for the drop in inspections. The report states, "Decreasing inspection resources during a period of increasing mining activity made it more difficult to complete the required inspections."

In addition to the deficiencies in MSHA's coal mine inspection program, MSHA's rulemaking division is struggling to keep up with its responsibilities to set standards that ensure the health and safety of coal miners. In the wake of the Sago, Aracoma Alma, and Darby mine disasters,

Congress passed the Mine Improvement and New Emergency Response Act of 2006 (MINER Act) which requires MSHA to set several new coal miner protection standards and sets deadlines for MSHA to finalize those regulations.

MSHA has missed at least two of those deadlines. One rule would "provide for certification, composition, and training requirements for mine rescue teams in underground coal mines." The rule would also set standards for the speed with which rescue teams respond to mine accidents. The rule is expected in February. Another rule to tighten federal standards for sealing abandoned areas in underground coal mines in order to prevent explosions is currently under review at the White House and is expected in the coming months. The MINER Act had required MSHA to finalize both rules by December 15, 2007.

Staffing cuts are at least partially to blame for MSHA's rulemaking woes. In January, the administrator of the Department of Labor's Occupational Safety and Health Administration (OSHA) asked his rulemaking staff to volunteer to be shifted to MSHA. OSHA's administrator said MSHA is "in need of experienced standards writers who can help them meet the challenges before them," according to BNA news service, which obtained an intra-departmental memo.

Outlook

Congress is currently considering the Supplemental Mine Improvement and New Emergency Response Act, which would further amend the MINER Act. The bill does not address resource issues at MSHA. The Bush administration is opposed to the new bill.

Endnotes:

All budget and staffing data for fiscal years 1979-2007 are from the Budget of the U.S. Government appendices, fiscal years 1981-2009. These volumes are the president's request to Congress and contain final budget numbers and program data from two fiscal years prior.

* All inflation-adjusted figures are expressed in 2006 dollars. Inflation adjusting is based on the Bureau of Labor Statistics Consumer Price Index, available at: ftp.bls.gov/pub/special.requests/cpi/cpiai.txt

OMB Reports $508 Million in E-Gov Savings; Congress Remains Doubtful

The Office of Management and Budget (OMB) released a report to Congress Feb. 14 that calculates the benefits of President Bush's 24 E-Government (E-Gov) Initiatives at approximately $508 million in Fiscal Year 2007, based on agencies' estimates. Congressional skepticism of the Initiatives, and subsequent reluctance to fund them, led OMB to develop a questionable funding mechanism using agency contributions from their annual budgets.

OMB released the report, *Report to Congress on the Benefits of the President's E-Government Initiatives*, as required by a section of the Consolidated Appropriations Act of 2008 (Pub. L.

No. 110-161). OMB created the E-Gov Initiatives in 2001 to "provide high-quality, common solutions such as citizen tax filing, Federal rulemaking, and electronic training" across agencies, according to the report's executive summary.

The E-Government Act of 2002 authorized approximately $345 million for FY 2003-2007 for the 24 programs intended to move the federal government away from paper-based information systems and to provide more transparency and information sharing. Congress has appropriated no more than $5 million in any year, according to a Feb. 15 BNA (subscription) article. The FY 2008 appropriation is $2.97 million, although the administration requested $5 million.

Congress has not been enthusiastic about the E-Gov Initiatives regardless of the party in control. It balked at reducing agency discretion in addressing the best means for communicating and serving the diverse groups agencies serve. The major criticism leveled at OMB, however, is the way in which the office funded the programs when Congress refused to appropriate funding. To get around limited funding from Congress, OMB requires agencies and departments to make transfers from their annual budget appropriations.

Although the amount contributed by agencies and their departments varies widely, in FY 2007, agencies contributed more than $161 million to the E-Gov Initiatives, according the BNA article. Congress has increased its E-Gov reporting requirements on OMB as a result of this end-run around the congressional appropriations process. An example of Congress's concern is expressed in the legislative report accompanying the Consolidated Appropriations Act of 2008:

> *'E-Government' initiative*.--The Committee notes that it continues a government-wide general provision that precludes the use of funds for the 'e-Government' initiative prior to consultation with and approval by the Committee on Appropriations. The Committee continues to be concerned about OMB using this initiative to force its management priorities on agencies that would otherwise choose different approaches to serving the public and other government agencies that are better tailored to meet the needs of their customers and meet their statutory requirements.

The E-Rulemaking Initiative

The E-Rulemaking Initiative is intended to allow greater participation in agency rulemaking, improve the quality of regulations, and save administrative costs. The website, Regulations.gov, is the Internet portal where the public can learn about and comment on proposed rules. All agencies' proposed and final rules are to be posted to the site. According to OMB's report to Congress, twenty-nine departments and independent agencies representing almost 90 percent of all federal rulemaking activity are fully using the site.

Several problems plague the implementation of this initiative, the most important of which is the uneven funding through agency contributions, according to an October 2007 report by the Congressional Research Service (CRS). The funding mechanism includes a formula by which agencies' required contributions vary according to several factors, including how many

comments their rules normally receive. CRS reports this mechanism has resulted in budget shortfalls that have delayed implementation. For example, the e-rulemaking initiative only received about 51 percent of its expected funding in FY 2004.

The Regulations.gov site has been criticized for being difficult to use. A simple search on the site will often return hundreds or thousands of results, because the site does not give high-demand documents (such as proposed and final rules) priority over less significant documents (such as supporting evidence or public submissions). Many documents have vague or nondescript titles and can be virtually impossible to find if the user does not know the Regulation Identifier Number. Professor Richard Parker, a professor at the University of Connecticut School of Law and an expert in regulatory issues, said of the site, "Too much information — badly disorganized — is not much better than too little."

New modifications to the site, unveiled late last year, have improved the usability of Regulations.gov by allowing users to easily filter out extraneous results after searching, but numerous problems remain.

The larger standoff between Congress and OMB, however, appears to be the questionable legality of requiring agency contributions to be transferred to the agency managing each initiative. For example, the e-rulemaking initiative is funded through agency "contributions" to the U.S. Environmental Protection Agency. CRS points to the Government Accountability Office's (GAO) *Principles of Federal Appropriations Law* that defines these transfers as requiring "statutory authority." OMB believes the funding mechanism is more appropriately described as a fee for service payment. GAO's Office of General Counsel told CRS it had not rendered an opinion on the legality of these transfers and would not do so unless it receives "a congressional request or a request from an agency."

House Forces Expiration of Protect America Act

During the week of Feb. 11, the White House and Democrats in Congress exchanged blows over whether and how to extend the surveillance powers of the Protect America Act of 2007 (PAA). The Senate's approach, the FISA Amendments Act (S. 2248), included a provision granting immunity for telecommunications companies that helped the government monitor citizens through its warrantless wiretapping program. The House leadership, opposed to immunity for telecommunications companies, refused to consider the bill. Instead, House leaders wanted to pass a three-week extension of PAA powers to give themselves time to resolve differences with the Senate, but House Republicans blocked the move. As a result, the PAA expired at midnight Eastern time on Feb. 16. Despite the expiration, the government still has numerous surveillance tools available as debate continues.

On Aug. 6, 2007, President Bush signed the Protect America Act of 2007, 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 bill included

a six-month sunset.

On Feb. 12, the Senate passed the FISA Amendments Act (S. 2248) by a vote of 68 to 29. Various amendments to strike telecommunications industry immunity, limit bulk collection, limit use of illegally obtained information, and prohibit targeting foreigners with the purpose of collecting information on American citizens were voted down. As a result, the Senate voted to grant immunity for telecommunications companies that may have participated in the administration's illegal warrantless wiretapping program and granted the administration wide warrantless surveillance powers. Under the Senate-approved bill, the administration could target foreign surveillance involving communications of American citizens without judicial approval.

Late last year, on Nov. 15, 2007, the House passed the RESTORE Act (H.R. 3773) to address these FISA issues. Importantly, the RESTORE Act did not include a telecommunications immunity provision. Moreover, it scaled back the expansive authority granted under PAA, requiring a finding of probable cause for surveillance targeting American citizens, including Americans located overseas, but permitting blanket orders in which multiple people could be targeted.

Given the important differences between the Senate and House bills, the House leadership rejected consideration of S. 2248 and instead moved to extend the PAA for another three weeks to permit further negotiations between the House and Senate bills. The White House, however, opposed the extension, as did House Republicans and a few Democrats. This was enough to block passage of the extension.

Despite the fact that the government still has multiple surveillance tools at the ready, President Bush responded to the expiration of the PAA by saying, "American citizens understand, clearly understand that there's still a threat on the homeland. There's still an enemy which would like to do us harm." He added, "By blocking this piece of legislation, our country is more in danger of an attack." In his comments about blocking legislation, Bush was referring to House leadership's refusal to consider S. 2248, not the move to block the extension of PAA powers for three weeks.

"If our nation is left vulnerable in the coming months, it will not be because we don't have enough domestic spying powers. It will be because your Administration has not done enough to defeat terrorist organizations—including al Qaeda—that have gained in strength since 9/11," retorted Rep. Silvestre Reyes☼ (D-TX), chairman of the House Permanent Select Committee on Intelligence, in a letter to Bush on Feb. 14.

Reyes went on to state, "It is an insult to the intelligence of the American people to say that we will be vulnerable unless we grant [telecom] immunity for actions that happened years ago."

Despite the expiration of PAA, the warrants received under its authority are active for a full year. Moreover, if new targets arise, the government still has the authority to receive FISA

orders from the Foreign Intelligence Surveillance Court, as it has done for the past thirty years.

As House Speaker Nancy Pelosi (D-CA) explained, the FISC no longer has a backlog, and a new order can be received in a matter of minutes. Pelosi stated that the president "refused to support an extension, which can only mean he knows our intelligence agencies will be able to do all the wiretapping they need to do to protect the nation. That surveillance can be undertaken under broad orders authorized under the PAA or under orders that can be obtained through the FISA court."

Director of National Intelligence Mike McConnell, however, argued that the FISA procedures are overly burdensome, slowing down intelligence gathering practices, and that without retroactive liability protections, telecommunications companies are unwilling to cooperate with the administration.

McConnell urged Congress to "ensure that we do not again have gaps or lapses in gathering intelligence necessary to protect the nation because of an outdated law or a failure to shield private parties from liability for helping to protect the nation."

This debate is not expected to go away anytime soon. The PAA will be at the center of the House's attention when it returns from a one-week Presidents Day recess on Feb. 25.

EPA Bucks White House and Plans for Registry on Greenhouse Gases

The U.S. Environmental Protection Agency (EPA) has started work on a draft rule creating mandatory greenhouse gas reporting requirements, even though President Bush's proposed FY 2009 budget does not provide funding for the rulemaking.

Last year's omnibus spending bill for FY 2008 (H.R. 2764), passed at the tail end of 2007, included a provision to create a greenhouse gas registry. The provision required a draft rule within nine months and a final regulation within 18 months of the bill's enactment. Despite signing the omnibus spending bill that contained the greenhouse gas registry provision for FY 2008, President Bush's recently proposed budget for FY 2009, released on Feb. 4, failed to continue funding for the rulemaking or implementation of the registry. While EPA can move forward with the rulemaking using the money allocated in the FY 2008 omnibus bill, without additional funds in FY 2009, the program would come to a halt. Perhaps that is the point of the president's proposal to zero out spending for the registry.

Sens. Dianne Feinstein (D-CA) and Barbara Boxer (D-CA) sponsored the measure, seeing reliable and accurate baseline greenhouse gas emissions data as the first step to any policies aimed at their reduction, particularly for cap-and-trade legislation. The provision specifically directed $3.5 million to EPA for establishing an emissions registry but provided little implementation direction beyond having the registry cover all sectors. Therefore, EPA has

wide discretion in establishing the registry and determining reporting threshold levels.

Sarah Dunham, director of EPA's Office of Transportation and Air Quality's Transportation and Climate Division, reported that EPA would be moving forward on a greenhouse gas registry. Dunham also explained that avoiding overlapping reporting requirements is a priority, using carbon dioxide emissions by cars and light trucks under corporate average fuel economy (CAFE) standards as an example.

Creating a national greenhouse gas registry has been the focus of other legislation. Rep. Eliot Engel☼ (D-NY) introduced the Greenhouse Gas Accountability Act of 2007 (H.R. 2651), requiring all publicly traded companies to report their emissions to both EPA and in financial reports to the Securities and Exchange Commission. Sens. Amy Klobuchar (D-MN) and Olympia Snowe (R-ME) sponsored the National Greenhouse Gas Registry Act of 2007 (S. 1387), which adds greenhouse gases to the list of chemicals tracked by the Toxics Release Inventory. Neither the House nor the Senate were able to move these bills during the 2007 session and instead opted for the omnibus provision.

As Congress reacts to the president's budget request, it is unclear whether it will insert dedicated funding for the greenhouse gas registry program during the FY 09 appropriations process to build on the $3.5 million allocated in the FY 08 omnibus bill. If Bush's proposed elimination of funding for the emissions registry remains, a greenhouse gas registry may require Congress to take action on one of the greenhouse gas bills introduced last year. Until told otherwise, however, EPA appears to be trying to stay on target.

CDC Watering Down Great Lakes Report on Toxics

After significantly delaying the release of a report that identifies alarming toxic health risks for the Great Lakes region, the Centers for Disease Control and Prevention (CDC) is now reportedly planning to release a substantially modified document.

Originally, *Public Health Implications of Hazardous Substances in Twenty-Six U.S. Great Lakes Areas of Concern* was slated for release in July 2007, but Agency for Toxic Substances and Disease Registry (ATSDR) Director Dr. Howard Frumkin objected to the report and stopped its release. Additionally, shortly after lead author Christopher De Rosa demanded the report be published on time, Frumkin had him removed from his position, raising questions about retaliatory employment actions. The report is the conclusion of a multi-year research project by CDC and the International Joint Commission (IJC). The IJC, an independent organization that negotiates boundary water issues between the U.S. and Canada, has also called for the report's immediate publication.

While the CDC has not yet officially released the report, the Center for Public Integrity (CPI) obtained a copy of the 400-page document. The original report linked toxic chemical exposure to increased infant mortality and cancer rates, raising serious concerns for the nine million people living in the eight Great Lakes states. Environmental data isolating "areas of concern,"

or toxic hot spots, was crossed with regional health data to identify any significant correlations.

Frumkin's main complaint is that the report implies that pollutants are the cause of elevated health risks, but the data do not support such conclusions. However, Dr. Peter Orris, who independently reviewed the report, contends that the report did not indicate causality, but was clear that the role of the pollutants was an area for future research. In a December 2007 letter to ATSDR, Orris reportedly described the report as "the most extensively critiqued report, internally and externally, that I have heard of." Under review since 2004, the report has been scrutinized by dozens of experts across government agencies, state governments, and academic institutions.

De Rosa, who was demoted from his position as ATSDR chief of toxicology, a position he held for 15 years, to an assistant position, claims that Frumkin illegally retaliated against him and is seeking to be reinstated as chief.

This is not the first time De Rosa has spoken up for people's right to health and safety information. With thousands of families living in emergency trailers in the Gulf Coast, De Rosa was adamant that residents must be appropriately warned about the long-term health risks associated with formaldehyde gases present in the substandard trailers. The CDC testing results of occupied trailers confirmed his concerns, with average levels of formaldehyde at least three times higher than the recommended level.

De Rosa sees the Great Lakes report's publication delay as another incidence of the political manipulation of science and withholding information from the public — to its detriment. As he wrote in an e-mail to Frumkin, the delay gave the "appearance of censorship of science and distribution of factual information regarding the health status of vulnerable communities."

The House Committee on Science and Technology has called on CDC Director Julie Gerberding to protect both De Rosa and the people of the Great Lakes region. Reps. Bart Gordon (D-TN), Brad Miller (D-NC), and Nick Lampson (D-TX) demanded CDC provide related records for a committee oversight investigation and assurances that no retaliatory action will be taken against De Rosa.

Congressional oversight will be imperative in determining whether or not the final report was inappropriately edited. As Canadian biologist and peer reviewer Michael Gilbertson postulated to CPI, the potential legal ramifications and the close ties of the chemical industry with both the U.S. and Canadian governments provide strong incentives to tamp down any evidence of harm caused by toxins. However, it is the federal government's role to ensure that communities are safe and are informed when there is cause for concern.

CDC said the report will be released in four to five weeks.

Senate Bill Would Regulate Robocalls during Election Campaigns

On Feb. 12, Senate Rules Committee Chair Dianne Feinstein (D-CA) and Sen. Arlen Specter☼ (R-PA) introduced S. 2624, the Robocall Privacy Act of 2008. The bill would place restrictions on how and when prerecorded messages, known as robocalls, can be made 30 days before a primary and 60 days before a general election. The bill would only affect prerecorded calls, not calls made by volunteers at phone banks.

Robocalls are an inexpensive way to send prerecorded messages to a vast number of people. The messages can be an effective advocacy tool for groups to promote issues, solicit donations, or campaign for or against any political candidate. Commercial robocalls are limited by the Federal Trade Commission's "Do Not Call" list, and many states have their own no-call lists. Organizations engaged in political, charitable, or survey work are exempt from these lists, but lawmakers are responding to complaints about abuses of this practice, which include calls late at night and robo-messages that may intentionally mislead voters.

A press release from Feinstein and Specter said the bill would not ban robocalls but place "sensible restrictions" on them, including:

- Limiting the hours the calls can be made (no calls between 9 p.m. and 8 a.m.)
- Limiting the number of calls that can be made to each household (no more than two calls per organization to the same telephone number per day)
- Requiring callers to identify themselves at the beginning of the call
- Prohibiting the calling organization from blocking their caller identification number

The Federal Election Commission (FEC) would be able to impose civil fines against violators, and individuals could sue to stop abusive calls.

According to a December 2006 survey by the Pew Internet and American Life Project, 64 percent of voters received recorded telephone messages right before the 2006 mid-term election, and they were the second-most popular way for campaigns and political activists to reach voters.

In the House, four bills have been introduced addressing this issue, and the House Administration Subcommittee on Elections held a hearing on Dec. 6, 2007, to examine the use of robocalls in federal campaigns. Subcommittee Chair Zoe Lofgren (D-CA) introduced H.R. 1383, the Quelling of Unwanted Intrusive and Excessive Telephone Calls Act, which would impose similar limits as the Feinstein-Specter bill. During her opening statement, Lofgren said, "Used responsibly, robocalls can be an efficient, low-cost means for candidates and advocacy groups to reach out to their supporters or the public at large. Used irresponsibly or maliciously, however, robocalls can harass, confuse, or deceive the public about elections or other matters of pressing importance . . . many voters responded to the deluge of robocalls by disengaging from the election entirely. With the airwaves already saturated with political advertising, robocalls drove voters away from meaningful participation in the democratic

process." Lofgren may add a provision to her bill that would require groups running robocalls to adhere to the same do-not-call list as commercial telemarketers.

Two House bills would direct the Federal Trade Commission to prohibit political prerecorded calls to telephone numbers listed on the federal do-not-call registry. One is sponsored by Rep. Jason Altmire☼ (D-PA) (H.R. 372) and another by Rep. Virginia Foxx☼ (R-NC) (H.R. 248). Foxx has pledged not to conduct robocalls to voters in her district if their phone number is registered with the National Political Do Not Contact (NPDNC) registry at StopPoliticalCalls.org, established by the nonprofit group Citizens for Civil Discourse. Foxx became the first member of Congress to sign the Do Not Robocall Pledge.

On June 25, 2007, the House passed a more expansive bill, sponsored by Rep. Rahm Emanuel☼ (D-IL), H.R. 1281, the Deceptive Practices and Voter Intimidation Prevention Act of 2007. It would punish anyone who attempts to deceive or intimidate voters, including telephone calls that attempt to mislead voters. Sen. Barack Obama☼ (D-IL) introduced a similar bill in the Senate, S. 453.

Many states are also taking action to regulate political use of robocalls. The Associated Press reports that "At least 12 states — Arkansas, California, New Hampshire, Indiana, Kansas, Minnesota, Montana, North Carolina, North Dakota, Oregon, South Carolina and Wyoming — restrict or ban political robo-calls. Some states require a human being to ask permission to connect a recorded message before giving a political pitch. Others require the caller be identified and provide contact information about the group making the calls. Some states just prohibit the calls." More than a half dozen additional states are considering their own restrictions.

Robocalls are not always intrusive or annoying. If used correctly, they can be effective advocacy tools, and an easy way for nonprofits to get their message to the public. The First Amendment limits restrictions on such messages, which may explain why proposals to require the call recipient to press a specific button in order to play the recorded message do not appear in any of the congressional proposals.

SpeechNow Challenges FEC Contribution Limits for Independent Political Groups

SpeechNow.org, an independent organization whose stated mission is to advocate for the election of federal candidates who favor free political speech, has filed a lawsuit challenging federal campaign finance laws that prohibit contributions of more than $5,000 per year to political committees as an unconstitutional violation of free speech and association rights.

In November 2007, a newly formed organization, SpeechNow.org, submitted an Advisory Opinion request to the Federal Election Commission (FEC) seeking approval of its plan to collect unlimited contributions from individuals to conduct "express advocacy" for or against federal candidates. The group is organized under Section 527 of the Internal Revenue Code

and wants to support or oppose candidates based on their positions on free political speech. According to its website, "SpeechNow.org is a nonpartisan independent speech group that supports free speech and associational rights. It plans to speak out in support of candidates who favor free political speech and oppose those who back so-called campaign finance 'reform' legislation that restricts the rights to speech and association."

On Jan. 24, the FEC counsel's office released a draft Advisory Opinion that said SpeechNow.org cannot accept unlimited contributions from individual donors if it wants to advocate for or against candidates for federal office. The draft said the group would be required to register as a political committee under FEC rules, which limit contributions from individuals to $5,000 a year and prohibit corporate contributions. The FEC contends that the group would be considered a political committee, since its main objective will be federal campaign activity. Under the Bipartisan Campaign Reform Act (BCRA) and FEC regulations, a political committee is defined as any "group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."

SpeechNow.org argues that because individuals are allowed to spend unlimited amounts on independent efforts to influence federal elections, it is unconstitutional to impose restrictions when two or more individuals form a group to spend money on elections. If its speech is independent of any candidate or party, funded only by individuals, SpeechNow argues that the anti-corruption justification for regulation does not hold up. In addition, they argue that any restrictions on the ability of individuals to associate violate the First Amendment, and the group would be silenced if the draft Advisory Opinion is adopted.

The FEC's only two sitting commissioners disagreed over the draft opinion. Democratic Commissioner Ellen Weintraub voted in favor of it, but Republican Commissioner David Mason voted against it. Mason said in a written dissenting opinion, "The distinction between candidate coordinated speech and independent speech is of constitutional significance. . . . Limiting the contribution limits given to an organization like SpeechNow would impose an intolerable, and constitutionally unjustifiable, burden on the independent spending of this organization." However, the FEC currently does not have a quorum of six commissioners, because a dispute over confirmation of nominees in the Senate allowed four positions to lapse at the end of 2007. Without a quorum, the commissioners can neither officially adopt the opinion nor approve SpeechNow.org's request. However, now that a lawsuit has been filed, FEC lawyers will defend the draft opinion in court.

SpeechNow.org, its president David Keating, and four potential contributors are represented by attorneys from the Center for Competitive Politics and the Institute for Justice. The complaint was filed on Feb. 14 in the U.S. District Court for the District of Columbia, asking the court for an injunction blocking the FEC from enforcing limits on contributions to the group (*SpeechNow.org v. FEC*). It states, "Recognizing that elections are an ideal time to bring attention to important issues and to affect policy, SpeechNow.org wishes to finance television advertisements that call for the election of candidates who support rights to free speech and

association and the defeat of candidates who do not support these rights."

It is unclear how quickly the case will move forward, but it could be considered by a federal appeals court by spring or summer. The plaintiffs have requested a preliminary injunction and asked that an expedited hearing on that request be scheduled within 20 days. The lawsuit could have broad implications for spending by independent organizations during federal elections. A *Los Angeles Times* editorial said that the case "will reopen the question of how much freedom of speech must be curtailed in the name of legitimate campaign finance reform."

Ohio Restrictions on Voter Registration Drives Overturned

On Feb. 11, a federal judge in Ohio issued a permanent injunction blocking enforcement of a state law restricting voter registration activities. The Ohio law in question in *Project Vote v. Blackwell* limited the ability of third parties such as nonprofits to register citizens to vote in the state. Voting rights advocates hailed the decision as a victory for minority, disabled, and low-income voters who often rely on nonprofits to help with registration.

The voter registration rules at issue were passed by the Ohio legislature in June 2006 as part of House Bill 3. In July 2006, six nonprofit organizations filed suit against Ohio Secretary of State J. Kenneth Blackwell, challenging portions of the new law. In her decision last week, District Court Judge Kathleen M. O'Malley wrote that the challenged provisions not only violated the First and Fourteenth Amendments, but also the 1993 National Voter Registration Act.

The most burdensome provision of the now-vacated regulations required voter registration workers to personally deliver new registrations to the board of elections or Secretary of State. Previously, registration workers were allowed to hand over completed registration forms to a supervisor, who would then approve and collectively submit all new registrations. Failure to comply with the new requirement was considered a felony.

Passage of the new rules in 2006 immediately impacted Ohio nonprofits' voter engagement activities. In their original July 2006 complaint, the plaintiffs argued, "These onerous and vague new laws and regulations chill core political speech and association and have forced all of the plaintiffs to seriously curtail or halt their voter registration and related core political speech and association activities."

In its motion to dismiss, the state argued that Ohio offered citizens numerous alternatives to third-party registration and that the regulations were a means of protecting citizens from fraud. In their response, the plaintiffs replied that the new regulations actually made registration fraud more, not less, likely because the regulations forbid a supervisor from reviewing registrations before submission. The plaintiffs wrote, "Requiring individual workers and volunteers to personally deliver forms to the state severely constrains Plaintiffs' voter registration drives by limiting their ability to implement quality control measures and by

imposing inefficient, unnecessary, and taxing burdens on their employees and volunteers."

Wendy Weiser, the Deputy Director of the Democracy Program at the Brennan Center for Justice, applauded O'Malley's decision last week, saying, "We are very pleased the Court recognized how laws restricting voter registration drives unlawfully stand in the way of core democratic activity. The original law hindered efforts by non-partisan groups to help low-income, minority and disabled citizens to register to vote."

In recent years, several states have passed laws restricting third-party voter registration. New Mexico imposed a strict deadline on registration, requiring new applications be turned in no later than 48 hours after completion. In Florida, nonprofits are challenging a new law which imposes fines on charities for each voter registration not submitted within ten days of its completion. Similar restrictions for third-party registration were declared unconstitutional by a federal court in Florida last year in *League of Women Voters v. Cobb*. Other states that have passed restrictions on voter registration include California, Colorado, Georgia, Maryland, Missouri, and Washington.

The nonprofit plaintiffs in the case included Project Vote, American Association of People with Disabilities, ACORN, People for the American Way Foundation, Common Cause, and Community of Faith Assemblies Church.

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In This Issue

Investigation of United Church of Christ Shows IRS Rules Need Fixing

On Feb. 20, the Internal Revenue Service (IRS) sent the United Church of Christ (UCC) national office a letter announcing the agency has launched an investigation because there is "reasonable belief" that the church violated the ban on partisan electioneering, based on a June 23, 2007, speech by Sen. Barack Obama☼ (D-IL) at the church's 50th General Synod. The investigation has generated strong reactions, and as details emerge, it is clear that this case highlights the inherent weakness of the IRS's facts and circumstances test as a regulatory standard defining what is and is not partisan electioneering.

On Feb. 26, the United Church of Christ released a statement that denied any wrongdoing. UCC President Rev. John H. Thomas called the investigation "disturbing" and said it will likely have "a chilling effect on every religious community." The statement said Obama had been invited to speak a year before he became a candidate for president and that he spoke as a 20-year member of the UCC on the topic of the intersection of faith and public life. He was one of

60 speakers at the annual event, which was held at the civic center in Hartford, CT.

The IRS letter said the agency's concerns were based on articles on the Web that described Obama's speech to nearly 10,000 church members attending the event, and it noted that "40 Obama campaign workers staffed campaign tables outside the center to promote his campaign." The IRS did not mention a complaint filed with the IRS in August 2007 that said Obama did not speak as a non-candidate because he referred to his candidacy once during his 45-minute speech and pledged to sign a universal health care bill by the end of his first term. The identity of the person filing the complaint was redacted, and the complaint was anonymously sent to James Hutchins, who posted it on UCC Truths, a blog that is critical of the UCC denomination's leadership and positions. Hutchins said he did not file the complaint.

The IRS gave the UCC 15 days to respond to a list of specific questions and said the church has the right to request a meeting with IRS representatives "to discuss our concerns." There is no deadline on when the IRS must conclude its investigation.

The UCC statement listed several factors it said indicate there was no partisan campaigning at the event. These include the following facts:

- Obama was invited to speak in his capacity as a church member and elected official a year before he became a presidential candidate
- Before the speech, church officials warned the crowd that the event was not about the campaign and no signs, buttons, leaflets, or other campaign material would be allowed in the civic center
- Obama campaign volunteers were not allowed into the civic center, but set up outside, in public space where the UCC had no control
- There were 60 speakers at the Synod, including Obama, who addressed the intersection of faith with their vocation
- Obama has been a member of Trinity United Church of Christ in Chicago for over 20 years
- Church leaders got legal advice before the event

Strong Reactions

In addition to denying wrongdoing, the UCC criticized the IRS for failing to seek any information from them prior to launching the investigation. The Rev. Davida Foy Crabtree of the Connecticut Conference UCC wrote a letter to the editor of the *Hartford Courant* and said, "I believe the agency needs to change its process. A simple dialog with our leaders would have established that the facts contradict the complaint. Instead, given the facts in this case, by issuing this letter the agency risks encumbering the free practice of religion."

Others have been equally critical. The *Hartford Courant* reports that Hartford mayor Eddie Perez has asked Connecticut's congressional delegation to investigate an "intimidation tactic aimed at preventing churches and people of faith from hearing from public officials about the important issues of the day." Americans United for Separation of Church and State Executive

Director Rev. Barry Lynn released a press statement saying, "We looked into the situation and did not see a violation of IRS rules. We saw no evidence of UCC officials seeking to appear to endorse his candidacy."

The Huffington Post's John Wilson posted an analysis on Feb. 28 with the headline "IRS Probe of Obama's Church Underscores Anxieties For Nonprofits". Wilson wrote, "What's at stake here is not just religious freedom, but the freedom of speech of all nonprofits. The danger is that when nonprofit groups are silenced, corporate America will be able to dominate even more thoroughly the public debate." Wilson noted that the threat of IRS enforcement has "already caused fearful reactions from nonprofit organizations," citing the example of the School of the Art Institute of Chicago, which banned a documentary about Obama from being shown in January.

But Wilson's biggest objections center around the apparent IRS interpretation of standards for appearances by candidates, noting that there were nearly 50 presidential candidates in the field in June when the speech occurred, and that to require the UCC or any nonprofit to invite all these candidates or none at all "would effectively mean that every nonprofit organization in the country is now banned from having any politician speak at an event at any time."

The UCC Truths blog argues that the entire speech was a campaign speech because Obama made one mention of being a candidate. One article on the blog says, "One could argue that Obama spoke of his work as a US Senator, not as a candidate. But in declaring himself a candidate, how does one deny that his take on the issues doesn't represent his presidential values? When Obama said he was a candidate, his whole speech became a candidate speech." It is not clear that the IRS interprets the law this way.

Finally, the Street Prophets blog said that although there "was no foul" in this case, "anyone who thought that having a single presidential candidate come to speak at a denominational convention wasn't going to draw some kind of fire had to be smoking the wacky tabacky."

IRS Revenue Ruling 2007-41, Candidate Appearances, and the Complaint

The IRS uses an undefined "facts and circumstances test" to enforce the ban on partisan intervention in elections by 501(c)(3) organizations. IRS Revenue Ruling 2007-41 was published last year to provide better guidance, but it leaves many questions unanswered. One section addresses candidate appearances at 501(c)(3)-sponsored events, including those where the candidate is appearing in a non-candidate capacity. It says, in part, "If the candidate is invited to speak, factors in determining whether the candidate's appearance results in political campaign intervention include the following:

- "Whether the individual is chosen to speak solely for reasons other than candidacy for public office;
- Whether the individual speaks only in a non-candidate capacity;
- Whether either the individual or any representative of the organization makes any mention of his or her candidacy or the election;

- Whether any campaign activity occurs in connection with the candidate's attendance;
- Whether the organization maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present; and
- Whether the organization clearly indicates the capacity in which the candidate is appearing and does not mention the individual's political candidacy or the upcoming election in the communications announcing the candidate's attendance at the event."

The complaint against the UCC only addresses some of these factors and does not indicate factors that show the church took steps to ensure the speech was not a campaign event. For example, it says the UCC "selectively provided convention facilities for Sen. Obama to speak in support of his campaign" and "campaign activity occurred in connection with the speech." It even cites the UCC's disclaimer of any endorsement as an indication of partisanship, saying the UCC "referenced his candidacy" before the speech.

What Next

On Feb. 27, the UCC announced a legal fund to help defray the costs of the investigation, so that "money given for mission will not be needed to pay legal bills, instead of ministry needs." By March 3, a new UCC announcement said that that former Solicitor General Seth Waxman, now with the firm WilmerHale, will lead their legal defense and waive hourly fees. The legal fund had already raised $59,564, which the UCC said should be enough to cover other expenses relating to their defense. As a result, the fundraising effort has been suspended.

House Committee Hearing Highlights Lax Enforcement of Voting Rights

The House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties held a hearing on Feb. 26 to examine the problems of voter suppression and poor enforcement of voting rights. The hearing largely focused on the U.S. Department of Justice's (DOJ) lax enforcement of voting rights mandates in the National Voter Registration Act (NVRA). Evidence of tactics to prevent people from voting (voter suppression) was also presented.

A press release from Subcommittee Chairman Jerrold Nadler (D-NY) said, "The right to vote is the cornerstone of our democracy — a right that must be protected and defended ... However, under the current Administration, the Department of Justice has a remarkably poor record of protecting that fundamental right. Laws that protect voters from discrimination on the basis of race, language or disability have not been properly enforced. Indeed, it would seem that political pressures have deterred the Justice Department from fulfilling its mandate."

The hearing's first panel included testimony from Asheesh Agarwal, Deputy Assistant Attorney General at the Department of Justice Civil Rights Division, which is charged with enforcing civil rights and voting rights laws. Agarwal's testimony defended DOJ against criticism that it has not adequately prosecuted voter suppression cases. However, Gerry Herbert, Executive Director of the Campaign Legal Center and former attorney with the Civil Rights Division,

testified that "professionalism and nonpartisan commitment to the historic mission of the Division has been replaced by unprecedented, political decision making. The result is that the essential work of the Division to protect the civil rights of all Americans is not getting done."

Other voter suppression tactics addressed during the hearing include voter caging, an illegal process of purging people from the voter rolls if they fail to answer registered mail sent to a place where they are not currently living. This strategy works to suppress votes by minorities, college students, people in the military, and others. Testimony also addressed excessively strict voter identification requirements, strict rules to purge voter rolls because of administrative errors, and lax enforcement of NVRA.

Two nonprofits, Project Vote and Demos, submitted written testimony in advance of the hearing detailing DOJ's failure to enforce provisions of NVRA that would increase the number of low-income registered voters. Section 7 of NVRA requires public assistance agencies to offer voter registration services to all individuals when they apply for benefits, recertify benefits, or change of address (otherwise known as the motor voter provision). Project Vote found that these agencies failed to offer voter registration, and voter registration from public assistance agencies has decreased 79 percent since the provision was first implemented. "Specifically, we are concerned that Mr. Agarwal's statement fails to acknowledge or explain DOJ's record of largely ignoring evidence of state non-compliance with the NVRA's requirements for registering low-income voters, while focusing selectively instead on urging states to purge more voters from their rolls."

Barnard College professor Lorraine Minnite, author of a Project Vote report *The Politics of Voter Fraud*, testified that "the alleged epidemic of voter fraud sweeping the country is a fabricated myth. It can not compare to the massive challenges the states face in administering elections in ways that open up the process and make voting easier for all Americans, but especially for our most vulnerable citizens for whom the barriers to access to the vote are still too high."

Before the hearing began, the committee voted to issue a subpoena for former Ohio Secretary of State Kenneth Blackwell for testimony about the 2004 election. On Jan. 29, Judiciary Committee Chairman John Conyers (D-MI) and Nadler wrote a letter to Blackwell to "explore the state of voting rights and the allocation of resources to end voter suppression and voter fraud." Blackwell has refused to appear voluntarily. The Associated Press quoted Conyers as saying, "Mr. Ken Blackwell, wherever you are in North America today, please know that we are not sending the gendarme for you this moment." Conyers added, "I do not like to issue subpoenas. ... The only problem is we can never reach him."

Federal Meat Inspectors Spread Thin as Recalls Rise

The federal regulator of meat, poultry, and egg products, the Food Safety and Inspection Service (FSIS), faces resource limitations that make it more difficult for the agency to ensure the safety of the food supply. Although the agency's budget has risen since it was created,

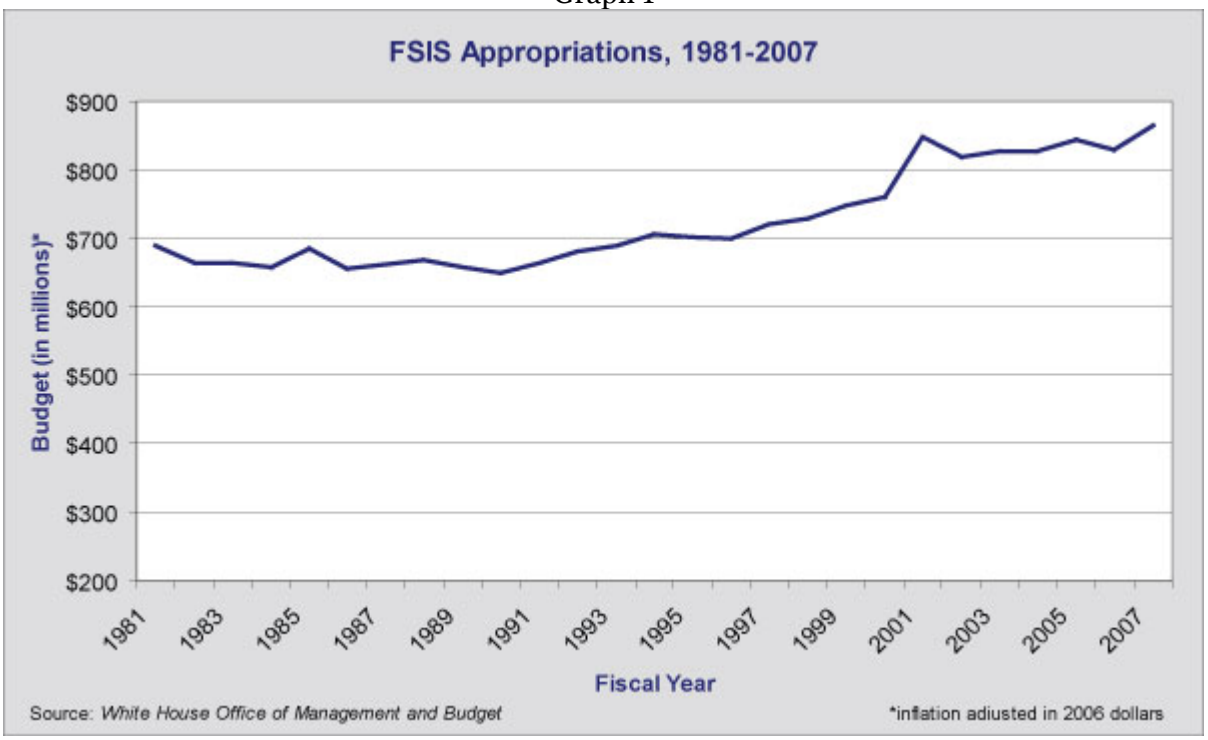
staffing levels have dropped steadily. Widespread vacancies in the agency have spread FSIS's inspection force too thin. Meanwhile, the number of meat, poultry, and egg product recalls has risen, and a recent recall of 143 million pounds of beef is the largest in the nation's history.

The U.S. Department of Agriculture created FSIS in 1981. Federal law requires the agency to monitor the slaughter, processing, and labeling of all meat and poultry and to inspect meat and poultry to ensure products are not contaminated or adulterated. Egg products also fall under the agency's jurisdiction. The agency is responsible for ensuring the safety and wholesomeness of the billions of pounds of meat, poultry, and egg products that enter the market each year.

Budget Increases Fail to Keep Pace with Size of Mandate

Unlike many other federal regulatory agencies, the budget for FSIS has seen a marked increase since its inception. From FY 1981 to FY 2007, appropriated funds for the agency increased 25 percent when adjusted for inflation. The bulk of that growth has occurred in the last 12 years. (See Graph 1.)

Graph 1

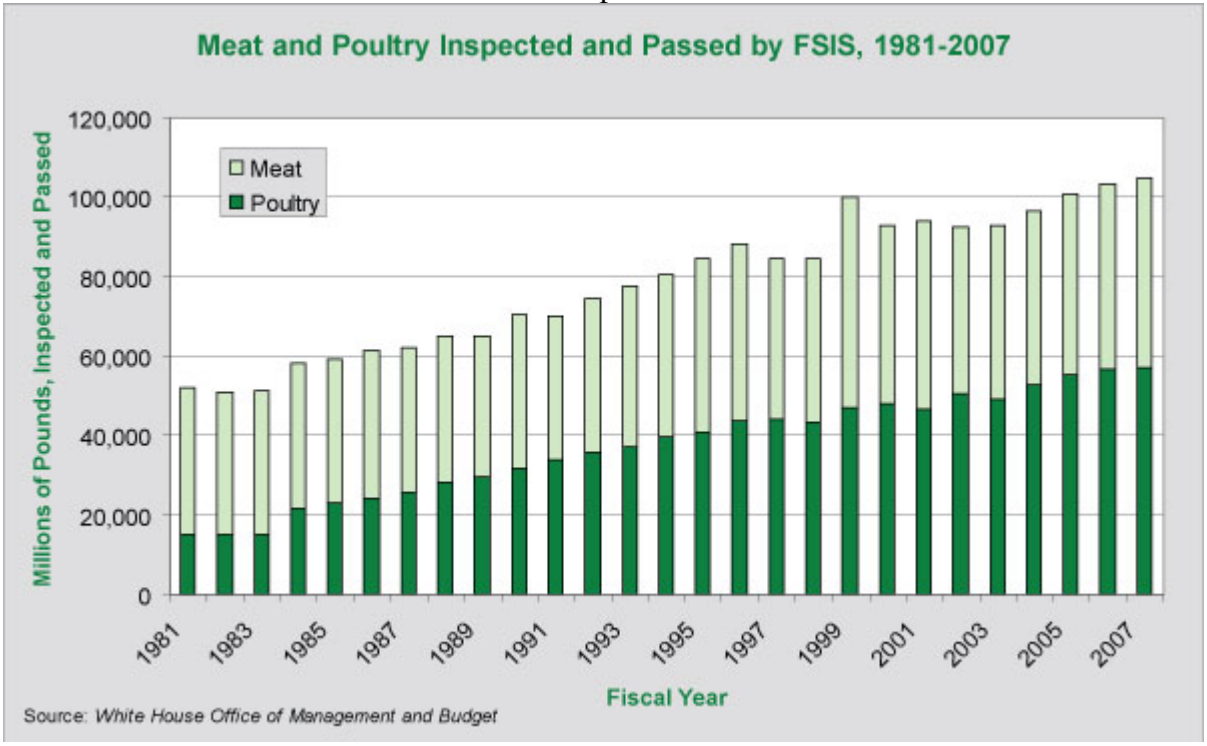


In particular, the agency has enjoyed significant budget increases over the past three fiscal years. In FY 2006, FSIS was appropriated $830 million; in FY 2007, $890 million; and in FY 2008, $930 million — a two-year increase of 7.5 percent when adjusted for inflation. President Bush's proposed FY 2009 budget calls for another increase of $22 million, to $952 million. When adjusting for inflation, the proposed increase will likely be negligible — holding funding for FSIS level.

Meanwhile, meat and poultry consumption in the U.S. has increased sharply. Since FSIS began

operations, pounds of slaughtered meat and poultry inspected and approved by the agency have doubled — from about 52 billion pounds in 1981 to about 104 billion pounds in 2007. Much of the increase is due to the expanding U.S. poultry market. Pounds of poultry approved by FSIS nearly quadrupled during that time. (See Graph 2.)

Graph 2

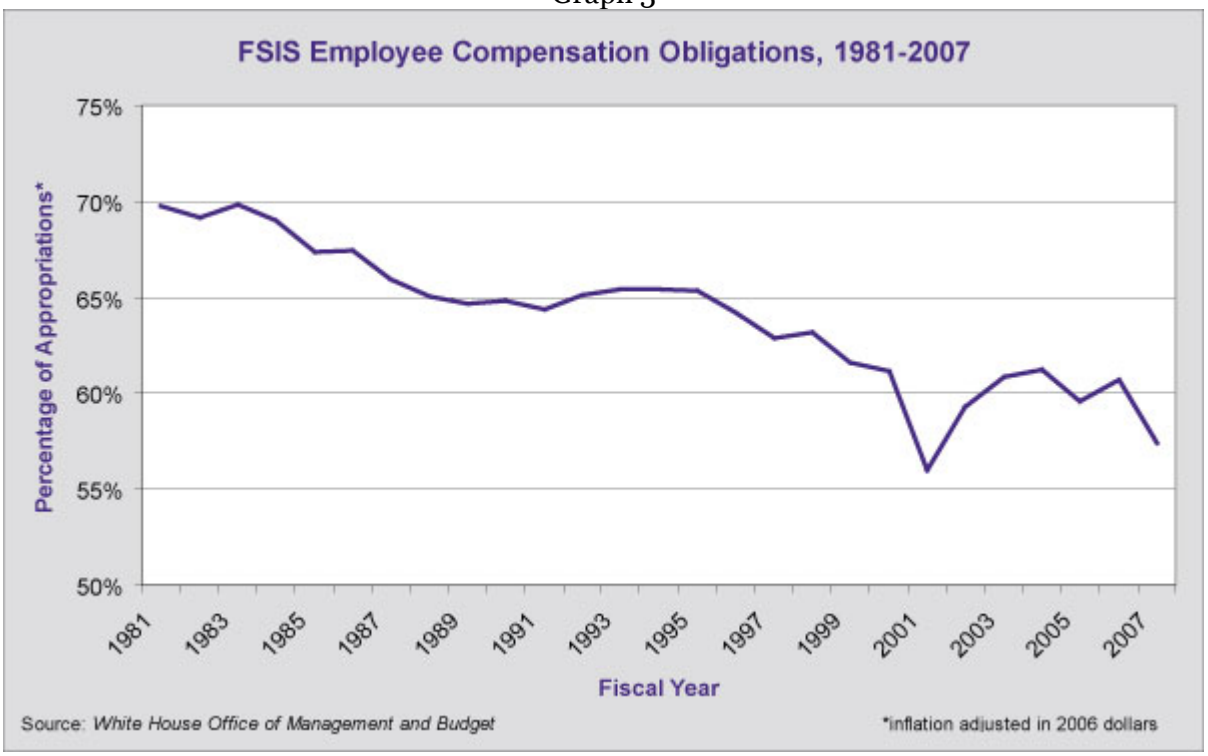


Because of the increase in production, FSIS staff and resources become increasingly smaller when compared to the scope of the industry it regulates. Even though FSIS's budget has increased, the growth is dwarfed by the expansion of the meat and poultry industry. Of its appropriated funds, in FY 1981, FSIS spent $13.22 per thousand pounds of meat and poultry inspected and passed. By FY 2007, the figure had fallen to $8.26 per thousand pounds — a drop of almost 40 percent.

Spending on FSIS Workers Slows

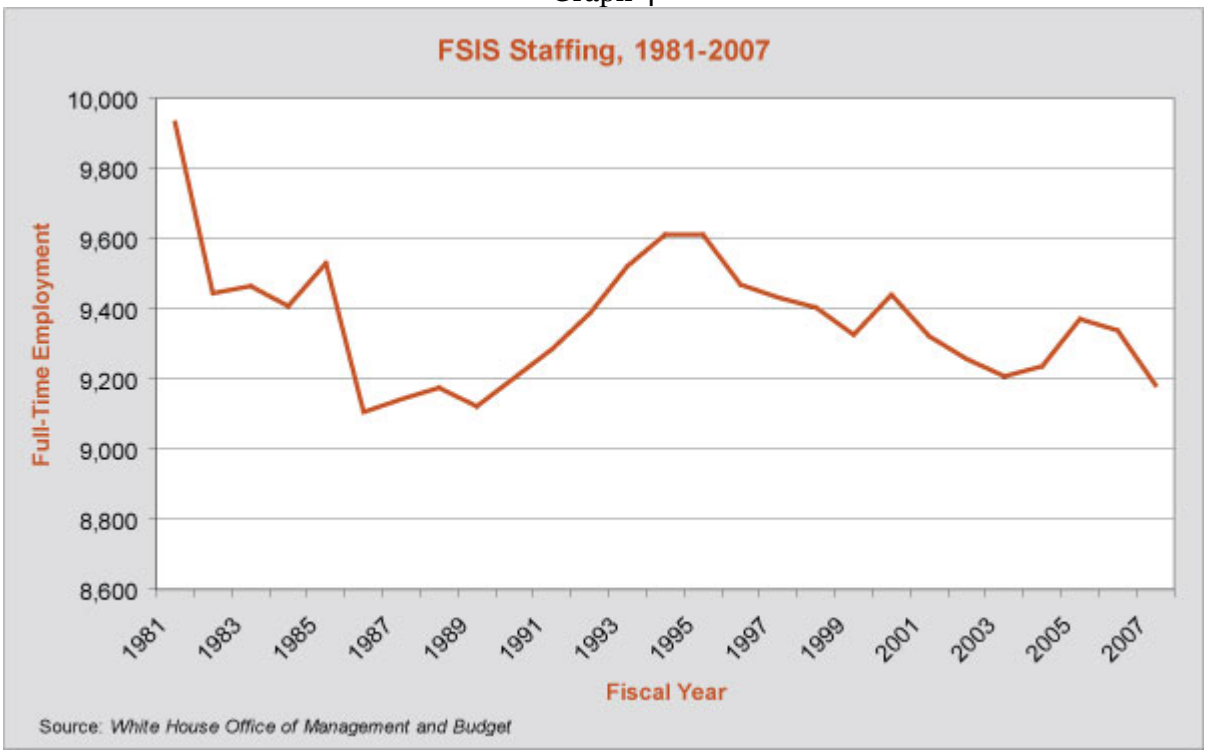
While Congress has appropriated significantly more money since the early 1980s, the agency has not spent proportionally for personnel. In the early 1980s, FSIS spent about 69 percent of its appropriated funds to pay its employees. However, the percentage has steadily dropped. By FY 2007, the agency only spent 57 percent on employee compensation. (See Graph 3.) And correlated with this decline is a drop in the number of agency workers.

Graph 3



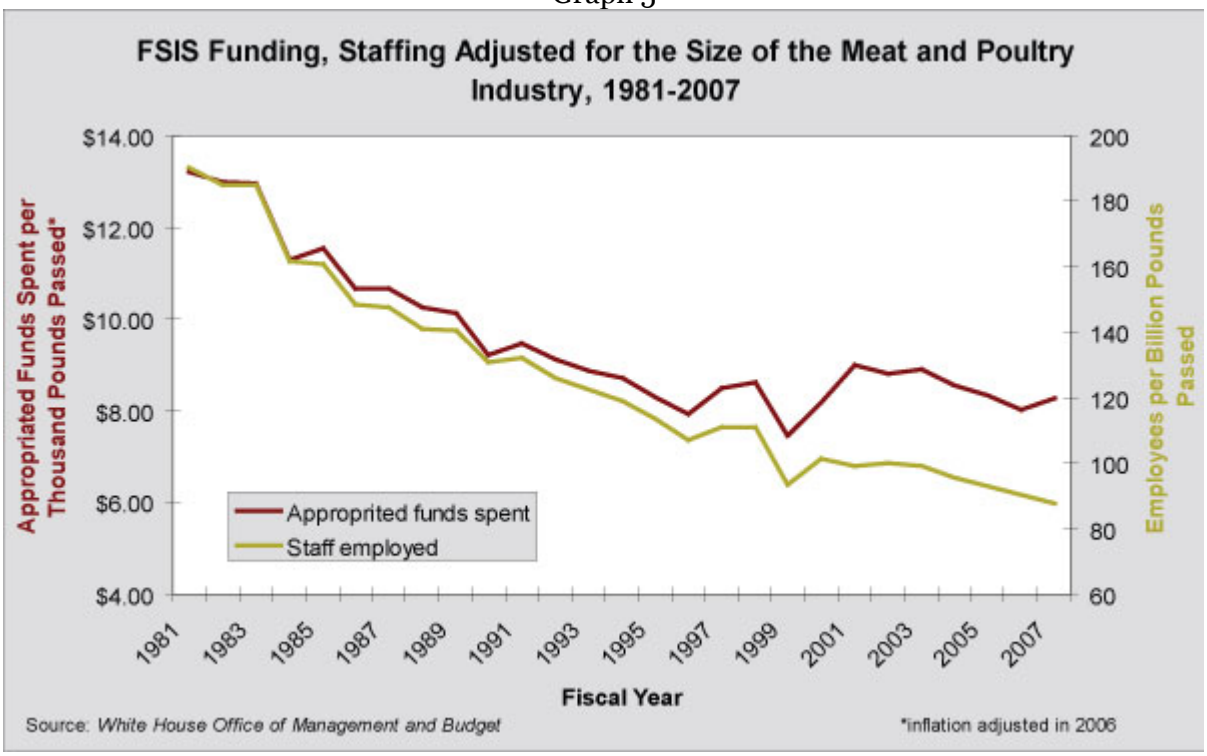
From FY 1981 to FY 2007, the number of full-time employees at FSIS fell from 9,932 to 9,184 — a 7.5 percent drop. Despite robust funding increases in the 2000s, FSIS's staffing level has dropped nearly three percent during this time. FSIS's staffing is now at its lowest level since FY 1989. (See Graph 4.)

Graph 4



The situation appears even worse when comparing the size of the meat and poultry industry to the size of FSIS's workforce. In FY 1981, FSIS employed about 190 workers per billion pounds of meat and poultry inspected and passed. By FY 2007, FSIS employed fewer than 88 workers per billion pounds, a 54 percent drop. (See Graph 5.)

Graph 5



Where's the Inspector?

For FSIS and consumers, the consequences are real. The increasing disparity between the size of FSIS and the size of the regulated community means FSIS inspectors face difficulty performing their duties and fulfilling the mission of the agency.

Other agencies that focus on product inspection, such as the Consumer Product Safety Commission or the food division of the Food and Drug Administration, conduct risk-based inspections. In risk-based inspection, managers, analysts, and field officers focus on those products or firms that they determine pose the greatest risk to consumers.

Under federal law, FSIS must inspect all meat, poultry, and egg products intended for commercial use. According to the FSIS website, "Slaughter facilities cannot operate if FSIS inspection personnel are not present," and, "Only Federally inspected establishments can produce products that are destined to enter commerce." Theoretically, FSIS's comprehensive inspection regime means that the physical presence of inspectors is essential to both plant operations and product safety.

In reality, inspection activity manifests itself differently. Recent media accounts have reported that slaughterhouse and processing plant employees use radios to signal the comings and goings of FSIS inspectors. According to *The Los Angeles Times*, "They even assign the pretty talkative woman to work next to the inspector to distract him from his mission to safeguard the nation's food supply."

The ability of processors and manufacturers to circumvent the FSIS inspection process is aided by widespread inspector shortages. According to *The Baltimore Sun*, "inspectors interviewed said that because of vacancies in the ranks, inspectors are often forced to do the work of two or three staff members, making it all the more difficult for them to catch signs of disease either in animals before slaughter, or in meat that has been butchered."

In multiple media accounts, FSIS officials claim the agency employs more than 7,000 inspectors nationwide. However, FSIS's inspection force has an average national vacancy rate of at least ten percent. In June 2007, the rate spiked to 12.2 percent. Three of the agency's 15 districts — Denver, Dallas, and Chicago — consistently carried vacancy rates of about 15 percent. One district, Albany, consistently carried a vacancy rate of more than 20 percent. These high vacancy rates continue to erode the ability of FSIS to properly carry out a robust inspection regime of the nation's beef, poultry, and egg stocks.

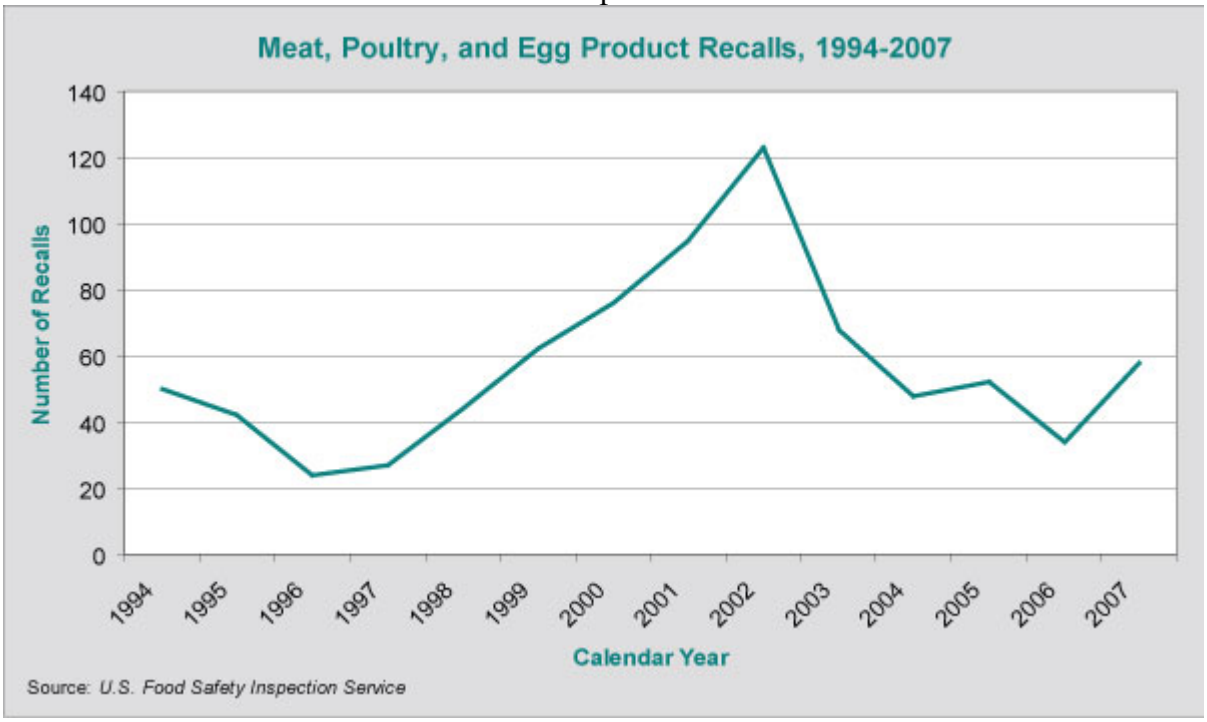
Recalls and Right to Know

Less thorough inspections raise the chance that processors may have to conduct recalls. Although recalls present an opportunity for FSIS and processors to keep tainted meat, poultry, or egg products away from consumers, recalls are far less effective in protecting public health than proper inspections, which keep those products from entering the market in the first place.

First, all recalls are conducted by manufacturers or distributors and are completely voluntary. FSIS may request a recall, but it cannot force a recall. (FSIS does have the authority to seize products in commerce.) Second, manufacturers and distributors frequently recover only a small fraction of the product for which the recall was announced. Lastly, and most importantly, FSIS does not release the names or locations of retail outlets where tainted products may end up, stripping consumers of their ability to make informed decisions and their right to protect themselves and their families.

Meat, poultry, and egg product recalls have spiked in the 2000s. In 2001, FSIS announced 95 recalls of the products under its jurisdiction. In 2002, the agency announced 123 recalls. (See Graph 6.)

Graph 6



Although the number of recalls has declined since 2002, their severity has increased. Two of the three biggest meat recalls in U.S. history have occurred in the past four months. In October 2007, Topps Meat Co. announced the recall of 21.7 million pounds of ground beef used for frozen hamburgers due to *E. coli* contamination. At the time, the Topps recall was the second largest in U.S. history. The *E. coli*-contaminated meat sickened at least 40 people in eight states.

On Feb. 17, Hallmark/Westland Meat Packing Co. announced the recall of more than 143 million pounds of beef, the largest recall in U.S. history. The company announced the recall after an investigation by the Humane Society of the United States showed that nonambulatory (or "downer") cows were slaughtered and allowed into the market. Federal regulations prohibit companies from processing and selling meat from downer cows without explicit FSIS inspector approval because downer cows have a higher probability of being infected with mad cow disease. However, USDA officials say the health risks posed by the Hallmark/Westland beef are low.

Outlook

In 2005, FSIS began considering switching to risk-based inspection practices. FSIS says it would move additional inspectors to processing plants determined to have a high risk. The agency has also proposed virtual inspection — a process by which cameras would monitor facilities' compliance with food safety regulations — for lower-risk plants, according to sources familiar with the issue. FSIS hopes to finalize the switch before the end of the Bush administration.

Critics believe the transition to a risk-based inspection model is directly tied to agency resources. According to a report by the nonprofit group Food and Water Watch, "Far from a minor adjustment intended to maximize food safety, this plan is really being used as a way to reduce the USDA's budget." The report adds, "The changes in the way inspectors are assigned to meat and poultry plants would make current inspector shortages permanent, effectively shrinking the size of the agency's frontline inspection workforce."

Recent failures of the meat inspection regime have provided the public and Congress a window into the breakdown of FSIS's ability to safeguard a large part of the nation's food supply. And although resource allocation within the agency may be open to criticism, it is clear that Congress has failed to maintain funding levels for FSIS comparable to the size of the meat, poultry, and egg industries. Restoring and enhancing FSIS's capacity to protect consumers is not restricted to a single-dimension policy change, but it does require that Congress provide adequate levels of funding that would allow FSIS to keep up with its responsibilities and fulfill its mission.

Endnotes:

All budget and staffing data for Fiscal Years 1981-2007 are from the Budget of the U.S. Government appendices, Fiscal Years 1981-2009. These volumes are the president's request to Congress and contain final budget numbers and program data from two fiscal years prior.

* All inflation-adjusted figures are expressed in 2006 dollars. Inflation adjusting is based on the Bureau of Labor Statistics Consumer Price Index, available at: ftp.bls.gov/pub/special.requests/cpi/cpiai.txt

Environmental, Worker Safety Rules Targeted by Industry Groups

The Small Business Administration's (SBA) Office of Advocacy has finalized a list of ten rules it will encourage federal agencies to modify. The Office of Advocacy compiled the list after receiving recommendations from small businesses and industry lobbyists.

The Office of Advocacy announced the list Feb. 28 as a part of its Regulatory Review and Reform Initiative (R3). The Office of Advocacy undertook the R3 initiative in 2007; the program is "designed to identify and address existing federal regulations that should be revised because they are ineffective, duplicative, or out of date."

The Office of Advocacy acts as a liaison between the business community and the federal government, particularly the executive branch. Although the Office of Advocacy purports to be the voice of small business in the federal government, it often appears to cater to the wishes of national trade groups and anti-regulatory lobbyists when it comes to regulatory issues.

The final list targets public health and safety regulations. Of the final ten rules, four are U.S. Environmental Protection Agency (EPA) rules, one is an Occupational Safety and Health Administration (OSHA) regulation, and one is a Mine Safety and Health Administration

(MSHA) rule. The Office of Advocacy winnowed the final list from a preliminary tally of 82 rules nominated by small businesses, industry lobbying groups, and think tanks.

The Office of Advocacy recommended EPA update a rule that requires dry cleaners to test their machines for air pollutant emissions. According to the Office of Advocacy, "The testing method requires an operator to open the machine to sample the emissions. However, most modern machines are closed-loop machines that will automatically shut down if any of the components are disconnected." The Office of Advocacy also recommends EPA ease requirements on the devices that test dry cleaning machine emissions by reducing their sensitivity. Easing the requirement would make it more difficult for operators to discover the presence of air pollutants. The Small Business Environmental Assistance Program and Small Business Ombudsman National Steering Committee nominated the rule.

The Office of Advocacy also targeted a rule on community drinking water systems. The Office of Advocacy recommended EPA make it easier for small communities to receive an affordability variance from EPA. Affordability variances allow small communities to adopt alternative pollution control technologies in their drinking water systems. The National Rural Water Association nominated the rule.

The third EPA rule concerns the recycling of solid waste. Currently, solid waste deemed to be a hazardous material must undergo special treatment. EPA has been in the process of revising definitions for solid waste policy since 2003.

The Office of Advocacy is pushing EPA to adopt a definition of hazardous materials that is as narrow as possible, stating, "Currently many useful materials that could otherwise be reused are required to be handled, transported, and disposed of as hazardous wastes." EPA, the Office of Advocacy, and the White House Office of Management and Budget (OMB) have attempted to portray the rule change as environmentally friendly by claiming it would increase recycling.

Leading environmentalists are critical of the proposed definition change. According to the Sierra Club, "If the rule were adopted, an estimated three billion pounds of hazardous waste annually would no longer be regulated as waste under certain conditions." The group added, "If the waste is no longer regulated, it will be much easier for these still toxic substances to make it onto our land and into our waters."

An environmental consulting firm (iSi Environmental Services), the Synthetic Organic Chemical Manufacturers Association, and the National Paint and Coatings Association nominated the rule.

The fourth EPA rule concerns oil spill prevention. The Office of Advocacy is asking EPA to clarify the definition of oil under federal regulations that require facilities to adopt oil spill prevention and clean-up plans. According to the Office of Advocacy, "Many facilities are unsure whether a given product is considered 'oil' or not, and therefore whether the [prevention and clean-up] rules apply." The American Chemistry Council and the National

Paint and Coatings Association nominated the rule.

The OSHA rule protects laboratory and medical workers from exposure to bloodborne pathogens by, for example, requiring facilities to reduce the risk of needlestick. The Office of Advocacy is asking OSHA to revise the rule to allow smaller facilities or facilities where the risk of blood exposure is low to be held to less stringent requirements. Scott George, president and CEO of the Mid-America Dental and Hearing Center in Missouri, nominated the rule.

The MSHA rule sets standards on the use of explosives in mines. According to the Office of Advocacy, MSHA has not updated the standards since 1996. The Office of Advocacy recommended MSHA update the standards to reflect industry best practices and to more closely resemble federal standards for general industry, which OSHA is currently in the process of updating. The Institute of Makers of Explosives and the International Society of Explosives Engineers nominated the rule.

Another nominated rule places restrictions on flights around the Washington, DC, metropolitan area. The Federal Aviation Administration (FAA) issued the rule as an interim rule in the wake of the September 11 attacks and plans to finalize it, according to the Office of Advocacy.

Of the remaining three rules, one is an IRS rule regarding home office deductions, and the other two relate to federal procurement and contracting.

The Office of Advocacy consulted with OMB's Office of Information and Regulatory Affairs (OIRA) in finalizing the list of rules. SBA's Office of Advocacy and the White House's OIRA often work together under a memorandum of understanding signed in 2002 in which both offices pledged to "achieve a reduction in unnecessary regulatory burden for small entities." Although the memorandum expired in 2005, the offices continue to work together closely. OIRA serves as the clearinghouse for most regulations developed by executive branch agencies. In President Bush's White House, OIRA has often sought to weaken or delay environmental and worker safety regulations.

The Office of Advocacy's attempt to push for agencies to review the rules duplicates a statutorily required process under the Regulatory Flexibility Act (RFA). Under RFA, agencies must review every ten years rules they find to impact small entities. A recent Government Accountability Office report found agencies often conduct regulatory reviews even more frequently under individual internal policies.

The Office of Advocacy will post and update the status of each rule on its website at www.sba.gov/advo/r3/.

High Court Expands Federal Preemption in Medical Cases

The U.S. Supreme Court has taken up a series of cases that addresses the issue of whether federal agency approval of medical devices and drugs shields manufacturers of those products from liability under state laws. In a case decided Feb. 20, the Court held that federal law preempts state liability claims if certain medical devices received U.S. Food and Drug Administration (FDA) approval. The Court also considered if that same protection should be extended to drug manufacturers.

In *Riegel v Medtronic Inc.*, the Court held that the 1976 Medical Device Amendments (MDA) contained express preemption language. Congress intended to create a federal oversight responsibility and, therefore, intended to limit the rights of those injured by medical devices. Allowing state law liability claims would create a conflict between federal and state law requirements, according to the Court. The preemption language, the Court held, "bars common-law claims challenging the safety or effectiveness of a medical device marketed in a form that received premarket approval from the FDA."

FDA's premarket approval process is its most rigorous medical device review and is applied only to certain medical devices — in this case, a balloon catheter used in angioplasty. "These devices may enter the market only if the FDA reviews their design, labeling, and manufacturing specifications and determines that those specifications provide a reasonable assurance of safety and effectiveness. Manufacturers may not make changes to such devices that would affect safety or effectiveness unless they first seek and obtain permission from the FDA," according to the opinion.

In a Feb. 21 article, BNA (subscription required) quotes the attorney arguing on behalf of the plaintiff as saying that this decision curtails patients' ability to receive compensation when they are harmed by medical devices that fail. Justice Ruth Bader Ginsburg, the lone dissenter in the case, argued Congress had no intent to curtail the public's right to compensation when injured because "a legislative design to preempt state common-law tort actions" does not exist in MDA and because FDA did not provide any federal compensation remedy.

According to a Feb. 26 BNA article, the Court denied review Feb. 25 of another medical device liability suit from Texas involving a heart valve that was voluntarily recalled after a supplemental FDA premarket approval process concluded the valve needed an infection-resistant coating. The Court was asked to overturn a Texas appeals court ruling that the state claim was preempted by the MDA language.

The same day, the Court heard arguments in a similar case from Michigan involving drug manufacturers. According to another Feb. 26 BNA article, in *Warner-Lambert Co. v Kent*, a lawyer representing pharmaceutical companies argued that Michigan's tort-reform law, which allows liability suits against drug makers in cases where the company has misled FDA during or after the approval process, is preempted by federal law. The basis for the argument is the same conflict between state and federal requirements as found in *Riegel*.

The drug makers were supported in their arguments, according to the article, by the Solicitor General's office of the U.S. Justice Department. In an amicus curiae brief, the Bush administration argued that FDA and the drug makers have a relationship that is "inherently federal." What is unique about the administration's position, according to a Feb. 26 *New York Times* article, is that FDA has historically argued these liability lawsuits protected patients; under the Bush administration, the lawsuits are generally regarded as conflicting with FDA's ability to do its job and with FDA's discretion about whether it was misled.

The New York Times reported in its March 4 edition that the Court voted 4-4 on the case March 3. Chief Justice John Roberts recused himself because he owns stock in the drug maker Pfizer Inc., the parent company of Warner-Lambert. The tie vote means that the suit against Warner-Lambert may proceed in Michigan courts.

According to the *Times* article, the Court agreed to hear yet another drug liability case in the October term, *Levine v. Wyeth*, that could extend preemption even further if products have received FDA approval.

There are at least three implications from this line of cases. First, the Court seems to be moving toward extending preemption over state tort law to a broader category of products under FDA's jurisdiction. Since *Riegel* was decided by an 8-1 vote, it seems clear that the Court is interpreting the MDA language to be clearly preemptive. This gives manufacturers liability protection via FDA approval and removes citizens' ability to receive compensation for injuries from faulty products — at least under the most rigorous FDA reviews.

Second, this is also an instance in which the law fails the public. The Court is ignoring FDA's inability to regulate these products effectively. Two recent studies point out how severely limited the FDA is in carrying out its mission after years of staffing losses and budget cuts. One is a 2006 report from the Institute of Medicine. The other report is from FDA's own Subcommittee on Science and Technology, which was asked to assess "whether science and technology at the FDA can support current and future regulatory needs." The reports are scathing indictments of governmental failure.

Third, both Congress and the executive branch have an obligation to make sure the FDA can regulate effectively these products if indeed the responsibility is "inherently federal." In addition, it is incumbent upon both branches to ensure that patients harmed by ineffective or dangerous drugs and faulty medical devices have a way to hold manufacturers responsible. If the Court finds that federal law removes liability suits as one incentive to industry to produce safe products, the other branches must restore protections to American citizens.

Bush Administration to Alter Employee Leave Protections

The Department of Labor (DOL) has announced a proposed rule that would alter federal protections for workers who need to take leave to care for themselves or their families. DOL

chose to pursue the rule changes after hearing complaints from industry lobbyists.

The Family and Medical Leave Act of 1993 (FMLA) allows employees to take up to 12 weeks of unpaid leave in a 12-month period without risking their pay, benefits, or position. According to DOL, employees can apply for FMLA leave "for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition."

According the National Partnership for Women and Families, a nonprofit organization that works on workplace fairness issues and has expertise on FMLA, seven provisions in the proposed rule would make it more difficult for workers to take FMLA leave. The proposed rule would:

- Make it more difficult for workers to use paid vacation or personal time during FMLA leave. Because FMLA leave is unpaid, this may mean more workers will be unable to use FMLA leave time if they cannot afford to miss work.
- Require employees to notify their employers before their shift starts for unforeseeable leave except in emergency situations. Conversely, employers would have more time (five days, from the current standard of two days) to determine whether an employee will be granted FMLA leave.
- Allow employers to speak directly to an employee's health care provider after receiving permission from the employee. Currently, employers must use a medical professional as an intermediary.
- Require chronic condition sufferers to visit their doctors every six months in order to recertify their condition. Currently, employees must only visit their doctors "periodically."
- Allow employees to waive their FMLA claims without review. Currently, DOL or courts must review such claims. Because employees may not have access to legal counsel, the rule change would increase the chance that employees may waive their rights under duress or may be coerced into doing so.
- Allow employers to count FMLA leave against the attendance record of an employee. Currently, employers cannot withhold attendance rewards based on time missed under FMLA.
- Make little progress in educating workers about the benefits of FMLA. Many workers do not utilize FMLA because they are unaware of the benefits or the process for requesting leave, according to the National Partnership.

Two provisions of the proposed rule would strengthen FMLA for workers, according to the National Partnership. The proposed rule would:

- Allow employees to take "light duty" assignments without counting the time worked toward FMLA leave. Currently, light duty time is subtracted from the 12 weeks of FMLA leave allowed.
- Improve employer disclosure of FMLA policy, including notification of how much

FMLA leave time an employee is being charged and written notification of why an employer finds a medical excuse insufficient and what can be done to correct it.

The proposed rule would also expand FMLA's provisions to military families. As part of the 2008 Defense Authorization Bill (P.L. 110-181), which President Bush signed into law on Jan. 28, Congress amended the FMLA to assist members of the military and their families. The legislation expands the FMLA in two significant ways: It adds a Caregiver Leave section that allows up to 26 weeks of unpaid leave for employees to provide care to a close relative who is a member of the Armed Forces undergoing outpatient treatment, recuperation, or therapy for a serious injury or illness. This provision was implemented immediately. The law also adds an Active Duty Leave section that allows up to 12 weeks of unpaid leave for employees who have an immediate family member who is on active duty or is called to active duty to serve in a military operation and who experience "any qualifying exigency." This provision does not go into effect until DOL issues final regulations. The proposed rule addresses the Active Duty Leave section by defining "any qualifying exigency."

By DOL's own admission, FMLA is working: "No employment law matters more to America's caregiving workforce than [FMLA] of 1993. Since its enactment, millions of American workers and their families have benefited from enhanced opportunities for job-protected leave..."

But business groups and industry lobbyists have been complaining about some of the FMLA's provisions for years. According to the National Partnership, "The organized business community has been pushing hard for a number of changes in the FMLA."

In December 2006, DOL solicited the public for their views on FMLA with a potential modification in mind. According to DOL's report on the comments, "There is broad consensus that family and medical leave is good for workers and their families, is in the public interest, and is good workplace policy." The Department received more than 15,000 comments from public interest groups, lobbyists, businesses, academics, and the general public.

Nonetheless, DOL began working on a rule change in late 2007. DOL published the proposed rule in the *Federal Register* on Feb. 11.

Some of the provisions of the proposed rule that the National Partnership and others find objectionable mirror the complaints of industry lobbyists who submitted comments in response to the Department's December 2006 request. For example, the National Association of Manufacturers urged a change in the rules to allow an opportunity for "unambiguous employee authorization for the employer — not necessarily a health care provider — to make inquiries of the employee's health care provider, as needed." The Department heeded that recommendation in the proposed rule.

Other industry suggestions, such as those to narrow the definition of "serious medical condition," have not been taken up in the proposed rule.

DOL is accepting public comments on the proposed rule until April 11. Comments can be

submitted here: www.regulations.gov, Docket identifier: ESA-2008-0001.

EPA Releases 2006 TRI Data

The U.S. Environmental Protection Agency (EPA) released the 2006 Toxics Release Inventory (TRI) data on Feb. 21. This is the fastest data release in the history of the program, although it still constitutes more than a year of lag time from the period the data refers to, and it still takes four months longer than Canada's National Pollutant Release Inventory. The 2006 data, which marks the first year that facilities are allowed to stop detailed reporting on chemical waste of less than 5,000 pounds, indicates that nationwide, 4.25 billion pounds of toxic pollution were released, which was a two percent decrease from 2005.

TRI Program

TRI is a database that tracks the release and management of over 650 toxic chemicals by industry, including manufacturing, waste handling, mining, and electric utility facilities. Facilities report to EPA on an annual basis, and EPA provides public electronic access to this information so that users can determine where, how, and in what amounts chemicals are released or managed in their communities and who is responsible for them. Pollution is divided into "releases," in which chemicals are discharged directly into the environment, and "waste," which adds waste management processes such as treatment, recycling, and energy recovery to the releases. Both can be on or off site of the reporting facility.

Facilities can opt out of providing such specific information — using the short Form A — if releases or total waste fall beneath a certain threshold, which was recently raised from 500 to up to 5,000 pounds, so long as less than 2,000 pounds are released directly to the environment. This sparked a controversy that is still unresolved: congressional legislation is pending to return the thresholds to the original 500 pounds, and 12 states are suing EPA over the change.

The 2006 data is the first year of the new threshold levels, and there is concern that a reduction of releases and/or waste management might be partially a consequence of the policy change rather than actual pollution reduction. Facilities filed 12,365 Form A reports in 2006, which was a 13 percent increase (1,435 more) from 2005. However, the overall reduction figures underscore that U.S. pollution in the TRI industrial sectors has steadily declined over the past 20 years. When considering chemicals and industries that have reported to the program since it began in 1988, annual releases are down are 59 percent.

2006 Releases and Waste

EPA has not provided a definitive cause for the two percent decrease in releases from 2005, but the three percent fewer facilities reporting for 2006 could be a factor. Electric utilities had the largest decrease in chemical releases, with a drop of 1.02 billion pounds from 2005. Metal mining remained the largest polluting industry, claiming all top five polluting facilities, and

had the largest increase in releases and disposal (47 million pounds).

Of the 4.25 billion pounds of releases in 2006, 88 percent of the releases were on site of the facility, and 12 percent were off site. Of on-site pollution:

- 49 percent was released into land
- 33 percent was released into air
- Six percent was released into water

Of the 24.4 billion pounds of total waste produced:

- One-third was recycled
- One-third was treated
- 13 percent was burned for energy recovery

2006 PBTs

A total of 455 million pounds of persistent bioaccumulative toxics (PBTs) were released in 2006, accounting for 11 percent of total releases. These included:

- 446 million pounds of lead and lead compounds, a five percent decrease from 2005
- 5.1 million pounds of mercury and mercury compounds, a 17 percent increase
- 130,277 grams (287 pounds) of dioxin and dioxin-like compounds, a 52 percent increase

Dioxin and related compounds are extremely toxic and have a reporting threshold of 0.1 grams. Three chemical manufacturers account for almost two-thirds of the reported releases.

2006 Carcinogens

The TRI program tracks 179 known or suspected carcinogens, including many of the PBTs. In 2006, approximately 820 million pounds of carcinogens were released, mostly to land. Ninety-one percent of them were on-site releases. Lead and arsenic were the largest contributors, and both of them decreased since 2005. Overall, carcinogens decreased by 11 percent in 2006.

In the last five years, releases reported by TRI facilities have decreased by 24 percent, sustaining the reduction trend since the program's inception. As previously mentioned, EPA has not provided an explanation for this significant progression, and the public is left to wonder whether it is predominantly due to increased efficiency, alternative practices, reduced production, fewer reporting facilities, and/or less detailed reporting. Such an analysis could be useful for determining how to decrease pollution even more.

The Next New Chemicals for TRI?

A recent analysis by the Project on Emerging Nanotechnologies (PEN) proposed adding

nanomaterials to the list of toxic chemicals tracked under the TRI program. The PEN report considered TRI only a possible avenue for advancing nanotechnology disclosure and acknowledges that more toxicological research needs to be done to determine whether or not nanomaterials constitute a health hazard. The last major overhaul to the TRI chemical list was in 1995, and PBTs were added in 2000. The new use of nanotechnology raises the question of how EPA can increase an older pollution program's relevancy in the face of current and emerging technologies.

2006 Data Available on RTK NET

Just one day after EPA released the 2006 TRI data, OMB Watch made the new information available on the Right-to-Know Network (RTKNET.org), which provides the public with search capabilities for a number of environmental databases. OMB Watch also launched new formats for presenting TRI data, such a new summary page that provides a concise snapshot of a search, including release/waste breakdown graphs, trend charts, and Top 5 lists of polluting companies, industries, and chemicals. Improved low- and medium-detail views allow users to easily sort results by releases or waste amounts, facility names, parent companies, chemicals, industry sectors, and geographic locations. The core chemical option in searches provides meaningful chemical comparisons by isolating chemicals consistently reported across any range of years being searched. Additional new features include links to street maps for facility addresses, an XML output, updated industry codes, and estimate amounts for the new Form A thresholds.

Inspectors General Need More Independence

A new study by the Project on Government Oversight (POGO) found that many Inspector General (IG) offices do not have sufficient independence to effectively discharge their responsibilities to investigate agencies for possible mismanagement, waste, fraud, or abuse.

Congress established the modern IG system with the Inspector General Act of 1978 in reaction to Watergate and other governmental scandals of the time. The IG offices have served as a vital check and balance against many of government's biggest reoccurring problems — excessive spending, abuse of power, and misleading the public. Currently, there are 64 IGs, 30 of which are appointed by the president, while the remaining 34, mostly at smaller agencies, are appointed by the heads of their respective agencies.

POGO surveyed IG offices throughout the federal government, receiving replies from 49 of the 64 offices. The report, *Inspectors General: Many Lack Essential Tools for Independence*, highlights patterns and issues contained in the responses and offers recommendations to improve the IG process.

The study reviewed several key factors that affect the level of independence of an IG office including:

- IG Candidate Selection
- Budget Line Items and Authority
- Staffing and Spending Authority
- In-House Counsel
- Ease of Website Access and Use
- Unfettered Investigative Authority

The responses from agencies revealed troubling trends among the IG offices. POGO concluded that many IG offices lacked the resources, staff, and money necessary to operate effectively. Some must even receive agency approval before spending funds, creating a potential conflict of interest when permission for investigations could lead to embarrassments for the agency. Similarly, few IG offices have their own in-house counsel and are required instead to use the general counsel of the agency, whose responsibility it is to protect the agency.

Another pattern noted in the report was the greater difficulties faced by the 34 IGs not appointed by the president. For instance, based on legislation, the fund for the 30 presidential appointed IGs must be separated out in the agency budgets and overseen by Congress. The agency-appointed IG funds are not listed separately and therefore are subject to administrators of those agencies. Since agency-appointed IGs are mostly at smaller agencies, commissions, and boards, the lack of funding and staff are more pronounced and many are unable to bring in contract help or post reports of their findings to agency websites.

The POGO study offered a number of recommendations for all IG offices to improve the level of independence and effectiveness. The recommendations included the idea of creating a council of all IGs to encourage greater coordination and sharing of resources, such as a pool of professional employees for smaller IG offices or consultation with IG counsel of another agency for those offices that lack their own in-house counsel. POGO also urged that the internal vetting process previously used by the IG community be revived to help ensure that only well qualified candidates are granted IG positions. Additionally, each IG office should have separate budget authority and transparent public budgets and should be allowed to spend the funds without additional agency approval. The POGO report also included several recommendations specific to individual agencies based upon unique issues indicated in their responses.

Congress is currently considering several bills that seek to improve the IG system. On Oct. 3, 2007, the House passed the Improving Government Accountability Act (H.R. 928), sponsored by Rep. Jim Cooper☼ (D-TN), which seeks to enhance the independence of the Inspectors General and create a Council of the Inspectors General on Integrity and Efficiency. The bill now moves on to the Senate for consideration. The Senate also has another bill, the Inspector General Reform Act of 2007 (S. 2324), introduced by Sen. Claire McCaskill☼ (D-MO), that seeks to address many of the same Inspector General issues. On Nov. 14, 2007, the Senate Committee on Homeland Security and Governmental Affairs passed S. 2324 by unanimous voice vote, and the bill has been scheduled for debate.

In the last several months, OMB Watch has on several occasions reported troubling activities

concerning IG offices in federal agencies, including the Central Intelligence Agency conducting an investigation of its own IG while that office reviewed the agency's detention practices; the General Services Administration dramatically cutting its IG office's budget; and the IG for NASA destroying documents and interfering in a federal investigation. These ongoing problems across several agencies serve to reinforce the problems outlined in the POGO report. Many of the recommendations contained in the POGO report, as well as the improvements sought by the pending legislation, would directly address many of these problems.

POGO plans to release another study that will address questions of IG accountability, performance, and effectiveness.

FY 09 Budget Resolution: Goals, Strategies, and Challenges

The House and Senate Budget Committees will soon turn to the congressional budget resolution for Fiscal Year 2009. The draft versions of the budget resolution, to be offered by House Budget chief Rep. John Spratt☼ (D-SC) and Senate Budget head Kent Conrad (D-ND), are likely to be considerably different from President Bush's unrealistic budget proposal submitted to Congress in February.

The budget resolution is a non-binding blueprint in which Congress charts out a fiscal direction for the federal government over a five-year period, but it also sets the rules for debate on fiscal issues and establishes tax and spending parameters for the year ahead. In 2008, on crucial issues such as balancing the budget, war funding, the reach of the alternative minimum tax (AMT), or whether revenue can be boosted without raising taxes, Democrats will be challenged to explain why their budget is more realistic than what the White House offered.

The president's FY 09 budget proposal to Congress showed a balanced budget, with a $48 billion surplus, by FY 2012. Democrats and some Republicans in Congress rightly criticized the proposal, arguing it was based on some improbable assumptions:

- Hundreds of billions of dollars in federal revenue from allowing the AMT to go "un-patched" — thereby affecting tens of millions of middle-class taxpayers
- Only $70 billion in future war funding for Iraq, Afghanistan, and other fronts in the global war on terror — far less than current spending requests
- Stagnant or even reduced domestic discretionary spending in real terms

Spratt and Conrad have indicated their budget blueprints both set a goal of a balanced budget by FY 2012, often using the same spending and revenue assumptions. Regarding war costs, for example, Conrad says the $70 billion makes more sense "in the context of our policy than [Bush's] policy because he intends to stay in Iraq. Some of his people told us, 'Think Korea,' when we asked how long might we stay... So the President has played hide the ball in the budget on war cost with respect to his policy."

On the AMT, the Democrats will likely assume passage of a fully offset patch in FY 09. The

assumption of an extended AMT patch is politically warranted, but there is no reason to expect the GOP to permit it to be paid for with tax increases elsewhere in the budget. Democrats will also assume, like last year, that they can balance the budget without allowing all of the 2001 and 2003 tax cuts to expire in 2010. Few experts, however, think sufficient revenue can be raised from the limited roll-backs the Democrats have proposed to balance the budget.

Another budget resolution strategy for Congress to achieve fiscal goals is through budget reconciliation instructions. Democrats' fiscal goals were stymied in 2007 due to Republican senators whose filibuster threats regularly killed legislation intended to reduce the deficit. Many of these legislative proposals had support from more than half the Senate, but the rules of that chamber require 60 votes to defeat a filibuster. To overcome this deadlock, Democrats can use special instructions contained in a budget resolution directing committees to move legislation that would reduce the deficit and be protected from filibusters.

This means that securing offsets for the AMT legislation and the renewable energy tax package that has passed the House three times already would be far easier. But this strategy has its risks. Democrats, with their one-vote majority in the Senate, have no room for error.

Sen. Mary Landrieu☼ (D-LA), for example, opposes offsetting renewable energy tax breaks by raising taxes on oil and gas companies, as was tried in an energy bill last year; she does not want that proposal included as a reconciliation instruction. And Senate Finance Chair Max Baucus (D-MT) calls trying to pass an offset AMT patch "a waste of time" because the Senate proved in 2007 that such an approach was futile. Baucus might be right, as even if fully offset energy tax or AMT bills are cleared, President Bush would likely veto them.

The antagonism over budget priorities witnessed in 2007 will likely repeat itself in 2008, especially since the president has already threatened to veto any spending bills exceeding his requests. Almost no one in Washington expects Congress and the president to agree on an FY 09 budget anytime this year. As has been typical of the debate over the federal budget recently, House Appropriations Chair Rep. David Obey☼ (D-WI) has vowed to wait "until a new president is in office who will act like an adult" before negotiating an FY 09 federal budget.

Under these circumstances, there is little reason for Democrats not to include "message" instructions that highlight differences in fiscal priorities with their GOP colleagues and the president. Among the message instructions under consideration are:

- Spending $20 billion to prevent a 10 percent cut in Medicare payments to physicians as well as other Medicare changes
- Adding $35 billion for another stimulus package featuring additional money for the unemployed, food stamps, and heating subsidies for the poor
- Providing $40-60 billion for the highway trust fund and other infrastructure projects
- Expanding the State Children's Health Insurance Program

Recent election-year history points up the challenges facing budget-makers in Congress in 2008. Republicans failed to produce a House-Senate agreement in 2004 and 2006, while in

2002, Democrats in the Senate and Republicans in the House could not overcome their differences to pass a budget.

Even if a resolution is enacted, it may not produce a realistic roadmap to a balanced budget in the next few years. Indeed, it may not even produce a viable budget for the next fiscal year. But it will quite likely serve as a proxy fight for the post-election battle over the future of President Bush's tax cuts, most of which expire at the end of 2010, as well as other fiscal issues that will be played out over the course of the 2008 election year. These issues, like the FY 09 budget, will ultimately be resolved in 2009 by the next Congress and the next president.

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In This Issue

White House Interferes with Smog Rule

The U.S. Environmental Protection Agency (EPA) announced March 12 its revision to the national air quality standard for ozone, or smog. While the new standard is an improvement, EPA did not go as far as its own scientists had recommended. Last-minute changes orchestrated by the White House have also mired the rule change in controversy. In addition to the new standard, EPA proposed legislative changes to the Clean Air Act, which environmentalists and lawmakers immediately criticized.

The Primary Standard

EPA regulates ozone under the Clean Air Act. Exposure to ground-level ozone is associated with a variety of adverse health effects including asthma attacks and premature death.

EPA announced its decision to tighten the primary standard for ozone to 0.075 parts per million (ppm) from the current level of 0.084 ppm. In July, EPA had announced its intent to tighten the standard and had proposed a range of 0.070-0.075 ppm. The Clean Air Act requires EPA to reevaluate the standard for ozone every five years, although the agency had not revised the standard since 1997. The current revision comes as a result of a lawsuit filed by environmentalists concerned about public health (*American Lung Association v. Whitman*).

EPA's primary standard for ozone is intended for the benefit of public health. EPA must base its decision on the latest scientific evidence and may not consider compliance costs. When EPA sets out the implementation plans for meeting ozone standards (the next phase in this process), it is allowed, and indeed required, to consider costs in order to create a situation in which communities and polluters can meet the standard but bear the lowest compliance costs possible.

Recommendations of EPA Experts

EPA's Clean Air Scientific Advisory Committee
Primary standard: 0.060 parts per million (ppm) - 0.070 ppm
Secondary standard: 7.5 ppm-hours - 15 ppm-hours

EPA Staff
Primary Standard: 0.060 ppm - "somewhat below" 0.080 ppm
Secondary Standard: 7.5 ppm-hours - 21 ppm-hours

EPA Administrator Stephen Johnson
Primary Standard: 0.075 ppm
Secondary Standard: 21 ppm-hours

Final standards announced March 12

Primary Standard: 0.075 ppm
Secondary Standard: identical to primary standard

EPA's decision has drawn criticism from many environmentalists and public health advocates who complain EPA did not go far enough in tightening the standard. The American Lung Association called the decision a "missed opportunity" and said, "Thousands will suffer more and die sooner than they should."

According to an EPA analysis, tightening the primary standard to 0.075 ppm will prevent at least 260 premature deaths, 890 heart attacks, and 200,000 missed school days every year starting in 2020. Had EPA adopted a standard of 0.070 ppm, the analysis shows the more protective standard could have prevented an additional 300 premature deaths, 610 heart attacks, and 440,000 missed school days each year.

The American Lung Association and others point out that EPA did not heed the advice of its own scientists. EPA's Clean Air Scientific Advisory Committee — an independent body of scientists charged with making recommendations on air pollution standards — recommended EPA adopt a primary standard of 0.060-0.070 ppm. EPA's staff scientists recommended a standard of 0.060 ppm — "somewhat below" the current standard. EPA's Children's Health Protection Advisory Committee called on EPA to adopt a standard of 0.060 ppm and cited the

vulnerability of children to ozone's harmful effects.

Industry groups and anti-regulatory lobbyists are unhappy with EPA's decision to tighten the standard at all. Groups like the National Association of Manufacturers (NAM) claim a tighter standard will cause economic hardship.

EPA and the White House Office of Management and Budget (OMB) frequently heard the complaints of industry as the agency prepared to announce its decision. In three closed-door meetings, representatives from EPA and OMB met with lobbyists from NAM, the Edison Electric Institute, the National Paint and Coatings Association, the American Petroleum Institute, and the National Taxpayers Union, among others. On one occasion, OMB and EPA met with representatives from the public interest community, including groups such as the American Lung Association, the American Academy of Pediatrics, and the Natural Resources Defense Council (NRDC).

The Secondary Standard

EPA also announced a new secondary standard for ozone. As it has in the past, EPA will set a secondary standard identical to the primary standard, in this case, 0.075 ppm.

Under the Clean Air Act, EPA may set a secondary standard for the protection of public welfare. This provision allows EPA to tailor a standard to meet special considerations, such as seasonal variance, with the goal of protecting things that do not directly impact public health but may impact our way of life, such as ecological health.

When EPA first proposed the revised standard for ozone in July 2007, it laid out two options for the secondary standard: 1) tighten the standard to the same level as the primary standard; or 2) set a separate seasonal standard that would afford additional protection to sensitive plant life harmed by ozone's deleterious effects during times of intense ozone exposure.

EPA intended to adopt the second option. However, last-minute pressure from the White House forced EPA into adopting a secondary standard identical to the primary standard.

On March 6, Susan Dudley, administrator of OMB's Office of Information and Regulatory Affairs (OIRA), wrote to EPA Administrator Stephen Johnson complaining about the agency's plans to set a seasonally adjusted secondary standard different from the primary standard. Dudley urged EPA to consider the potential economic impact of the separate secondary standard and questioned the agency's scientific justification.

Dudley has a history of opposing regulation. Before heading OIRA — the clearinghouse for executive branch regulations — Dudley worked at the Mercatus Center, an anti-regulatory, industry-funded think tank at George Mason University. Her nomination to head OIRA stalled in Congress, partially in response to public opposition organized by a coalition of good government, environmental, and labor groups, including OMB Watch. As a result, President Bush installed her by recess appointment in April 2007.

On March 7, Marcus Peacock, EPA's Deputy Administrator and Regulatory Policy Officer, replied to Dudley. Peacock said the Clean Air Act prohibits EPA from considering costs in setting the secondary standard and that the agency had provided ample scientific rationale for its decision.

EPA appeared ready to dismiss the White House's concerns. On March 11, just a day before announcing the ozone standards, the agency prepared a talking points memo indicating EPA Administrator Stephen Johnson intended to adopt the second option — the seasonally adjusted standard: "The seasonal form is the most scientifically defensible. Ozone decreases the ability of plants to produce and store food. The impact of repeated ozone exposure accumulates over the course of the growing season." According to NRDC, Johnson used these talking points in a meeting with Bush. (The talking points memo was marked confidential but is now available in the rulemaking record.)

In defense of Johnson's decision, the memo cited studies and comments by the National Academy of Sciences, the National Park Service, the U.S. Department of Agriculture, and EPA's own staff and independent science advisors. Johnson's decision to choose the "scientifically defensible" option is consistent with the Clean Air Act's requirements that the agency base its decision on the latest and best available science.

However, at the last minute, President Bush was brought in to settle the dispute between EPA and OIRA. Under Executive Order 12866, Regulatory Planning and Review, the director of OMB or an agency head may ask the president to resolve disputes that occur during the OIRA review process. It is unclear who asked Bush to settle the dispute over the secondary standard. Bush sided with OIRA and forced EPA to cancel its plans to adopt a separate secondary standard and instead keep the two standards identical. (A letter identifying Bush's involvement, as well as Dudley's March 6 letter and Peacock's March 7 letter, are collectively available in this document. Public disclosure in the rulemaking record of this type of divisive internal policy debate is unusual.)

An initial draft of the *Federal Register* notice EPA planned to publish to formally announce its decision also demonstrates the agency was preparing to adopt a new, seasonally adjusted secondary standard. A comparison of the initial draft with the draft now available reveals a host of edits that delete mentions of a seasonally adjusted secondary standard and erase evidence of the scientific justification in support of it.

In the initial draft, EPA discussed the available science in support of setting a new secondary standard and sided with public commenters, such as Environmental Defense and the National Park Service, who urged the agency to adopt a standard more protective of sensitive plant life. In the current iteration, EPA claims scientific uncertainty and sides with commenters such as Exxon-Mobil and the American Petroleum Institute.

EPA deletes a number of notable passages from the initial draft in the revised version. In the earlier draft, EPA stated a seasonally adjusted secondary standard "is clearly supported by the basic biological understanding of how most plants in the U.S. are most biologically active

during the warm season and are exposed to ambient [ozone] throughout this biologically active period." In addressing industry's complaints that not enough new science had emerged in support of a secondary standard since EPA's last revision, the agency stated, "EPA disagrees that these uncertainties have not been materially reduced."

In the current draft, EPA reverses course and legitimizes the industry groups' objections. For example, EPA states, "As reflected in the public comments, the Administrator also recognizes that there remain significant uncertainties in determining or quantifying the degree of risk attributable to varying levels of [ozone] exposure [and] the degree of protection that any specific cumulative, seasonal standard would produce."

Process Changes

In a surprise move, Johnson also announced his intent to seek legislative changes to the Clean Air Act. As discussed above, currently, EPA must base its standard-setting decisions for air pollution on the latest scientific evidence and can only consider compliance costs when developing implementation plans.

Johnson wants Congress to consider changes to the Clean Air Act that would allow EPA to consider costs in the standard-setting process. Legislative changes would be necessary because the Act is explicit in prohibiting the consideration of costs, a notion the U.S. Supreme Court upheld in 2001 (*Whitman v. American Trucking Association*).

A recent OMB Watch report found that economic analyses in environmental rulemaking often overstate compliance costs. Cost assessments do not, and cannot, account for technological improvements that may be developed to control pollution more efficiently, the report found.

Environmentalists and public health advocates immediately assailed Johnson's proposal. Frank O'Donnell, president of the nonprofit Clean Air Watch, said the changes "would be a radical attack on the Clean Air Act" and said Johnson's proposal "is taking a page directly from the playbook of polluters and their most ardent supporters in Congress."

In a statement, Sen. Barbara Boxer☼ (D-CA), chair of the Senate Environment and Public Works Committee, also criticized the proposal: "It is outrageous that the Bush Administration would call for changes that would gut the Clean Air Act, which has saved countless lives and protected the health of millions of Americans for more than 35 years."

A March 17 *New York Times* editorial predicted Congress would dismiss the proposal: "Since this would permanently devalue the role of science while strengthening the hand of industry, the proposal has no chance of success in a Democratic Congress."

The House Oversight and Government Reform Committee has scheduled an oversight hearing for April 10 about the revised ozone standards. The Committee has not yet announced a witness list.

EPA will now begin considering implementation policy for the revised standards. EPA determines compliance at the county level. Counties will have to come into compliance with the new standards sometime between 2013 and 2020.

Bipartisan Consensus Forming on CPSC Reform

Although differences between the House and Senate still exist, Congress is moving toward a bipartisan agreement on major reforms to the Consumer Product Safety Commission (CPSC). Bills from each chamber need to be reconciled, but if Congress can agree on a single proposal, it will set up a showdown with the Bush administration over new provisions intended to expand consumer protections by revitalizing the CPSC.

On March 6, the Senate passed the Consumer Product Safety Commission Reform Act (S. 2663) by a veto-proof margin of 79-13. Among the bill's ten cosponsors were two Republicans, Sens. Susan Collins (R-ME) and Ted Stevens (R-AK), marking a significant change from December 2007 when not one Republican cosponsored similar legislation.

The House passed its version of CPSC reform in December 2007 (H.R. 4040), but the Senate was unable to move its companion bill because of a lack of bipartisan agreement. These efforts came amidst a record year for recalls of toys, pet food, tires, and other products.

Both bills increase funding and staffing for CPSC and expand the number of commissioners from three to five. The House version expands the agency's budget to $80 million in FY 2009 and $100 million in FY 2011 but does not authorize funding beyond that year. The Senate bill calls for $88.5 million in FY 2009 and then increases the budget by ten percent per year through FY 2015.

S. 2663 is considerably stronger than the House bill in significant ways. For example:

- The cap on civil penalties for those violating the law increases to $20 million (from the current $1.8 million level), twice the level in the House bill
- All children's products have to pass third-party safety certification before they can be marketed. The House bill subjects only CPSC-approved products aimed at children 12 years and under to third-party testing
- The Senate bill establishes a public database to report on injuries, illnesses, and the risks associated with consumer products from consumers, government agencies, health care providers, and others. H.R 4040 calls for a CPSC study to plan for a database
- Employees of manufacturers and the CPSC who blow the whistle on supply chain problems or hazards receive protections to encourage the flow of information to the CPSC about harmful products. The House bill does not contain a whistleblower protection provision
- State attorneys general would be able to enforce CPSC's rules, standards, orders, recalls, and certifications when they determine there is potential harm from a product. Like the database, this provision allows additional information to be collected and

action taken, such as removing recalled products from store shelves. The House bill only allows state attorneys general to use injunctions to enforce any rule involving a mandatory recall; CPSC recalls are voluntary, however

In a March 3 Statement of Administration Policy (SAP), the White House strongly objected to the expanded powers for state attorneys general contained in the Senate bill. The statement argued enforcement should remain the province of the CPSC, which currently relies on input from state and federal agencies about product issues. In addition, the statement raised the specter of a "confusing patchwork of safety standards that will make it impossible to enforce uniform, national policies" if state attorneys general are allowed to interpret what constitutes violations of CPSC policies.

The administration's objections parallel those raised by industry groups, according to a March 14 BNA article (subscription). The major concern expressed by business representatives quoted in the article and in the White House's policy statement is that additional time and money will be spent on litigation if states have this expanded enforcement authority. According to the article, however, if the CPSC has initiated its own action for rules violations, a state attorney general cannot bring action while the CPSC's action is pending.

Consumer advocacy groups support the state level enforcement powers. They argue the stronger enforcement provisions could keep unsafe products off the market and thereby reduce litigation, and that having states actively supporting CPSC's regulatory authority helps a poorly staffed and funded agency perform its functions better by providing additional "cops on the beat."

The White House also objects to the whistleblower protections and the public database, among other provisions included in S. 2663. The SAP states preferences for some provisions of the House bill over parallel Senate provisions, but stops short of threatening a veto.

House Passes Compromise FISA Bill

The House recently rejected the president's request to pass and send to the White House a Senate bill to extend surveillance authority and grant telecommunications companies retroactive immunity for assisting in wiretapping. Instead, on March 14, the House passed the FISA Amendments Act of 2008 (H.R. 3773), which rejects immunity for telecommunications companies and imposes stronger civil liberties safeguards.

In summer of 2007, President Bush signed the Protect America Act of 2007 (PAA), which granted 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 bill included sunset provisions that would automatically eliminate the surveillance powers after six months if Congress did not act to extend the authorities. The provisions were scheduled to sunset in February.

In mid-February, the Senate passed the FISA Amendments Act (S. 2248) by a vote of 68 to 29. The bill included immunity for telecommunications companies that may have participated in the administration's illegal warrantless wiretapping program and granted the administration wide warrantless surveillance powers. Under the Senate-approved bill, the administration could target foreign surveillance involving communications of American citizens without judicial approval.

Shortly before Congress's February recess, the House leadership declined to consider S. 2248 and, after President Bush threatened to veto a short extension of PAA, the PAA powers expired. Last week, the House, going into secret session — a rare occasion, not performed since it was invoked to discuss America's involvement in Guatemala 25 years ago — introduced and passed a substitute H.R. 3773 to the previously passed RESTORE Act.

The bill includes a number of provisions to ensure protection of civil liberties while granting broad national security powers. H.R. 3773 includes provisions which:

- Require the government to target and receive warrants for non-U.S.-citizens without receiving individualized showing of probable cause
- Grant no immunity for telecommunications companies for their alleged involvement in illegal warrantless wiretapping programs, though it does allow for certain procedures to allow telecommunications companies to rely upon classified information
- Require approval of the Foreign Intelligence Surveillance Court for surveillance procedures
- Prohibit the government from doing an end-run around the Fourth Amendment by reverse targeting American citizens through surveillance that is targeting foreigners
- Require an audit of government warrantless surveillance practices after 9/11 by a congressional commission

The bill sunsets at the end of 2009, along with various provisions of the USA PATRIOT Act, thereby allowing a new administration to consider their expediency and utility.

The White House denounced the House bill as an affront to the government's efforts to provide national security. The president again vowed to veto the House bill, stating, "Congress should stop playing politics with the past and focus on helping us prevent terrorist attacks in the future. Members of the House should not be deceived into thinking that voting for this unacceptable legislation would somehow move the process along."

Attorney General Michael Mukasey and Director of National Intelligence Mike McConnell issued a joint statement saying that the House bill "would not provide the Intelligence Community the critical tools needed to protect the country." Mukasey and McConnell objected to the bill on three grounds. First, it does not provide what they see as the necessary protections to telecommunications companies and that those companies' cooperation is necessary to conduct the war on terrorism. Second, they argued that requiring court approval for surveillance will result in the loss of valuable intelligence. Finally, Mukasey and McConnell objected to the short sunset, which they argued would create instability of enforcement, and to

the creation of a congressional commission to investigate warrantless wiretapping.

On the House floor, Rep. John Conyers☼ (D-MI), chairman of the House Judiciary Committee, pointed to the continuing controversies surrounding the administration's conduct of the war on terrorism. "We learned just yesterday that the FBI was continuing to misuse the authorities we granted it under the Patriot Act six years ago to unlawfully obtain information about law abiding Americans. We learned just four days ago that the National Security Agency was using its massive powers to create a nationwide data base of American citizens," said Conyers.

"The U.S. House today passed responsible legislation that arms our intelligence community with powerful new tools to keep us safe and restores essential constitutional protections for Americans that were sharply eroded when the President signed the Protect America Act into law last August," said House Intelligence Committee Chairman Silvestre Reyes (D-TX). "We have put the security of Americans first and foremost. We will continue to work to move this forward in a manner that provides for both our nation's security and liberty."

The substantive differences between the House and Senate bills leave only two options open for moving forward. Either the differences between the bills will have to be worked out in a House-Senate conference, or the Senate will have to pass H.R. 3773. Given that the Senate has decided to provide immunity to the telecommunications industry and that the administration is openly opposing the House bill, it seems unlikely the Senate will pursue passage of the House bill in its current form. Debates on how to resolve the impasse are expected to continue into the weeks and possibly months ahead.

Sunshine Week Arrives

The week of March 17 marks the third annual national Sunshine Week, a nonpartisan campaign to promote openness in government and access to public records.

The core of Sunshine Week, led by the American Society of Newspaper Editors, is a massive coordinated media blitz around the country and across print, radio, and television to highlight the importance of government transparency and ongoing problems with the issue. As the annual event has become more established, many outside the journalism community have scheduled open government events to coincide with the week, including elected officials, public interest groups, schools, civic groups, and many others.

Sunshine Week is scheduled in March each year to coincide with James Madison's birthday, who is celebrated as a strong proponent of open government among the Founding Fathers. This year's Sunshine Week includes several prominent events and releases.

- Sunshine Week released a survey that found that 74 percent of those polled view the federal government as very or somewhat secretive, which is a significant increase from the 62 percent who responded that way in a similar survey two years ago. The survey

also revealed that nearly nine in ten say it's important to know presidential and congressional candidates' positions on open government when deciding who to vote for in the upcoming elections.

- The National Security Archive released a new survey of FOIA implementation throughout the federal government, which found that despite a 2005 Executive Order to improve FOIA performance, many agencies still have large backlogs of unanswered requests for information. The report titled *Mixed Signals, Mixed Results: How President Bush's Executive Order on FOIA Failed to Deliver* concluded that the lack of any enforcement mechanism or increased funding associated with President Bush's order directly resulted in the lack of significant progress on FOIA performance.

- In anticipation of Sunshine Week, Sens. Patrick Leahy (D-VT) and Jon Cornyn (R-TX) introduced new FOIA legislation on March 12 called the OPEN FOIA Act. The bill would require Congress to explicitly and clearly state its intention to provide for statutory exemptions to FOIA in new legislative proposals. The Senate unanimously passed similar legislation in the last Congress. Leahy and Cornyn are seeking to build on the passage of their OPEN Government Act, which the president signed into law in December 2007, making the first improvements to FOIA in more than a decade.

- The Associated Press (AP) began a two-part story reviewing laws that address open government and restrictions to public access in all 50 states. The first installment concluded that many states have been increasingly closing down public access to government information since the terrorist attacks of Sept. 11, 2001. The AP analysis of 1,023 new laws dealing with public access to government information found that more than 60 percent closed access, just over a quarter increased access, while the rest had a neutral effect.

- On March 17, the Collaboration on Government Secrecy, an educational project on the study of government secrecy at American University's Washington College of Law, held its first annual Freedom of Information Day Celebration with an all-day conference. The program consisted of a series of panels, with both public officials and public interest groups discussing important current issues in the freedom of information, international transparency, and government secrecy arenas, such as the use of state secrets and the explosion of Sensitive But Unclassified (SBU) information restrictions.

- OpenTheGovernment.org will be hosting a Sunshine Week webcast on March 19 consisting of two panels discussing government openness, executive branch secrecy, and places to get hard-to-find government information. The event, "Government Secrecy: Censoring Your Right to Know", will take place at the National Press Club and will be webcast online through participating host organizations.

- OMB Watch will be releasing a report on the results of a survey on the top open government questions people want presidential and congressional candidates to

answer before the elections. Over the course of several weeks, OMB Watch conducted an open survey on 12 government transparency questions covering a range of topics. The report will discuss the results from more than 2,000 respondents who participated. The report is a part of OMB Watch's 21st Century Right to Know Project, which is seeking to collaboratively develop recommendations for the next administration and Congress to improve government transparency and bring the government's policies and practices into the next century.

For a more complete tally of Sunshine Week events around the country, see the organization's running list.

EPA Blasted for Library Closings

The U.S. Environmental Protection Agency (EPA) was blasted in both judicial and congressional forums for closing seven of its libraries over the past several years. In a Feb. 15 ruling, a federal arbitrator found EPA guilty of unfair labor practices with respect to the closings. One month later, Congress heard testimony from several sources, including the Government Accountability Office (GAO), that EPA's library restructuring plan was poorly conceived, planned, and implemented.

Closed Libraries

Since 2004, six of the original 26 EPA libraries have been closed, one remains unstaffed, four others have reduced their hours, and one is scheduled to be consolidated in 2008. Looming budget cuts and apparent plans to digitize the agency's collections were catalysts for the reorganization. EPA began a series of studies in 2003 that evaluated the value of services and uses of the libraries, and in November 2005 created the Library Steering Committee, which was tasked with developing a plan for maintaining the quality of the library network on a restricted budget.

In anticipation of major Fiscal Year 2007 budget cuts, the committee's 2006 proposal included closing three libraries and reducing access to five others, in some cases by more than 50 percent. With no centralized management or plan for content preservation, libraries that were being closed or that were having their services reduced independently determined whether to digitize content, send it to other collections, or throw it away. Upon the request of Congress in 2007, EPA suspended further library closures, and the FY 2008 omnibus appropriations bill provided funding for the library system and directed the agency to come up with a concrete management and digitization plan that would restore library services. EPA's plan is expected toward the end March and may include reopening libraries.

GAO Report

The GAO, in its report *EPA Needs to Ensure That Best Practices and Procedures Are Followed When Making Further Changes to Its Library Network*, faults EPA with failing to follow

through with many of its own initial recommendations, most importantly a comprehensive cost-benefit analysis and user survey, before starting the library closures. The staff survey that EPA conducted had a 14 percent response rate, which GAO determined was hardly sufficient to accurately ascertain user needs. Significantly, EPA also failed to gather information on public use of the agency libraries which, by EPA's own estimates, accounted for 20 to 40 percent of all reference requests. Additionally, the GAO found fault with EPA's limited efforts to evaluate alternatives to actual closures, such as reducing journal duplications, revising the outdated policy framework, or soliciting ideas from staff who know the libraries best.

The GAO concluded that as a result of these early missteps, the libraries' "reorganization" lacked agency-wide oversight, specific goals, and timelines for providing service continuity. EPA did not adequately assess resources for less disruptive, and potentially more efficient, transformation. EPA expected that digitizing information would reduce costs while maintaining access to the information. However, only ten percent of EPA's holdings are eligible for digitization since only EPA-produced reports are allowed to be electronically reproduced by the agency.

The lack of coordination and staff guidance has resulted in content dispersal and chaotic organization. For instance, all of the Chemical Library materials appear to be located at a library that has been closed for a full year. Additionally, many of the closed locations failed to develop any plans for replacing services that had been provided to the public.

Upon close investigation, GAO also found the budget crunch excuse circumspect. EPA has full discretion in determining libraries' funding, mainly determined by the Office of Environmental Information. The funding cuts appear to have been initiated by the agency *before* Congress passed its FY 2007 budget. EPA's actions may have actually made the library system less efficient by eliminating monies being brought in by the libraries. EPA's initial study found that between $2 to almost $6 came back to the agency for every dollar spent on the library system, largely aided by librarians' expertise with research. The agency's plans to replace actual librarians with computers or online services would severely reduce this source of compensation.

The congressional hearing included testimony from several other experts including:

- Charles Orzehoskie, president of American Federation of Government Employees Council 238, who spoke about the impact of the library closings on employees and the public at large. The Council was the union that filed grievances before the Federal Labor Relations Board Arbitrator.
- Francesca Grifo, director of the Scientific Integrity Program at the Union of Concerned Scientists (UCS), who testified about concerns of scientists and accessing important research materials. A UCS survey of 555 EPA scientists indicated that researchers found the reorganized system "inadequate" and that the changes are "impairing" their ability to do their jobs.
- James Rettig of the American Library Association stated that EPA failed to base its library plan on end users' needs. Rettig also addressed the importance of "the

information specialist — the staff librarian — to ensure the most effective access to this information."

- Molly O'Neill, assistant administrator for the Office of Environmental Information (OEI) and the EPA's chief information officer, defended the agency, claiming that many positive steps had been taken, including the hiring of a chief librarian to provide strategic direction to the agency's plans. O'Neill also noted that EPA would soon be releasing a report to Congress to describe the agency's plans for the EPA library network.

EPA Guilty of Unfair Labor Practices

In a recent ruling, Federal Labor Relations Board Arbitrator George Larney sustained complaints by the American Federation of Government Employees Council 238 that EPA acted "unilaterally without the benefit of" employee input in regard to the library closures. Though the agency has claimed to prioritize EPA staff access to information (while virtually ignoring the public's), Larney heard the opposite from EPA scientists, enforcement agents, and other staff.

Larney ordered EPA "to engage the Union in impact and implementation bargaining in a timely manner" before taking any additional steps to reorganize the library network. The union had sought to have the closed libraries reopened, but the arbitrator declined such an order and noted that it would impossible for EPA to reopen those libraries that had been physically dismantled.

Pressure Flushes CDC Report Out of Hiding

In response to allegations of suppression of science, the Centers for Disease Control and Prevention (CDC) recently released a draft report that the agency will continue to modify due to CDC concerns that the report too closely links environmental pollution with adverse health effects in the Great Lakes region.

The draft, *Public Health Implications of Hazardous Substances in Twenty-Six U.S. Great Lakes Areas of Concern*, was posted on the CDC website on March 12 and is the latest version of the report. CDC also posted an earlier draft from 2004 and says it will release the report's final revisions later in March. The agency continues to hold reservations over the draft report's release and has submitted it to the Institute of Medicine for an independent review of study methodology.

Just a few weeks before the latest draft's release, the Center for Public Integrity (CPI) exposed the report's six-month release delay and the agency's plan to substantially rewrite the report. At that time, the planned modifications would have deemphasized findings that could be construed as implicating environmental toxins as being partially responsible for increased infant mortality and cancer rates in the region. The latest draft, which has been through a rigorous independent review already, currently emphasizes that the increase of health

problems and pollution should not be considered directly correlated but rather indicates important areas for future research. It is unclear whether the current wording of the draft report addresses the possible implication of cause and effect about which CDC has expressed concern.

Outcry from the scientific community about the report's delay and possible redrafting prompted Reps. John Dingell (D-MI) and Bart Stupak (D-MI) of the House Committee on Energy and Commerce to investigate possible suppression of the report and allegations of illegal retaliation against Christopher De Rosa, the outspoken lead author who was demoted after criticizing the report's publication delay. Dingell and Stupak sent the agency a Feb. 6 letter demanding the report's release.

As Stupak noted, "It is unfortunate that it took a congressional investigation and intense media coverage to prompt the release of a scientific report that has been five years in the making." Considering CDC's ongoing resistance to accept a report written by its own scientists, continued oversight may be crucial to ensuring that the agency does not undercut years of scientific research and analysis in the final version of the report.

After Long Delays, House Creates Independent Ethics Panel

On March 11, the House voted to create an Office of Congressional Ethics (OCE). The six-member independent panel will have the power to begin formal investigations into allegations of ethics violations of House members and either dismiss the claims or refer them to the House Ethics Committee. OCE members will be appointed jointly by the Speaker of the House and the Minority Leader. The debate over the panel was intense, and Democratic leaders were forced to pull the proposal from the floor twice before the vote. The vote ends a process that took more than a year to resolve.

When Democrats took control of the 110th Congress in January 2007, Speaker Nancy Pelosi (D-CA) announced a plan to create a bipartisan task force that would consider whether the House should create an outside ethics enforcement entity. The May 1, 2007, deadline stretched into December when the chair of the task force, Rep. Mike Capuano☼ (D-MA), released H. Res. 895, to create an independent ethics office that would conduct preliminary investigations.

All Republicans on the task force opposed the measure. In addition, some members did not want outsiders to review House ethics investigations. Rep. Lamar Smith☼ (R-TX) offered an alternative, H. Res. 1003, that would have expanded the current 10-member Ethics Committee by adding four former House members, two from each party. Many advocacy groups opposed the Capuano plan as well, arguing that lack of subpoena power and authority to put people under oath made it too weak. There were also fears that the panel would create more bureaucracy or give rise to partisan complaints.

The Democratic leadership planned to bring the proposal up for a floor vote on Feb. 28, but the vote was postponed because of considerable bipartisan criticism. In response to the criticism,

Capuano made three amendments. First, all appointments to the panel must be made jointly. The Speaker and Minority Leader both nominate three members, subject to the others' agreement. The second and third amendments revised the two-step review process. An investigation can only begin if one member of each party agrees that the case should move forward. The third amendment also clarified that a review could only proceed if at least three members of the OCE voted affirmatively. If a case makes it past the second phase, the board would then refer the case to the Committee on Standards of Official Conduct, the current House ethics committee. Upon introducing these changes, Capuano sent out a Dear Colleague letter that stated, "Taken together, these three amendments make it impossible to initiate a partisan witch hunt … and impossible to use partisan stonewalling to thwart a reasonable review once it has begun. Members are protected, but so is the integrity of the process."

Despite remaining skepticism, with a vote of 229-182, the House passed the revised Capuano proposal on March 11. Republicans criticized the process that was used to get the resolution passed. Democrats kept the procedural vote on the issue open for 16 extra minutes. According to *Roll Call* (subscription), "During a procedural vote preceding final passage of the resolution, known as 'ordering the previous question,' Democrats appeared to lose, as nearly two dozen of their own Members voted against the proposal. But Democrats refused to gavel the vote closed for another 12 minutes beyond the normal 15-minute period, as leadership pressed four Members to change votes and provided the majority a narrow victory."

Highlights of the new Office of Congressional Ethics include:

- For the first time, individuals other than members of Congress will be able to initiate formal investigations into allegations of wrongdoing
- Members of the OCE cannot be current members of Congress or registered lobbyists and can only be a member if they have been off the House payroll for a year
- Terms will last four years, with one reappointment possible
- OCE will be prohibited from initiating an investigation within 60 days of a primary or general election

Senate Looks at Claims that Voter Fraud Justifies Photo ID Requirements

The Senate Committee on Rules and Administration held a hearing March 12 on the controversial tactics states and the federal government have used and proposed in response to claims of voter fraud. Senators who testified were sharply divided along partisan lines. Democrats argued that voter fraud is a false pretence used to justify laws that disenfranchise poor, minority, and elderly voters, but Republicans asserted that the problem is real and needs to be addressed. Nonpartisan witnesses cautioned lawmakers against exaggerating the extent of any election fraud.

Voter fraud (more accurately described as voter impersonation) has become a politically divisive topic over the last several years across all levels of government — federal, state, and

local. Senate Rules Committee Chair Dianne Feinstein (D-CA) described the purpose of the hearing, saying, "At today's hearing, I hope we will get into a full and robust discussion regarding to what extent that there is in-person voter fraud. Or to put it another way — are individuals going to vote pretending to be registered voters at the polls?" Despite Feinstein's appeal to reason, the testimony reflected the issue's troubled history.

Since 2002, the Bush administration has dedicated resources to investigating alleged incidences of voter fraud through the Department of Justice's (DOJ) Ballot Access and Voting Integrity Initiative. The refusal of several U.S. Attorneys to pursue voter fraud prosecutions, despite pressure from the administration, ultimately led to the "Attorney-Gate" scandal that felled former U.S. Attorney General Alberto Gonzalez. During her opening statement, Feinstein said that her office repeatedly asked William Welch, the Chief of DOJ's Public Integrity Section, which has jurisdiction over election crimes, to testify at the hearing, but he refused the request.

In his testimony at the hearing, Sen. Patrick Leahy☼ (D-VT) argued that laws that require a photo ID at the polls represent an undue barrier to voting. Leahy said, "Despite lack of credible evidence, the myth of voter fraud has increasingly been used to justify policies that suppress political participation by passing laws that threaten to exclude millions of eligible voters, with a disproportionate impact on vulnerable populations, such as the elderly, low-income, disabled, and minority communities."

Sen. Kit Bond (R-MO) argued on behalf of proponents of photo identification requirements, saying, "Vote fraud is alive and well in America. The only question for us is, are we willing to stop it?" He went on to defend the Missouri law requiring photo ID at the polls, saying, "Indeed, showing an ID is a universal feature of modern life. Cashing a check, renting a movie, boarding a plane, all require a photo ID. And for those who do not have one, photo ID laws now require States to provide photo IDs at no cost to anyone shown in such need."

Several witnesses before the Committee challenged Bond's assertion that voter fraud is "alive and well." Justin Levitt, counsel for the Brennan Center for Justice, cited their recent report that evaluated allegations of voter fraud, The Truth About Voter Fraud. Levitt testified that based on his extensive research, "We conclude that the incidence of actual in-person impersonation fraud is extraordinarily rare. Though it does occur, there are only a handful of recent accounts, even fewer of which have been substantiated."

David Iglesias was one of the former U.S. Attorneys infamously fired for not pursuing voter fraud as vigorously as the Bush administration wanted. Iglesias testified that as a U.S. Attorney, he established an Election Fraud Task Force in his district to investigate and prosecute cases of election fraud but found no evidence that voter fraud existed. He consequently filed no prosecutions.

The debate over voter fraud and its outcome has important ramifications for voters across America because it is being used to rationalize new laws requiring voters to present photo identification at the polls. Georgia, Missouri, and Indiana have all passed such laws. Similar

legislation has been introduced in 18 other states in the current session (2007-2008). The issue is also pending at the U.S. Supreme Court. In January, the court heard oral argument in *Crawford v. Marion County Election Board*, a case testing the constitutionality of Indiana's voter ID law.

Also testifying at the hearing: Missouri Secretary of State Robin Carnahan, Georgia Deputy Secretary of State Robert Simms, and James C. Kirkpatrick of Missouri's State Information Center.

Bills Improving Federal Contracting Gain Momentum

In FY 2007, the federal government paid contractors about $420 billion to provide thousands of goods and services, but it had little insight into whether those companies were delinquent in paying their federal taxes, had broken contracting rules or laws, or if those firms paid top-level executives exorbitant levels of compensation. However, if several proposed bills become law, these obstacles to oversight and transparency will be greatly reduced. H.R.s 3033, 3928, and 4881 were approved by the House Oversight and Government Reform Committee the week of March 10, while H.R. 5602 and a companion Senate bill were introduced the same week.

H.R. 3033: Contractors and Federal Spending Accountability Act of 2007
H.R. 3033 would direct the General Services Administration to compile and maintain a database containing information on civil, criminal, and administrative proceedings brought by the federal government and state governments against contractors or assistance recipients. It would also include federal suspensions and debarments of federal contractors.

Testifying before the Government Management, Organization and Procurement Subcommittee on Feb. 27, Scott Amey, General Counsel of the Project on Government Oversight (POGO), declared his support for the measure.

> H.R. 3033 would go a long way in improving pre-award contracting decisions and enhancing the government's ability to weed out risky contractors, especially those with repeated histories of misconduct or poor performance.

But Amey also expressed astonishment that such a database is not currently administered by the federal government, as POGO currently operates a database similar to the one described in the bill. Amey thought it "shocking" that a nonprofit would be compiling this data instead of the federal government. Without easy access to such data, it is impossible for government procurement officers to make informed decisions about proper allocations of federal contracts.

H.R. 3928: Government Contractor Accountability Act of 2007
Although publicly-traded firms are required by the Securities and Exchange Commission to disclose the names and salaries of top-level managers, many firms that contract with the federal government, like private security company BlackwaterUSA, are private entities for which this information is not publicly available. H.R. 3928 is intended to provide the federal

government and citizens insight into whether federal contractors are adding value to federal procurement or simply lining the pockets of a select few individuals.

The measure would provide this level of transparency by requiring federal contracting firms or grant recipients receiving more than 80 percent of their revenue from the federal government to disclose the names and salaries of their most highly compensated executives and would make this information available in the Federal Procurement Data System-Next Generation (FPDS-NG). During the committee markup, an amendment from Rep. Chris Murphy☼ (D-CT) was adopted that would require disclosure of this information only from companies that have more than $25 million in gross revenues. The bill does not differentiate between for-profit and nonprofit companies.

While this increased transparency is certainly welcome, it would be a mistake for Congress to solely add this information to the FPDS database. The database is a complex and hard-to-use data source that often confounds even the most expert analysts and government employees. It is not a sufficient vehicle for disclosure of this important information to the public. At a minimum, this data should also be included in the new government website designed for tracking federal contracts — USASpending.gov, which is authorized under the Federal Funding Accountability and Transparency Act.

H.R. 4881: Contracting and Tax Accountability Act of 2007
According to the Government Accountability Office (GAO), there are thousands of firms that are delinquent in paying their taxes to the federal government. Exasperated that over $7 billion is owed to the Treasury by firms receiving payments from the federal government, Rep. Brad Ellsworth☼ (D-IN) introduced H.R. 4881 to ensure that this practice ceases. H.R. 4881 would require all firms bidding on federal contracts to submit a declaration that they are not delinquent in their taxes. The bill would also bar firms on which the IRS has placed a tax lien from being awarded a federal contract.

POGO's Amey believes the act would "help address the need for greater transparency to prevent risky contractors from receiving federal dollars," and that "[i]mproved market research and contractor specific information should provide for better preaward contractor responsibility determinations."

The legislation has undergone significant changes since Ellsworth first introduced it in May 2007, in order to address concerns about how the law would be administered. Rather than setting a dollar level to focus on only the largest delinquent companies, the new version uses the filing of a tax lien by the IRS as the determinant. The change is designed to ensure that only significant cases are used to prevent companies from getting contracts. It also was made to give federal procurement officers a clear-cut way to check whether a company is ineligible for a contract.

Sen. Barack Obama☼ (D-IL) has sponsored a companion measure (S. 2519) in the Senate.

H.R. 5602: Fair Share Act of 2008
Introduced March 13 by Reps. Rahm Emanuel (D-IL) and Ellsworth and Sens. John Kerry (D-MA) and Obama, this bill could also be called the "KBR's Fair Share Act." Kellogg Brown & Root, one of the largest contractors working in Iraq, has been using a shell company located in the Cayman Islands to avoid paying an estimated $100 million per year in taxes. The practice, in which some 10,500 KBR workers are officially employed by an off-shore company, allows the firm to avoid paying Social Security and Medicare taxes. And according a *Boston Globe* story, only KBR and one other American firm use this method of employment to dodge paying payroll taxes. H.R. 5602 would change the tax code "to treat foreign subsidiaries of U.S. companies performing services under contract with the United States government as American employers for the purpose of Social Security and Medicare payroll taxes."

Budget Resolution: Recap and the Road Ahead

Late on March 13 and early in the morning of March 14, the House and Senate adopted $3 trillion budget resolutions for Fiscal Year 2009 by votes of 212-207 and 51-44, respectively. While the resolutions are similar in terms of broad policy outlines and priorities, they differ on a few major points, including the total amount of discretionary spending and whether to offset the cost of a one-year patch to the Alternative Minimum Tax (AMT).

The congressional budget resolution is a non-binding blueprint for the direction of budget policy over the next five fiscal years and sets the overall amount of money the twelve appropriations subcommittees will have to allocate to individual programs under their jurisdiction in each chamber. Before a final version is passed by Congress, the Democratic leadership will need to reconcile the differences between the two versions. Foremost among these are overall FY 2009 discretionary spending levels, where the chambers are about $4 billion apart, and plans to "patch" the AMT for next year, which the House does with instructions to provide offsets, while the Senate provides no offsets in violation of pay-as-you-go (PAYGO) rules. These and the numerous other differences will need to be worked out in conference committee, which will convene soon after Congress returns from its two-week recess on March 31.

In the end, 16 Democrats in the House crossed party lines to oppose the resolution, but it still passed with a five-vote margin. In the Senate, the vote on the resolution was party-line, except for Sen. Evan Bayh☼ (D-IN), who voted against it, and Maine Sens. Olympia Snowe (R) and Susan Collins (R), who voted in favor.

The House resolution adds $21.8 billion in discretionary funding over and above the president's top line; the Senate resolution adds $18 billion. While the House includes $4 billion in additional discretionary spending, both the House and Senate budget resolutions reverse the deep cuts proposed by President Bush in February to such programs as Medicare and Medicaid, a community policing program, low-income energy assistance, the Social Services and Community Development Block Grant programs, Amtrak, and the Centers for

Disease Control and Prevention.

In all, S. Con. Res. 70, the Senate budget resolution, was amended 18 times during the course of an all-day "vote-a-rama" that featured a total of 42 roll call votes. The first and most far-reaching amendment was offered by Sen. Max Baucus☼ (D-MT) and adopted by a vote of 99-1. The Baucus amendment calls for spending the resolution's projected budget surpluses in 2012 and 2013 on "middle-class" tax cuts, keeping the lowest income tax rate at 10 percent and the $1,000 child credit and preserving the estate tax at the 2009 rate and exclusion level, indexed for inflation.

The Senate voted on five amendments seeking to cut the estate tax, all of which failed. The closest vote came on an amendment by Sen. Jon Kyl☼ (R-AZ) raising the estate tax exemption to $10 million per-couple, with a top rate of 35 percent — at a 10-year revenue cost of about $750 billion. The Kyl amendment was technically defeated in a 50-50 tie, on a nearly party-line vote (Sen. Blanche Lincoln (D-AR) voted with the GOP). If Vice President Cheney had been in the presiding officer's chair at the time and voted, the amendment would probably have been adopted.

The voting generally followed a pattern in which Republicans offered amendments to create new deficit-financed and regressive tax breaks, which were voted down, but paired with or followed by amendments by Democrats proposing tax breaks that were similar but offset — several of which were adopted.

The House adopted its own version of the budget resolution, H. Con. Res. 312, after rejecting three alternatives. The Republican's version lost by a vote of 157-263, including being opposed by 38 Republican members. The GOP substitute budget plan sought to reduce mandatory spending by $412.4 billion over five years. The Progressive Caucus budget lost 98-322; the Black Caucus bill was rejected 126-292. There were no votes on amendments to H. Con. Res. 312, so it was passed by the full House unchanged from the version reported out of the House Budget Committee.

Looking ahead to conference, both sides have expressed optimism that a compromise on a resolution is achievable. The biggest sticking point in the negotiations will be whether or not to offset the revenue loss from a one-year patch of the AMT, estimated at $70 billion. Senate Democrats say a paid-for patch will never fly in their chamber, as they were unable to generate anywhere near the support to pass an offset patch in 2007. Fiscally conservative Democrats in the House are insistent that instructions in the budget resolution to develop a proposal for a revenue-neutral patch be retained. When this fight was fought in December 2007, the Senate prevailed. There is little reason to expect a different outcome this time, certainly not at the expense of an ultimate agreement on a budget resolution for FY 2009. Yet given the chance than Congress will wait to enact appropriations bills until a new administration is in place in the White House in 2009, House leaders may decide sticking to their fiscally responsible "guns" may be more important than finding agreement with the Senate on a final budget resolution.

GAO Report Examines Overuse of Supplemental Spending

In a recently released report, the Government Accountability Office (GAO) examined ten years of supplemental spending (FY 1997-FY 2006) and found not only a five-fold increase in the amount of expenditures funded through the supplemental process, but also that procedures that enable legislative deliberation are bypassed when Congress funds government operations through supplemental spending. Supplemental spending has become an alternative funding process, parallel to the normal annual appropriations process. This allows certain expenditures to elide close congressional and public scrutiny and allows Congress to escape debate over federal funding priorities.

"Emergency" and "Supplemental": A Fine Practical Distinction

Although the terms "supplemental" and "emergency" are often used to describe discretionary spending authorized outside of the annual appropriations process, there is a difference between the two. Emergency spending, when designated as such by the president, is not subject to the budgetary constraints established in the congressional budget resolution. Supplemental spending, on the other hand, is spending that is simply authorized outside of the twelve annual appropriations bills that fund the operations of the federal government, be it "emergency" or not. So, emergency funding may be included in any of the twelve appropriations bills, and supplemental spending may not necessarily be classified as "emergency." But, more often than not, emergency spending is enacted in supplemental spending bills.

While supplemental spending is technically subject to budgetary constraints, the mechanism to enforce such restraint is primarily toothless. Prior to FY 2003, spending that exceeded the congressionally established budget caps was sequestered — a process by which discretionary spending was reduced across the board automatically in order to push it below those budgetary limits. Since the expiration of those procedures, however, a point of order — a parliamentary hurdle — may be raised to prevent excess spending. Despite having the tool, members of Congress rarely raise points of order, and when they are raised, they are often waived. This lack of discipline in Congress effectively renders budgetary excesses without repercussion.

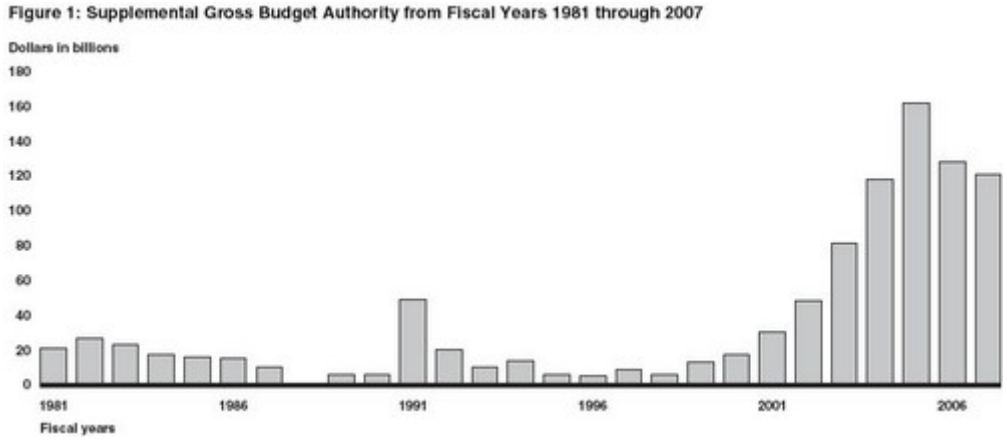
A Five-Fold Increase in Supplemental Spending

The GAO report, which examined supplemental spending only (i.e., ignoring emergency spending funded through the regular appropriations process), notes:

> The regular budget and appropriations process provides for greater legislative deliberation, procedural hurdles, and funding trade-offs which may be bypassed through the use of supplementals.

While this bypassing of budgetary controls is troubling in any context, the recent increase in supplemental spending makes these problems acute. Compared to the previous ten-year window (FY 1987-FY 1996), supplemental spending has increased five-fold. GAO indicates the $48.6 billion in emergency funding approved in 1991 for the first Gulf War is an outlier in the flat-line pattern of 1981 to 2001, in which supplemental spending averaged less than $20

billion annually. Since 2001, however, supplemental spending has been on a rapid ascent, leveling out at well over $100 billion annually after peaking in 2005 at $160 billion.



Non-Emergency and Regular Funding Evade Attention

The prevalent use of emergency supplemental funding is problematic, in part, because these legislative bills often attract unrelated or unnecessary spending items. And because emergency funding measures are often fast-tracked through Congress, such bills receive less consideration and debate. GAO found eight of the 25 emergency supplemental appropriations bills passed by Congress in the past ten years contained additional non-emergency spending provisions, totaling over $11 billion. Furthermore, GAO also found there were certain budgetary accounts that were regularly funded through the supplemental spending process.

In at least six of the past 10 years, 35 federal budget accounts received supplemental spending. At $375 billion, this recurring account funding represents 61 percent of the gross supplemental budget authority in the past ten years. The majority of these accounts were within the Department of Defense, but the Federal Emergency Management Agency and the Department of the Interior's Wildland Fire Management accounts also saw recurrent supplemental spending. That programs receive regular funding through supplemental appropriations should concern policy makers for a number of reasons, most notably because:

> For activities that regularly receive emergency-designated supplemental appropriations, there can be an incentive to provide funding in a supplemental rather than in the regular appropriations process where these activities would have to compete with others for limited resources in trade-off decisions.

The GAO report also notes other troubling trends in supplemental spending — relaxed standards as to what constitutes an emergency and combining emergency with non-emergency funding on individual supplemental spending bills. The emergency supplemental bills examined for the report contained $12.7 billion in spending provisions designated as "emergency" that appeared to be unrelated to the situation that originally prompted the need for the bill.

For example, the "Kosovo and Other National Security Matters" law in 2000 contained $110

million for a Great Lakes Icebreaker replacement as part of a $578 million appropriation for the Coast Guard, and the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006" bill contained $9 million for drought relief. The report also shows that funding designated as emergency does not always conform to the definition of "emergency" as promulgated by OMB, defined thusly:

- a necessary expenditure (an essential or vital expenditure, not one that is merely useful or beneficial)
- sudden (coming into being quickly, not building up over time)
- urgent (a pressing and compelling need requiring immediate action)
- unforeseen (not predictable or seen beforehand as a coming need although an emergency that is part of an overall level of anticipated emergencies, particularly when estimated in advance, would not be "unforeseen")
- not permanent (the need is temporary in nature)

More than $31 billion, or 5 percent, of spending designated as "emergency" in the funding bills studied by GAO were inconsistent with OMB's definition. In fact, some 26 provisions totaling over $6 billion "stood out as being clearly incongruent with the emergency-designation criteria of 'sudden' and 'unforeseen'," while nearly $25 billion in funding lacked sufficient detail for the GAO to determine the appropriateness of the "emergency" designation. Although the wars in Iraq and Afghanistan are now in their sixth year, and many experts would argue fail to meet the emergency spending criteria, the GAO did not find that this spending, totaling more than $500 billion, was misclassified as "emergency." Despite this, GAO did conclude that regardless of whether these funds were classified as emergency or not, "continuing to fund GWOT [Global War on Terrorism] through supplementals reduces transparency and avoids the necessary reexamination and discussion of defense commitments and funding tradeoffs."

Reining in Extra-Budgeting Spending

Until key changes are made in the spending process, it is doubtful the trend will reverse itself. Concluding the report is a discussion of several options that budget experts consulted by GAO suggested would restore tighter budgeting controls. The experts suggested that, among other practices, funding must meet an established set of criteria to be designated "emergency." Additionally, supplemental bills should not be used when the regular appropriations process can meet the needs of the program, but a balance must be struck between flexibility and oversight with respect to availability of additional funds.

Sen. George Voinovich☼ (R-OH) requested the GAO study on supplemental appropriations. As he had done during last year's budget resolution floor debate, Voinovich once again offered an amendment to the FY 2009 budget resolution that would made the supplemental appropriations process more fiscally responsible and restored integrity to the federal budgeting process. The amendment provided that a point of order may be made against any supplemental appropriations legislation requesting over $15 billion for domestic purposes or $65 billion for overseas purposes in a given fiscal year.

The Voinovich proposal would have provided a stronger tool for senators to control supplemental spending excesses than current budget mechanisms because the point of order could not be waived. This change would have gone some distance toward bringing greater accountability to the budget-making process and promoting fiscal responsibility while still maintaining the flexibility Congress needs to respond to true emergencies. Unfortunately, the amendment never came up for a floor vote and was not adopted by unanimous consent as it was in 2007 (the 2007 amendment was later dropped in a conference committee).

House Panel Hears Testimony on IRS Policies

On March 13, the House Ways and Means Subcommittee on Oversight heard testimony concerning the 2008 tax return filing season, Internal Revenue Service (IRS) operations, the Fiscal Year 2009 budget proposals, and the National Taxpayer Advocate's Annual Report to Congress. Then-Acting Commissioner of the IRS Linda Stiff testified, and Nina Olson, the National Taxpayer Advocate, pressed for reforms that would both protect taxpayer rights and improve tax enforcement.

The two main issues discussed during the hearing were the progress the IRS has made on implementing the recently passed fiscal stimulus package and the rationale behind and progress to date of the private tax collection program run by the IRS since late 2006. Stiff reported significant progress in implementing the tax rebate portion of the stimulus package. The IRS estimates it will process 130 million payments to taxpayers who file income tax returns this year and will also identify and process rebates for over 20 million taxpayers who do not file income tax returns. Stiff reported the IRS is working with the Social Security Administration and the Veterans Affairs Department, in addition to outside organizations like AARP, to identify those individuals who will file no return this year.

Despite the less-than-ideal timing of the stimulus package and complications caused by the extremely late passage of changes to the Alternative Minimum Tax (AMT) at the end of 2007, the IRS is performing admirably, according to statements made at the hearing. In fact, Olson made a point of commending the IRS for its extraordinary work under difficult conditions, stating, "The fact that the IRS has managed to turn on a dime and deliver this filing season without significant glitches is a testament to the extraordinary people who work at the IRS."

Olson was less supportive of the other main topic during the hearing, the private tax collection program. Olson has repeatedly expressed serious concerns about the private debt collection program instituted by Congress in 2004 and implemented by the IRS in September of 2006. She reiterated her concerns during the hearing and in her annual report to Congress, particularly mentioning potential taxpayer rights violations and the lack of transparency within the private collection agencies (PCAs). Despite the fact that IRS has made changes to the program to try to address these concerns, Olson's fears have not been assuaged.

Olson focused on the basic revenue projection during the hearing, however. She testified the program would lose $81 million annually in tax revenue and opportunity costs for the IRS and

could lose almost half a billion dollars over the next six years. Based on data from the program's first year of operation, Olson calculated the private debt collection program created a dismally small return on investment (ROI) of 1.45:1. She further testified if the IRS used the funds appropriated by Congress to administer the program ($7.65 million in FY 2008) on its Automated Collection System (ACS) program, it would yield between $91.8 million and $145.35 million in net revenue for the government each year. This is at least $81 million more than the private debt collection program is generating, which is around $11 million annually. Olson concluded:

> Since the purpose of the PDC [private debt collection] program was to raise revenue, the fact that it is costing the government $81 million or more each year destroys whatever thin rationale might remain for its existence.

OMB Watch has stated similar objections to the private tax collection program run by the IRS and detailed many of the same types of arguments offered by Olson in a recently released report, *Bridging the Tax Gap: The Case for Increasing the IRS Budget*. The report calls on the IRS to end the private debt collection program.

There were two other areas of agreement between the report's recommendations and Olson's recent testimony. First is the excessive burden placed on taxpayers claiming the earned income tax credit (EITC). Olson testified the EITC audit process places "a heavy burden on taxpayers who may be ill-equipped to correctly navigate the audit process." Olson focused in particular on poor communication between the IRS and taxpayers claiming the EITC, reporting more than 70 percent of a sample of audited EITC taxpayers found the IRS audit notification letter hard to understand, and only 50 percent of those surveyed knew what they needed to do to answer IRS questions. Most shocking, more than 25 percent of respondents *did not even realize* their tax return was being audited. Olson encouraged the IRS to take steps to improve the services offered to EITC filers.

Second is the need for additional resources for Taxpayer Assistance Centers (TACs). Olson did praise the IRS for beginning to stop efforts to limit the types of services and methods of delivery of those services at TACs and for relaxing overly harsh or illogical rules for determining out-of-scope topics and providing tax return transcripts. However, Olson reiterated previous findings that TACs were only servicing 60 percent of the U.S. population and that recent efforts by the IRS to close one quarter of existing TACs and reduce staffing at the others was hurting taxpayer services. The president's FY 2009 budget request continues these efforts, as it cuts the budget for TACs by over $31 million and proposes reducing staffing by an additional 100 employees. Instead, Olson recommended providing a level of staff and resources for TAC offices necessary to meet all taxpayer needs.

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In This Issue

Reports Highlight MSHA's Failures at Crandall Canyon Mine

Two recent reports highlight the failures of the Mine Safety and Health Administration (MSHA) in approving the retreat mining plans at Crandall Canyon mine in Utah that resulted in nine deaths after a mine collapse in August 2007. A third report criticizes MSHA's approval and implementation of emergency response plans required by legislation passed by Congress in the wake of mining disasters across the country in 2006.

The Aug. 6, 2007, mine collapse at the Crandall Canyon coal mine trapped six coal miners and led to the deaths of three rescue workers. The mine operators were working under a plan approved by MSHA in June 2007, just months after serious structural problems forced the operators to abandon a work area only 900 feet from where the miners were killed. The 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 — to extract the last significant coal

deposits before abandoning the mine.

On March 6, the Senate Health, Education, Labor and Pensions (HELP) Committee released a report that addresses MSHA's approval of the plan to conduct retreat mining and its monitoring of the safety conditions during mining operations. The committee's investigation is detailed in its *Report on the August 6, 2007 Disaster At Crandall Canyon Mine*. The report concludes that MSHA and the mine operator, Murray Energy Corporation, did not exercise "appropriate care in formulating and reviewing the plans" for mining the pillars. Furthermore, MSHA entered into a tacit agreement with Murray Energy to excuse the company from some reporting requirements that should have led MSHA to conduct an investigation, a failure the report calls "an abdication of MSHA's regulatory responsibilities."

Specifically, MSHA either missed or dismissed critical technical flaws in the plan assembled by Murray's consultant, approved the plans with only minor changes, and ignored signals that should have made the agency cautiously review or investigate the mining operations. As a result of these "failures of diligence, care and oversight," the report concludes that the Secretary of Labor should refer the case to the Department of Justice for prosecution.

A report released March 31 by the Department of Labor's Office of Inspector General (OIG) was even more scathing than the HELP Committee report. The OIG was asked by HELP to conduct an audit of MSHA's performance of its plan review and implementation activities in the mine accident. Among the conclusions the report draws is that

> MSHA was negligent in carrying out its responsibility to protect the safety of miners. Specifically, MSHA could not show that it made the right decision in approving the Crandall Canyon roof control plan. Similarly, the lack of documentation to support the review and approval of the plan prevented MSHA from showing that the process was free from undue influence by the mine operator.

MSHA's district offices are required to develop standard operating procedures that contain 20 minimum controls necessary for a plan approval process. MSHA's Washington, DC, headquarters is not required to review these operating procedures. The District 9 standard operating procedure, which regulates mining operations in most of the West, including Utah where the Crandall Canyon mine is located, did not address 12 of these 20 controls, which is the highest number of unaddressed controls among MSHA's district offices. In addition, each district office is required to develop its own procedure for reviewing roof control plans. According to the report, District 9 staff told the OIG that the plans are rarely if ever used except for training purposes.

The report offers nine specific recommendations to MSHA concerning rigorous processes and oversight, explicit criteria and guidance for assessing plans, and reevaluating districts' roof control plans. MSHA concurred with all the OIG recommendations but challenged the conclusion of negligence as "misleading." OIG investigators did not change their report in light of this objection. Instead, the report defends the conclusion: "MSHA's actions and inactions,

taken as a whole, lead us to conclude that MSHA lacked care and attention in fulfilling its responsibilities to protect miners…These deficiencies evidence MSHA's serious and systemic lack of diligence in protecting miners, and we do not believe it is misleading to use the term 'negligent.'"

Emergency Response Plans

In the wake of 47 deaths in 2006 from mining accidents, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 (MINER Act) in an effort to improve the safety of coal mines. The MINER Act required coal mine operators to develop by August 2006 emergency response plans designed to improve accident preparedness and response. The mandates include providing oxygen sources to miners trapped underground and wireless communications systems.

The House Committee on Education and Labor asked the Government Accountability Office (GAO) to review "1) the effectiveness of MSHA's process for approving mines' emergency response plans, 2) the status of implementation of underground coal mines' emergency response plans, and 3) the efforts MSHA has made to enforce implementation of the plans and oversee enforcement and plan quality." GAO released its report April 8, which concluded that MSHA's directions to the industry were unclear, requiring MSHA to revise its guidance several times, resulting in widely varying plans across MSHA's districts.

Although most aspects of these emergency response plans had been implemented by January 2008, the requirements to have air refuges and capacity underground for trapped miners and to have wireless communications systems were not implemented. In the first instance, the manufacturers have not produced enough of the necessary equipment. Fully wireless technology does not yet exist, and MSHA has not determined what technology mining companies will be allowed to use to meet the law's requirements. The dangerous conditions exposed by the mine accidents in 2006 and by the Crandall Canyon mine incidents may not to be resolved by the law's June 2009 deadline.

District offices have been diligent in inspecting mines and issuing violations related to the parts of the emergency response plans companies have in place. However, GAO noted that a November 2007 OIG report indicated that there were too few resources to conduct all the inspections required. This finding was supported by GAO's interviews with district officials. In addition, officials at MSHA headquarters have not evaluated the citation data to determine if implementation and enforcement problems exist among the districts, so there may be very different standards applied to mines across the country. "As a result, all mines may not be prepared to adequately protect their miners in the event of an accident."

White House Gains Influence in Toxic Chemical Assessments

The U.S. Environmental Protection Agency (EPA) has announced changes to its process for assessing the human health effects of common chemical substances. The revised process will

allow the White House Office of Management and Budget (OMB) to play a larger role in the evaluation of the substances.

EPA's Integrated Risk Information System (IRIS) serves as a publicly searchable database for studies and information on the human health effects of chemical substances. EPA scientists and policymakers use the information in the database to make determinations about the risk of various substances. EPA studies both the carcinogenic and noncarcinogenic effects of substances and determines safe or tolerable exposure thresholds when possible.

IRIS assessments can inform regulatory action intended to protect humans from the harmful effects of certain substances. "Through IRIS, EPA provides the highest quality, science-based, human-health assessments to support EPA's policymaking activities," according to the agency. Researchers and regulatory bodies in other nations also use IRIS assessments to inform decision making, according to EPA.

On April 10, EPA announced policy changes to its process for determining risk under IRIS. EPA will now involve OMB at every stage of the IRIS assessment process. Previously, OMB reviewed a final version of the draft assessment before EPA subjected it to external peer review. OMB already reviews — and often edits — agencies' proposed and final regulations. The office will now have several opportunities to review and alter the scientific findings that serve as the basis for chemical exposure standards.

Before EPA assesses a substance under IRIS, the agency asks the public and other federal agencies or interested parties for nominations. Under the new IRIS process, EPA will now consult with other federal agencies and OMB after receiving nominations to determine which substances EPA will evaluate.

After EPA, OMB, and other agencies select a chemical for assessment, EPA will conduct a literature search assessing available studies and information on the chemical in question. Under the old process, after conducting a literature search, EPA would perform a quantitative toxicological review. Now, EPA will have to put the process on hold and ask the public, other agencies, and OMB for additional studies or information on the chemical being assessed.

After reviewing all relevant information, EPA will prepare a qualitative assessment of the chemical. The qualitative assessment is to include potential health risks, susceptible populations, and potential uncertainties, among other things. EPA will then solicit comments on the qualitative assessment from the public, other agencies, and OMB — another new requirement.

EPA will then draft a quantitative toxicological assessment based on the qualitative assessment and relevant comments. EPA also prepares questions to pose to the external peer review panel that will eventually review the toxicological assessment. EPA will submit both the draft toxicological assessment and the peer review questions to OMB for review by the White House and other federal agencies. In the revised process, EPA explicitly states that the OMB/interagency review is deliberative and therefore is not subject to public disclosure

requirements.

EPA will then make public the toxicological assessment and convene a public meeting of external peer reviewers. The old IRIS process contained a similar requirement.

After the external peer review, EPA will revise the assessment. Then, EPA will send the assessment to OMB for one final review. Under the old IRIS process, OMB did not have the opportunity to alter the assessment after it underwent a rigorous external peer review. Now, OMB can pressure EPA to make last minute changes before finalizing and publishing the assessment.

The revised IRIS process will also allow EPA to abdicate to another federal agency its power to study a substance, so long as that agency can prove the substance is critical to its mission. The provision raises the possibility of a conflict of interest within the federal government if an agency is assessing a substance it frequently uses.

For example, a Natural Resources Defense Council (NRDC) investigation showed the Department of Defense, with the support of the White House, pressured the National Academies of Science to downplay the adverse health effects of perchlorate. Perchlorate is an ingredient in rocket fuel. The Pentagon and defense contractors use rocket fuel for a variety of purposes.

Perchlorate has been shown to cause brain damage in fetuses and infants, according to NRDC. Nonetheless, the federal government passed up numerous opportunities to regulate perchlorate, citing the need for more research.

Under EPA's revised IRIS process, federal agencies such as the Department of Defense will have new opportunities to exert pressure on EPA to suppress or cast doubt on public health science.

Sen. Barbara Boxer☼ (D-CA), chair of the Environment and Public Works Committee, criticized EPA's decision to revise the IRIS process. In a statement, Boxer says the changes "put politics before science by letting the White House and federal polluters derail EPA's scientific assessment of toxic chemicals." The statement also says the process will now "take place behind closed doors due to the administration's refusal to make federal agency comments public."

EPA's revised IRIS process may reflect changes to the regulatory process President Bush announced in January 2007. Those changes imposed new requirements on federal agencies' "significant guidance documents" — documents which are not rules or regulations but rather statements of policy that may impact the economy or other parts of society. The new requirements include an expanded OMB review period and mandatory public comment periods.

EPA does not mention the new guidance document policy in its revised IRIS process, nor does

it indicate whether it considers IRIS assessments to be guidance documents at all. OMB Watch criticized Bush for attempting to increase the White House's role in agency activity and for failing to adequately define guidance documents, fearing scientific assessments such as those conducted under IRIS would be swept in.

States Failing to Implement Critical Voting Rights Laws

On April 1, the House Committee on Administration's Subcommittee on Elections held a hearing on state-level implementation of the National Voter Registration Act (NVRA), in particular a provision that was designed to enable low-income Americans to register to vote more readily. According to testimony by witnesses at the hearing, many states are not offering voter registration at public assistance agencies and are failing to live up to the promise of the NVRA to provide more equal access to the opportunity to vote.

In 1993, the U.S. Congress passed the NVRA — also known as the "Motor Voter Act" — in order "to enhance voting opportunities for every American." The law is well known for mandating that voter registration be made available when people apply for or renew their drivers' licenses. Section 7 of the act requires that voter registration applications be made available at all state agencies offering public assistance programs including Food Stamps, Temporary Assistance for Needy Families (TANF), and Medicaid, and at state offices providing services to persons with disabilities.

Michael Slater, Deputy Director of Project Vote, a nonprofit organization that promotes voter registration and voting to Americans historically underrepresented in the electorate, testified at the hearing on Project Vote's recent evaluation of Section 7 implementation. According to Project Vote's extensive analysis, Slater testified,

> Voter registration at public assistance agencies has plummeted from 2.6 million in 1995-1996 to just 550,000 in 2005-2006, a 79 percent decrease. This decline cannot be explained by a decline in public assistance caseloads, the rate of citizenship among applicants, or registration rates of low-income individuals....the evidence points overwhelmingly to chronic and pervasive non-compliance by states.

Lisa J. Danetz of Demos, a nonpartisan public policy center focused on expanding democratic participation, affirmed Slater's testimony that registration is not being offered at public agencies in many states. In her testimony, Danetz reflected on the possible causes of the breakdown at the state agencies, saying, "This is not necessarily because of a deliberate effort to defy the law; it may just be that a lack of consistent oversight and training combined with high level of staff turnover at agencies has caused the issue to fall off the radar screen in many places."

According to the law, the Justice Department (DOJ) is responsible for enforcing the NVRA. Despite evidence of widespread noncompliance, however, the DOJ has only brought one

lawsuit against a state for failure to implement Section 7 of the NVRA. In 2002, DOJ sued the state of Tennessee for not offering registrations as required by law. Danetz testified that as a result of the court order that followed, Tennessee implemented changes that led to a significant increase in voter registration at public agencies. The number of registrations at these locations nearly quadrupled. At the hearing, Subcommittee Chair Zoe Lofgren (D-CA) noted that the committee planned to send an inquiry to DOJ on the matter of Section 7 enforcement.

Two witnesses at the April 1 hearing testified on the challenges and benefits of implementing Section 7 at the state level. Their statements supported the claim by voting rights advocates that better state enforcement of Section 7 could have enormous impact on the number of citizens registered to vote. North Carolina's Chief Deputy Director of the State Board of Elections, Johnnie McLean, outlined North Carolina's efforts to improve voter registration at public assistance agencies. North Carolina instituted a program to reform its Section 7 implementation efforts after discovering that registrations at these locations had fallen by nearly 75 percent, despite increases in welfare rolls during that time.

McLean was asked by Rep. Susan Davis☼ (D-CA) why she believes state agencies are neglecting their Section 7 duties. McLean responded, "Many state employees probably do not realize that it's a federal mandate."

The Civic Engagement Project Manager for the Michigan Department of Human Services, Catherine Truss, also testified on Michigan's efforts to comply with Section 7. Truss testified that the state of Michigan sees real value in ensuring that public agencies offer voter registrations, saying,

> We believe that feeling as if your vote does not count or that your opinion does not matter is a significant barrier to self-sufficiency... Compliance with the National Voter Registration Act is not just another federal mandate; it is a key component for families to act on their own behalf and become part of the public debate.

A senior policy analyst from the Heritage Foundation, David B. Muhlhausen, countered the assertions by the other witnesses that states are neglecting to implement Section 7. Referencing forthcoming data, Muhlhausen argued that two explanations better account for the decline in Section 7 registrations: one, that "voter registration drives by community mobilization organizations replaced the need for welfare recipients to register at public assistances offices," and two, "that welfare reform caused the decline in registrations."

Recent research by Project Vote and Demos — documented in their report *Unequal Access: Neglecting the National Voter Registration Act* — contradicts Muhlhausen's explanations. In regard to Muhlhausen's claim that demand for voter registration by low-income Americans has been met by mobilization organizations, the report finds that millions of low-income Americans remain unregistered in spite of the registration efforts of nonprofits and other organizations. In 2006, 13 million, or 40 percent, of voting-age citizens earning under $25,000

were unregistered. The *Unequal Access* report also addresses Muhlhausen's second argument that declines in state welfare caseloads led to the decrease in Section 7 registrations. The report asserts that although figures vary by state, the trend of decreasing caseloads generally reversed itself in the first years of this decade. For example, more adults are receiving assistance under the Food Stamps Program than in the 1990s.

Robocall Regulation Debate Heats Up

Controversy over S. 2624, the Robocall Privacy Act of 2008, has increased in recent weeks following a February Senate committee hearing. Labeled as an affront to First Amendment speech rights, an unwelcome infringement upon citizen-to-citizen communication, and unconstitutionally vague and overly broad, this bill has forced political pundits, consultants, and politicians to debate what constitutes "core political speech" and how best to utilize robocalls. Some consultants in the automated call industry are seeking donations for the Legal Defense Fund of the American Association of Political Consultants (AAPC), and others are partnering with the National Political Do-Not-Contact Registry.

According to a press release from Sen. Dianne Feinstein☼ (D-CA) and Sen. Arlen Specter☼ (R-PA), the bill's sponsors, the main objective of the legislation is to create a reasonable framework that protects Americans from being inundated by computer automated calls in the days leading up to an election. This framework would include:

- Limits on the hours phone calls are made
- Limits on the number of phone calls made
- Caller identification and civil fines for violators

During the Senate hearing, Feinstein announced that she intends to amend the bill to make candidates and consultants abide by the commercial do-not-call-list. This would remove nearly 150 million phone numbers from the reach of robocallers.

In response to S. 2624, more than 20 bipartisan political consultants have joined forces and spent more than $20,000 to fight legislative proposals which "violate" protected speech. A recent fundraising letter sent to thousands of consultants seeks support for what could be a long legal fight against a slate of federal and state bills banning robocalls. At present, more than 20 states are considering banning robocalls, while at least ten states have already begun enacting restrictions on the practice.

One Denver-based robocall firm has proposed an alternative to legislation and partnered with the National Political Do-Not-Call Registry. Rick Gilmore, president of the robocall firm Democratic Dialing, said, "It does my clients no good to call people who are only annoyed by the calls." Gilmore went on to say, "...we think it's good policy for us and a good direction for the industry in terms of policing itself." According to the registry's CEO and founder, Shaun Daskin, this type of "voluntary solution" seems to be the only viable option.

Whether the Robocall Privacy Act of 2008 will pass constitutional muster remains to be seen. A recent Senate hearing attests to the underlying difficulty of pragmatically yet legally addressing the privacy concerns of those receiving robocalls. At the hearing, North Carolina Attorney General Roy Cooper recounted the impetus behind pending legislation that would make both political parties abide by the Do-Not-Call Registry. Cooper stated, "At best these calls interrupt home life and family life, and, at worst, the calls can cut access to emergency help and medical assistance." In North Carolina, Cooper said robocallers to over 400 patients in county hospitals were stopped and fined. In the end, Cooper argued that "policymakers must find a way to control or eliminate unwanted political robocalls just like we did with unwanted telemarketing calls."

Attorney James Bopp opposed Cooper's contention that robocalls should be regulated. According to Bopp, the First Amendment protects a person's right to not only advocate for a cause but also select the appropriate means for doing so. Since S. 2624 applies to any computer-generated call which "promotes, supports, attacks, or opposes a candidate for federal office," Bopp labeled the bill unconstitutional. According to Bopp, such language would include robocalls for issue advocacy and would be difficult to enforce since the line between criticism of public officials and electioneering can often be debatable.

The hearing ended with exchanges between all panelists on the political feasibility of providing the opportunity to voluntarily opt out of political communications upon registering for the Do-Not-Call Registry. There was also some discussion about the actual cost-effectiveness of robocalls. In the weeks and months ahead, legislative bodies across the country may be charged with finding ways to address the concerns of those advocating for regulation without infringing upon the constitutional rights of those opposing regulatory efforts.

USAID Tells NGOs It Will Proceed with Plan to Use Secret Watch List

On April 11, the U.S. Agency for International Development (USAID) told an overflow crowd of nongovernmental organizations (NGOs) in Washington, DC, that the agency is moving forward with the widely criticized Partner Vetting System (PVS) it proposed in 2007. PVS will require USAID grantees to submit highly personal information about key personnel and leaders to be checked against a secret government watchlist. Although USAID representatives said some changes have been made based on public comments, details are not available, and there will be no further public comment period before the final rule is announced.

The stated purpose of the public meeting was "gathering feedback prior to the issuance of a final rule and initial implementation of the system." USAID representatives answered questions from over eighty skeptical NGO representatives who are likely to be directly impacted by the program. Acting Deputy Administrator Jim Kunder explained how PVS will be phased in, with the intention that it will eventually be enforced globally. Organizations likely to receive a grant will have to complete a Partner Information Form, including identifying information on "key individuals," including dates and places of birth, citizenship, phone

numbers, and passport numbers. The information will be entered into USAID's database and will then be checked by USAID Office of Security (SEC) against non-public U.S. government databases. If there is a "match," USAID will conduct further analysis to determine whether it is a false positive and make a recommendation on moving forward with the grant.

According to USAID, the PVS is required by law because of the existence of the government database, although no legal authorities were cited. Kunder said the public comments were useful but did not change the need for PVS.

This argument is likely to be challenged as PVS is implemented.

USAID detailed changes that will be made to the program since the July 2007 *Federal Register* announcement. One significant change is that applicants that are denied a grant can present additional information and proceed with an administrative appeal within USAID. However, there will be no description of this appeal process or any other change before the program becomes mandatory.

At the meeting, Jim Bishop, Vice President of InterAction, a coalition of U.S.-based foreign aid groups, addressed numerous concerns, saying, "Our members spend billions of dollars every year in funds received from the public and from the U.S. government. Imposing the PVS described in last summer's Federal Register notices on NGOs because of unsubstantiated media allegations that some USAID funds may have gone to suspect organizations is using a flame thrower to kill an ant. And more than ants may be killed if the PVS is implemented." Participants broke into applause after Bishop's remarks, a sign of the strong opposition to the current program design.

InterAction issued a press release on April 11, which stated, "USAID is currently describing the PVS in terms different from those used in the Federal Register Notices last July. Even so, as it is currently envisioned, it will still compromise the civil rights of American citizens, undercut the effectiveness of NGO programs, and endanger the staff members of these organizations and their local partners. As USAID has made changes to the proposed PVS, it must reintroduce the PVS, following the applicable rulemaking processes, and provide: accurate descriptions of the appeal and correction process; a concise definition of those individuals in each applicant organization that will need to provide personal information; and a description of the processes for emergency vetting in appropriate circumstances."

Other NGO representatives present at the meeting reiterated concerns made in written comments to USAID in 2007. For example:

- PVS will undermine aid programs by damaging the groups' trust and relationships with local partners in other countries
- The program will be seen as a means of intelligence gathering for the U.S. government, which could create a security risk for staff on the ground
- The PVS proposal ignores the tremendous amount of due diligence already being

performed by grantmaking organizations

Participants in the meeting said their work to alleviate poverty with humanitarian assistance is a means of fighting global terrorism, but humanitarian work suffers when groups are asked to perform intelligence-gathering activities. Kunder's response was that if assistance groups do not recognize that foreign policy and foreign aid depend on each other, "we'll eventually be having this conversation in the Pentagon."

Similar Program in West Bank/Gaza Illustrates Problems to Come

A program similar to PVS currently operating in the West Bank/Gaza (WB/Gaza) is already causing problems for NGOs. USAID claimed its experience with WB/Gaza shows improved timing for the vetting process. However, one representative at the meeting described a five-month delay for purchasing a fax machine.

Many meeting participants voiced concern that PVS would be overly burdensome for groups that have to report more detailed information on "key individuals." USAID tried to alleviate those concerns by reporting that in the WB/Gaza program, about 3.2 individuals were vetted per organization in a ten-month study period. "Key individuals" include senior management, officers within the organization, such as Executive Director, and those with responsibility over the funds' allocation. This vague standard leaves it up to the organization to figure out which key individuals to report. As one NGO representative said, this is problematic for a sector that takes compliance very seriously. Some groups in the WB/Gaza region have chosen not to receive USAID funding, and there will likely be more withdrawals if PVS is introduced on a large scale.

Oversight of Terrorist Financing Ignores Problems for Nonprofits

An April 1 Senate Finance Committee hearing continued an unfortunate pattern of insufficient congressional oversight of anti-terrorist financing programs, neglecting to address the unnecessarily harsh impacts the programs have on U.S. charities and philanthropy. Despite an OMB Watch request that the committee hear from additional witnesses, members only heard from Under Secretary for Terrorism and Financial Intelligence Stuart Levey. Both Committee Chair Max Baucus (D-MT) and Levey raised issues relating to charities that left important questions unasked and unanswered. However, committee staff has agreed to meet with nonprofit representatives.

In his opening statement, Baucus referred to failed criminal prosecutions of charities suspected of having ties to terrorism, asking if the prosecutions "were off base" or if the government should "do a better job of monitoring these organizations?" Levey did not address this issue in his testimony. Another witness could have explained the problem raised in the trial of the Holy Land Foundation, where prosecutors admitted all funds were spent for charity but argued it was illegal to provide aid through organizations that are not on the terrorist

watchlists because the group "should have known" of ties to Hamas. That case ended in a mistrial.

Baucus also said he is not satisfied the Internal Revenue Service (IRS) "is being aggressive enough in establishing links between nonprofits and terrorism financing." This was a reference to a problematic 2007 Treasury Inspector General for Tax Administration (TIGTA) recommendation that the IRS check nonprofit filings against the FBI's enormous and inaccurate Terrorist Screening Center watchlist. Nonprofits wrote a letter to Treasury Secretary Henry Paulsen in 2007 objecting to the plan and to the TIGTA claim that charities are a significant source of terrorist financing. This information was provided to the Senate Finance Committee but not mentioned at the April 1 hearing.

Ranking member Charles Grassley's (R-IA) statement focused on the need for better coordination between federal agencies but did not address the contradiction between Treasury's treatment of nonprofits and the Department of State's Guiding Principles on Nongovernmental Organizations, which indicate action by government "should be based on tenets of due process and equality before the law." Grassley also said he will update S. 473, the Combating Money Laundering and Terrorist Financing Act of 2007, which addresses loopholes in the law.

The hearing was the first time Levey had testified before the committee since he was confirmed four years ago. His testimony primarily focused on large-scale problems relating to anti-terrorist financing, including use of pre-paid credit and debit cards and smuggling. He outlined a general shift from broad sanctions to a more strategic approach of "targeted financial measures" and following investigative leads to disrupt terrorist networks, in line with recommendations from the 9/11 Commission.

In the short portion of his testimony devoted to charities, Levey failed to include crucial information the committee needs to fulfill its obligations to both prevent terrorist financing and protect and encourage the charitable mission of U.S. nonprofits. For example:

- Levey noted that Treasury has "designated approximately 50 charities worldwide as supporters of terrorism, including several in the United States, putting a strain on al Qaida's financing efforts." This fails to note that U.S. organizations account for only seven of 47 designated organizations among 479 Specially Designated Global Terrorists. In addition, not all are accused of funding al Qaida. Some of the U.S. organizations are accused of funding Hamas, the Tamil Tigers, and Hezbollah.
- Levey claimed "active engagement with the charitable sector" and "a comprehensive outreach campaign to the charitable sector" as successes, without disclosing criticisms of Treasury's shut-down of charities. This also mistakes civility from nonprofits for support of Treasury's policy, without recognizing the way its power to shut down charities inhibits honest dialog.
- The testimony noted Treasury has "issued guidance to assist charities in mitigating the risk of exploitation by terrorist groups" without acknowledging repeated calls for withdrawal of the guidelines from a diverse group of nonprofits that say the guidelines

are counterproductive and harmful to charities' operations.
- Levey said Treasury's engagement with the nonprofit sector "is particularly important because we want humanitarian assistance to reach those who are truly in need through channels safe from terrorist exploitation" without mentioning the department's refusal to release frozen charitable funds to reputable nonprofits so that the dollars can reach those in need.

After the hearing, OMB Watch issued a press statement and said, in part, "Anti-terrorist financing programs have had a widespread and negative impact on the U.S. nonprofit sector, including program cutbacks, decreased international giving, and increased fear of speaking out on important public issues. Witnesses from charities and foundations could have provided the committee with a full picture of the real damage the financial war on terror is causing charities, foundations, and the people we serve. Instead, the public record is left incomplete, which will likely lead to continuation of flawed programs that do little or nothing to stop terrorism."

The limited witness list also meant the committee has not heard from experts on money laundering, who are critical of Treasury's overall current approach to terrorist financing. These include:

- Ibrahim Warde, author of the book *The Price of Fear*, summarized in a Power Point presentation
- Professor Nikos Passas, author of Setting Global CFT Standards: A Critique and Suggestions

The hearing is one more in a series of one-sided, limited hearings in Congress. Other examples are detailed in an *International Journal of Not for Profit Law* article.

Housing Crisis Legislation: A Tale of Two Houses

By fits and starts, Congress is moving toward a legislative response to the housing sector crisis — the biggest sectoral crisis to afflict the U.S. economy since the technology stock bubble burst earlier this decade. In what might turn out to be a case of the tortoise and the hare, the Senate has jumped out front with a housing bill that enjoys little if any support in the House or the Bush administration, while the House has embarked on a schedule of hearings and mark-ups of a much-praised bill of a wholly different nature. There is a widely shared consensus that, with elections approaching, Congress must and will act to address the crisis, but thus far, the two houses are proceeding along on separate, if not perpendicular, tracks.

On April 10, the Senate adopted a package of tax breaks and assistance by a vote of 84-12 that was aimed more at easing the housing credit crunch by restoring liquidity to the sector than at addressing foreclosures. The day before, the House Financial Services Committee opened hearings on the Housing Stabilization and Homeownership Retention Act, a plan by Committee Chair Barney Frank (D-MA) to provide $300 billion in federal loan guarantees in an effort to stem the growing national tide of foreclosures. The committee will formally

consider the Frank plan April 23 and 24.

Despite being considered the same week, these two measures have almost no similarities. The Senate bill, the inaptly named Foreclosure Prevention Act, consists mostly of a set of tax cuts for corporations and potential homebuyers costing $16.9 billion over five years ($10.8 billion over ten) without any offsets. The House plan, on the other hand, has $11 billion in tax cuts, all targeted at the housing sector and fully offset.

The Senate had sprinted forward the prior week with a rapidly-forged compromise by Banking, Housing, and Urban Affairs Committee Chair Sen. Christopher Dodd☼ (D-CT) and ranking member Sen. Richard Shelby☼ (R-AL) on a bill that had originally included a $400 billion Federal Housing Administration (FHA) loan guarantee provision similar to the Frank plan. Within days, that bill was raced to the Senate floor, and the mostly unrelated tax cuts crafted by Finance Committee Chair and ranking member Sens. Max Baucus (D-MT) and Charles Grassley (R-IA), respectively, were quickly appended. Shortly before the final vote, Dodd withdrew his $400 billion loan guarantee provision.

The Senate tax provision drew criticism in progressive and fiscal watchdog circles for having precious little to do with the housing sector crisis, let alone with preventing foreclosures. Those foreclosures are expected to increase in the U.S. by over a million in the next 18 months. One particular criticism from the Center on Budget and Policy Priorities (CBPP) declared the "Senate Housing Legislation Highly Disappointing" in a paper released April 8.

Some aspects of the tax provisions are so disconnected from the housing sector, they could make an ultimate House-Senate conference protracted and contentious. In particular, the biggest piece, a $6.1 billion provision to extend the net operating loss (NOL) carry-back period, would benefit corporations without regard to sector. This would allow a company that paid taxes in past years to write off those profits with current year losses, thereby creating a potential for getting money back from the government for the tax payments made in past years. In fact, this provision could end up making the problems worse. For example, the NOL provision could promote fire sales within the housing sector as companies holding mortgages rush to take immediate tax write-offs.

Another provision, a tax credit worth up to $7,000 toward purchases of foreclosed homes, will only benefit those with sufficient equity and credit to purchase a new home. This might actually promote foreclosures by bankers and other lenders and is not likely to do much to help communities hard-hit by foreclosures. Additionally, the tax deduction for state and local property tax payments is not targeted to the most distressed homeowners, few of whom itemize deductions on their tax returns. As CBPP points out, of the Senate proposal's $10.8 billion in tax cuts, only $1.7 billion is devoted to alleviating the foreclosure crisis. None of these provisions is in the Ways & Means Housing Assistance Tax Act.

The rest of the Senate bill does offer some effective assistance to those who have suffered or are at risk of foreclosure, providing $150 million worth of credit counseling. Yet this sum of money means that only a small fraction of the afflicted will be reached. In addition, $4 billion in

Community Development Block Grants is included for local governments to buy or redevelop homes that have already been foreclosed.

Perhaps the most contentious feature of the Senate package is that it provides no offsets at all, thus violating Congress' pay-as-you-go (PAYGO) rule. This is not the first time the House and Senate have disagreed about following the PAYGO rule. It was at the center of a months-long delay in 2007 over patching the Alternative Minimum Tax (AMT).

Meanwhile, there has been growing support over the last two months for the Frank plan from House leadership, the Bush administration, and a broad range of outside analysts and experts. Under the plan, participating borrowers and lenders would pay a premium to the government in return for loan guarantees. These payments would bring the aggregate cost of the program down to negligible amounts — $10 billion over five years in the worst case, a profit for the government in the best.

Because the premiums and penalties will come close to covering government costs, the plan is expected to be practically PAYGO compliant without need for more than minimal offset provisions. For this reason, but more so because government spending would be negligible, the plan has found initial favor with the administration.

In the Senate, Dodd is reportedly preparing to re-introduce his initial proposal that would provide closer to $400 billion in loan guarantees, but it is unclear if that proposal would receive consideration now as the full Senate has already passed its proposal. But with growing support for the House proposal both from inside the Bush administration and out, the final version of housing legislation might look significantly different from the Senate-passed version.

House Cancels Private Tax Collection Program

On April 15, the House passed the Taxpayer Assistance and Simplification Act of 2008 (H.R. 5719). The bill, approved by a 238-179 vote, is a collection of provisions aimed at facilitating income tax compliance — especially among elderly and low-income taxpayers. Most significantly, the bill would end the Internal Revenue Service's (IRS) highly controversial private debt collection (PDC) program.

This bill represents a successful attempt by the House to cancel authorization for the IRS to contract out tax collection services. It would bar the IRS from entering into contracts with private collection agencies (PCAs) and prevent the agency from renewing contracts with the two PCAs with which it currently does business.

Prior attempts to end the PDC initiative met with strong Republican opposition in both the House and Senate and were ultimately defeated. Similarly strong opposition to H.R. 5719 came from supporters of the IRS's private debt collection program this time around. Indeed,

President Bush registered his opposition to repeal of the program in a veto threat on April 14.

One of the many arguments over the program concerns its ability to close the "tax gap," which is difference between what taxpayers owe and the amount the IRS collects. According to the IRS, the program generated $32 million in gross collections in FY 2007, $12 million of which was paid to the collection agencies, netting the government $20 million. During that period, the IRS spent $71 million in start-up and maintenance costs for the program. All told, the program has lost over $50 million for the government and is expected to continue to lose money for another three years. These figures do not include opportunity costs of not investing the $71 million in traditional, more productive IRS collection programs. National Taxpayer Advocate Nina Olson has recently testified these opportunity costs are upwards of $100 million per year, and she estimates the PDC program would lose almost $500 million over the next six years when these costs are factored in.

Yet because the debt collection program generates revenue, the Congressional Budget Office (CBO) scores the cancellation of the program as a $578 million revenue loss over ten years. That means that under pay-as-you-go (PAYGO) requirements, those revenue losses need to be offset with either additional revenue or entitlement spending cuts. The discretionary resources the IRS has spent on administering the program are not included in PAYGO calculations.

In addition to the PDC program cancellation, the bill contains three other provisions that would result in additional revenue losses. One of these would drop a requirement that businesses list individual calls in order to deduct mobile phone expenses. This widely supported measure would, over ten years, result in a $237 million revenue loss. Another provision would delay for one year the onset of a requirement that three percent of the cost of goods and services purchased by the government be withheld. This provision would cost $316 million over ten years. The third revenue loser is a modification of the rules regarding penalties applied to tax preparers for underreporting income, costing the Treasury some $22 million over ten years.

Despite these revenue losers, the CBO scored the legislation as PAYGO-compliant, as it generates $288 million for the federal government over the next ten years. Of the two provisions in the bill that would offset these losses, only one drew emphatic opposition when the bill was in committee — a proposal to require Health Saving Account (HSA) account holders to document that they use funds withdrawn from the account for approved purchases. This provision touched off a contentious exchange between Ways and Means Committee members during the mark-up on April 9.

Currently, HSA account holders are not required to provide proof that withdrawals from their accounts are applied only to approved uses; such unauthorized payments are subject to a 10 percent penalty. H.R. 5719 would require that when disbursements from HSAs are made, account users submit documents (e.g., receipts) proving the withdrawal was for an approved use. The measure would provide $308 million in offsetting revenues.

The most vocal opponent to the new HSA requirements in the mark-up session was Rep. Paul

Ryan☼ (R-WI). Ryan suggested that such a change was substantial enough that it warranted further hearings to ascertain the effects of such a move. Citing concerns the provision would place an inordinate burden on account users, thus causing fewer contributions to be made to such plans, Ryan offered an amendment striking the measure from the bill. The vote failed along party lines during the committee mark-up.

The bill's largest offset is an $860 million provision based on a stand-alone bill, H.R. 5602, the Fair Share Act of 2008. Introduced at the end of March in both the House and Senate, the Fair Share Act would require U.S. firms that employ American citizens overseas through foreign subsidiaries to pay Social Security and Medicare taxes when contracting with the federal government. A *Boston Globe* story in March reported that Kellogg Brown & Root, a former subsidiary of Halliburton, avoided about $100 million in payroll taxes by using foreign shell companies to employ U.S. workers in Iraq.

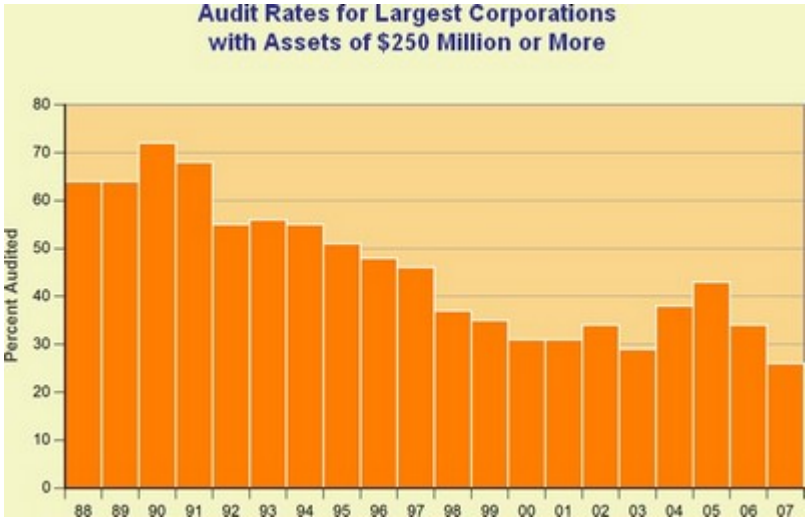
In addition to these important changes, the Taxpayer Assistance and Simplification Act would also:

- Prevent employment tax liability for elderly and disabled individuals receiving in-home care under certain government programs
- Allow IRS employees to refer taxpayers needing assistance with tax cases to qualified low-income taxpayer clinics
- Authorize an annual $10 million grant for Volunteer Income Tax Assistance ("VITA") programs
- Require the IRS to notify taxpayers of their potential Earned Income Tax Credit (EITC) qualification
- Prohibit the IRS from providing debt indicators to private parties if it is determined that the resulting refund anticipation loan plus related fees are predatory
- Require the IRS, to the extent permitted by law, to notify taxpayers if it determines that there may have been an unauthorized use of the identity of a taxpayer or the taxpayer's dependent
- Allow the IRS to disclose taxpayer identity information for unclaimed refund notification purposes

The abrogation of the IRS private debt collection program is probably the bill's most significant and controversial measure. In addition to Olson, good government groups and consumer rights organizations have been openly critical of the program, claiming it is fiscally wasteful, puts sensitive taxpayer data at risk, opens citizens to abusive collection practices, and lacks the transparency necessary to conduct proper oversight. OMB Watch has also called for repeal of the program and for strengthening the IRS capacity to close the tax gap.

New Report Shows "Historic Collapse" in Audit Rates of Largest Corporations

A report released by Transactional Records Access Clearinghouse (TRAC) at Syracuse University highlights a disturbing trend in Internal Revenue Service (IRS) audit rates of large corporations. Audit rates for corporations with $250 million or more in assets (large corporations) are at a historic low at 26 percent. Analyzing IRS data — portions of which had to be obtained through Freedom of Information Act (FOIA) requests — TRAC also found that the decline in audit rates has been accompanied by declines in audit quality.



The new data released by TRAC underscore a disturbing trend in tax enforcement. The number of hours per audit spent on the largest corporations has declined 20 percent, while the numbers of both field audits and revenue agent hours spent on such audits have declined by 30 percent. That audit rates and audit quality have fallen is especially troubling given that audits of large firms return an average of $7,498 per hour. This is significantly higher than the next-highest dollar-per-hour audit rate, which is $1,559 for firms with assets between $100 million and $250 million.

This decline in large-company audit rates, however, is masked in part by an increase in the overall audit rate. These trends have allowed the IRS to testify before Congress and the public that it is robustly enforcing the law and to offer increased overall audit rates as evidence, yet that data is not telling the whole story. The TRAC report indicates that:

Table 2. Audits of Largest Corporations

Measure	Fiscal Year			Change 2007 vs 2005
	2005	2006	2007	
Number of Field Audits	4,693	4,146	3,308	-30%
Revenue Agent Hours	4,576,398	3,900,164	3,219,336	-30%
Recommended Additional Tax	$30,123,008	$25,505,415	$24,139,907	-20%

> [M]oving the focus of the corporate auditors away from the large corporations and towards the smaller ones has been quite effective when it came to increasing

the overall number of these kinds of audits but actually was counter productive in financial terms.

Table 3. Corporate Audit Results

IRS Division and Corporate Asset Size	FY 2007 Dollars per Hour	FY 2007 Hours per Audit	Audits per 100 Returns	
			FY 2007 Rate	Change 2007 vs 2005
SBSE Division				
<5M	$682	41.9	0.9	41%
5M<10M	$840	65.4	2.9	24%
LMSB Division				
10M<50M	$474	168.5	14.7	29%
50M<100M	$586	189.4	10.9	-30%
100M<250M	$1,559	224.2	11.5	-31%
250M+	$7,498	973.2	26.3	-38%

Indeed, the TRAC report's findings are similar to a trend in individual audit quality that OMB Watch described in *Bridging the Tax Gap: The Case for Increasing the IRS Budget* in January.

> [C]orrespondence audits — not face-to-face audits — have accounted for 74 percent of the recent increase in audits among high-income individuals. . . . This trend is problematic because correspondence audits are less effective than face-to-face audits, partly because this type of audit can only spot problems that are evident from information submitted by the taxpayer or from information reported by third parties (employers, banks, and other sources). . . . The IRS has decided, perhaps because of limited resources, to shift to less efficient and effective processes for auditing.

Both the House and the Senate have hearings scheduled the week of April 14 to explore the IRS budget request and enforcement policies — an opportunity for Congress to get more information on why this recent data shows a decrease in the IRS's most effective type of audit.

EPA Submits Plan for Re-Opening Libraries

Responding to congressional demands, the U.S. Environmental Protection Agency (EPA) is re-opening libraries that the agency closed over the past several years. However, it appears that the content of the libraries will be more limited, and the facilities will be subject to stricter central supervision, raising concerns from critics about the role politics will play.

Beginning in 2004, the agency dismantled a significant portion of its library network in response to anticipated budget cuts. Ultimately, six libraries were closed, and four others had their hours reduced. Parts of the collections from the closed libraries were scattered across the network or converted into digital formats, though many records were simply thrown away. Outcry among public interest groups, public employees, librarians, scientists, and others prompted Congress to halt the closings and force EPA to reconsider its network plan. Congress then provided $1 million in the FY 2008 omnibus appropriations bill to re-open the libraries and instructed EPA to submit a plan on how it will proceed. The agency submitted the EPA National Library Network Report to Congress on March 26.

EPA's new network plan re-opens regional libraries in Chicago, Dallas, and Kansas City. The central Headquarters Repository and Chemical Library will also be re-opened as a single facility in Washington, DC, co-managed by two EPA offices, the Office of Environmental

Information (OEI) and the Office of Prevention, Pesticides and Toxic Substances (OPPTS). Network procedures and core reference materials are being standardized, and OEI Chief Officer Molly O'Neill will direct a library-wide "strategic planning effort."

The EPA library network plan also establishes basic standards for library resources and collections. Each library must:

- Staff at least one library professional
- Be open at least four days a week for either walk-ins or appointments
- Provide workstations with computers for patrons
- Maintain "core reference materials" and additional materials tailored for regional use

Public Employees for Environmental Responsibility (PEER) finds much room for improvement in the plan. "EPA is approaching the task for restoring its libraries grudgingly and appears to be trying to get by doing the bare minimum," said Associate Director Carol Goldberg. Much of the libraries' original spaces have been leased or converted for other uses, and collections for the Chicago and Dallas regional libraries need to be almost entirely re-created. The lack of stakeholder participation is also troubling to advocates: the March report contains no formal input from unions or librarians.

Most disturbing to PEER, however, is that the new library organizational structure places greater control of the system in the hands of a political appointee. The new standard operating procedures, developed by the appointee, require any new acquisitions and materials to "meet Network standards." PEER questions the clear "tension between rhetoric about the need for access and a stated desire to 'streamline operations and eliminate redundancies.'"

Public interest groups claim continued congressional oversight will be needed to ensure that such attempts at efficiency do not come at the cost of valuable research materials and reference services upon which the public and EPA staff rely.

According to EPA's plan, all of the libraries should be re-opened by Sept. 30.

Problems Disclosed on Classification Procedures at Intelligence Agencies

A recent report by the Office of the Director of National Intelligence (ODNI) reviews the classification procedures at eight agencies and finds significant problems, which unnecessarily complicate classification procedures and inhibit the free flow of information.

Secrecy News obtained the *Intelligence Community Classification Guidance Findings and Recommendations Report* (January 2008) and released it the week of April 7.

The ODNI report stresses the importance of information sharing within government and the need to foster an environment where analysts and employees have an incentive to share

information as opposed to operating with a default presumption of nondisclosure. Yet, the report notes, information sharing is slowed down due to "[i]nconsistent or contradictory classification rules." To facilitate information sharing, the report calls for classification standards that are common to all members of the intelligence community.

In particular, the report's review of agency guidelines found that there was:

- No definition of "national security" or "intelligence"
- No requirement to describe why a document is classified, beyond a reference to the Executive Order describing the three levels of classification
- Little clarity in determining precedence of classification guides when working inter-organizationally
- No standard lexicon across the different classification guides
- No consistent definitions as to what constitutes "damage," "serious damage," or "exceptionally grave damage" to national security, the three definitions used to classify information as confidential, secret, and top secret, respectively
- Duration of classification varies, without rationale, from agency to agency
- Inconsistent standards on declassification
- Absence of universal requirements to mark the date that a document is originally classified

ODNI recommends a number of simple reforms to alleviate many of these difficulties. "These [agency classification] guides present agency-unique and contradictory instructions that do not promote information sharing and collaboration among the Community's agencies and mission partners," states the report.

Steven Aftergood at the Federation of American Scientists criticized the report for not examining the need to narrow the scope of intelligence sources and methods that are in need of protection. "Almost anything can serve as an intelligence source or method, including a subscription to the daily newspaper," stated Aftergood. "But not every intelligence source or method requires or deserves classification or other protection from disclosure."

The difficulties in sharing information because of inconsistent and inchoate classification procedures are similar to problems agencies face in sharing sensitive but unclassified (SBU) information. The growing and unorganized use of SBU categories has also been recognized by the administration as severely hindering efforts to share information across government agencies and with state and local governments, and the ODNI is leading an effort to reform the hundreds of SBU categories that have proliferated since 9/11.

In a letter, public interest groups called on the administration to play a role in the formulation of recommendations to correct the SBU system by creating greater public access and accountability.

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In This Issue

Plastics Chemical Poses Health Risk, Businesses Respond

The findings of a U.S. government science panel and actions by the Canadian government are prompting major retailers and manufacturers to reconsider selling products containing bisphenol-A, a chemical commonly found in hard plastics and food containers.

On April 15, the U.S. National Institutes of Health's National Toxicology Program (NTP) released a report claiming ingestion of bisphenol-A poses a possible risk to human health. The report says high levels of exposure to the chemical can cause reproductive or developmental abnormalities, such as low birth weight, and may lead to a wide variety of cancers including breast and prostate cancer.

Three days later, the Canadian government announced a proposed ban on bisphenol-A in baby bottles, citing its own study on the chemical. Both the U.S. and Canadian studies found that fetuses and infants are at a higher risk for the adverse health effects associated with exposure

to bisphenol-A.

In response, Wal-Mart Canada has already begun to pull from its shelves baby bottles containing the chemical. The retailer also announced it would begin phasing out bottles containing bisphenol-A in its U.S. stores and stop selling them by early 2009, according to *The Washington Post.*

Nalgene, makers of the ubiquitous translucent water bottles, announced it would stop using bisphenol-A in its products. Baby bottle manufacturer Playtex also said it would phase out the chemical.

Bisphenol-A is an ingredient in hard, polycarbonate plastics. No. 7 plastics, like those used for reusable water bottles, are usually polycarbonate. Bisphenol-A is also an ingredient in certain resins used to line food cans.

The NTP report finds most humans are exposed to bisphenol-A and retain it in their bodies. The report states, "Bisphenol A can migrate into food from food and beverage containers with internal epoxy resin coatings and from consumer products made of polycarbonate plastic such as baby bottles, tableware, food containers, and water bottles." The report cites another U.S. study that found bisphenol-A in 93 percent of humans tested.

The panel then looked at studies of laboratory rodents exposed to bisphenol-A and found a wide variety of adverse health effects at high doses and other possible health effects at low doses.

NTP concluded bisphenol-A is of "some concern" — a qualitative designation. Other options available to the panel included "serious concern" and "concern" for riskier substances, and "minimal concern" and "negligible concern" for less risky substances.

Although the NTP report finds bisphenol-A may pose risks to human health, NTP cannot act on its findings because it is not a regulatory agency. Regulation of the chemical would fall to the U.S. Food and Drug Administration (FDA) which, like NTP, is a division of the Department of Health and Human Services.

FDA has consistently refused to regulate bisphenol-A in the face of public and congressional pressure. The agency has said bisphenol-A does not pose a "safety concern at the current exposure level."

But a congressional investigation uncovered that FDA had relied on two industry-funded studies in making its determination not to regulate. The House Energy and Commerce Committee wrote to FDA in January asking the agency to identify the basis on which it has made its decision. FDA identified two studies, both of which were funded by the American Chemistry Council. One study had never been published or subjected to peer review.

Most other bisphenol-A studies have shown varying degrees of human health risks. In August

2007, an NIH-sponsored panel of 38 independent experts found that the level of bisphenol-A present in the average human's bloodstream is higher than levels that have been found to cause adverse health effects in laboratory tests.

The move by Wal-Mart, Nalgene, and others mirrors that of other industries that have decided to take voluntary steps in response to mounting evidence and public pressure, but in advance of federal mandates. For example, after widespread reporting of the dangerous effects of diacetyl, a chemical used to give popcorn its buttery flavor, major popcorn makers like Orville Redenbacher announced they would discontinue use of the chemical. Countless individual businesses and industries are also taking steps to mitigate their carbon footprints in order to combat climate change.

The trend is a natural response to the Bush administration's refusal to regulate in any area, even when regulation would aid both consumers and businesses. In the cases of both diacetyl and climate change, the Bush administration has rebuffed public petitions, court mandates, and congressional pressures to act.

Most recently, the White House halted a U.S. Environmental Protection Agency (EPA) rulemaking which would have set carbon emissions limits. Instead, EPA is asking for "comment on the best available science." Similarly, FDA and other Bush officials continue to emphasize the need for further study of bisphenol-A's effects before action can be taken.

Fuel Economy Proposal: Higher Mileage, State Preemption

The U.S. Secretary of Transportation, Mary E. Peters, announced April 22 a proposed new rule to raise fuel efficiency standards for cars and light trucks. In December 2007, Congress passed the Energy Independence and Security Act, which required revisions to the Corporate Average Fuel Economy (CAFE) standards. The new rule, if implemented, would be the first significant improvement in fuel efficiency standards since the CAFE program's inception in 1975.

The CAFE program sets a mandatory fuel efficiency rate (measured in miles per gallon) and fines manufacturers who are not in compliance. Manufacturers are evaluated based upon the fuel economy of their entire fleet as opposed to individual vehicles. CAFE standards were widely credited with improving automotive fuel economy in the years immediately following enactment, but progress has since leveled off.

The Energy Independence and Security Act of 2007 required the Transportation Secretary to issue regulations to achieve a 40 percent improvement in the fuel standard by 2020. According to Peters' speech, the proposal achieves a 25 percent improvement by 2015, or a 4.5 percent annual improvement, which exceeds the pace established in the law. The proposed standard, written by the National Highway Traffic Safety Administration (NHTSA), sets an industry average of 35.7 miles per gallon (mpg) for passenger cars and 28.6 mpg for light trucks by 2015. Peters said the proposal also "would reduce carbon dioxide emissions by an estimated 521 million metric tons, and is an important part of this Administration's commitment to

reduce greenhouse gas emissions."

The Alliance of Automobile Manufacturers (the Alliance), an important trade association for carmakers, praised the proposal, saying it "represents an important mile marker" on the way to meeting the law's requirements. "While these increases will present a challenge, it is critical that automakers and consumers have the certainty that this nationwide, 50-state fuel economy rule provides." This is a reference to the Alliance's and the Bush administration's desire to have one national standard instead of letting states like California determine fuel efficiency through vehicle emissions standards as part of their programs to reduce greenhouse gases.

While the new proposal would result in a significant improvement in fuel efficiency, the proposal needs to be seen in light of the administration's recent denial of California's clean air waiver. In December 2007, the administrator of the U.S. Environmental Protection Agency (EPA), Stephen L. Johnson, denied California a waiver under the Clean Air Act (CAA) to establish a state vehicle emissions standard. The CAA specifically allows California to receive EPA waivers to set standards more stringent than the national standard. Other states are then free to adopt the California standard. Part of Johnson's rationale was that a patchwork of state standards would be confusing to automakers.

Avoiding a patchwork of regulations at the state level was indeed the rationale for establishing federal environmental protection laws in the 1960s and 1970s. Creating one national standard to avoid the patchwork that Johnson referred to in the California waiver decision, and that the Alliance noted in its response to the new CAFE standards, is misleading. Granting California a waiver would mean that there would only be two standards, a national standard and California's standard, even if it was adopted widely by other states.

More likely, what the Bush administration and the Alliance are trying to achieve is one national standard because California's vehicle emissions program might result in a stricter fuel efficiency standard. Evidence of this is contained in the CAFE standards proposal. Near the end of the 400-plus-page proposed rule, NHTSA writes, "Given that a State regulation for tailpipe emissions of CO2 is the functional equivalent of a CAFE standard, there is no way that NHTSA can tailor a fuel economy standard so as to avoid preemption." (California's approach focused on tailpipe emissions.) NHTSA writes, "We respectfully disagree" with two district court rulings in Vermont and California that greenhouse gas vehicle emission standards adopted by those states are not preempted by the law that created the CAFE program. The agency also proposes to preempt state standards in the new rule.

The responses to the new proposed rule from public interest groups acknowledge the improvement in fuel efficiency that should be achieved. However, Public Citizen's Joan Claybrook, who was NHTSA administrator from 1977 to 1981, issued a press release in which she takes both NHTSA and Congress to task for their failure to establish stricter standards. "Other countries already have set targets that exceed the U.S. 2020 goal — Japan requires more than 35 mpg by 2010; the European Union is ramping up to as much as 52 mpg by 2012; and even China will require 38 mpg for 2008."

The Environmental Defense Fund (EDF) said the proposal represents "only one step toward a national policy to protect the climate and ensure lasting energy security." According to John DeCicco, an EDF senior fellow, "What's missing is a comprehensive solution that will unleash innovation and require other parties — such as the petroleum industry — to contribute a fair share of emissions reductions, both in the transportation sector and across the economy."

Farm Bill Proposes Food Safety Improvements

The huge farm bill reauthorization under discussion among House and Senate conferees contains two food safety-related items that could help regulatory agencies better protect the U.S. food supply and provide consumers with more information when making purchasing decisions. First, the bill contains country-of-origin labeling, primarily for marketing livestock by-products. Second, it proposes a bipartisan food safety commission to review the existing food system and make recommendations for improvements.

The Food and Energy Security Act of 2007, H.R. 2419, passed the House and the Senate in 2007 and is now undergoing final negotiations among the conference members. The conference is led by Senate Finance Committee Chairman Max Baucus (D-MT) and House Agriculture Committee Chairman Collin Peterson (D-MN). According to an April 28 BNA story (subscription), the leaders expect negotiations on remaining issues to be completed in their next conference meeting, expected to occur April 29, allowing them to write the final version and send it to President Bush by May 6.

One section of the bill amends the Agricultural Marketing Act of 1946 to require country-of-origin labeling for beef, pork, lamb, chicken, and goat meat. The provision defines the conditions that allow retailers to label food products with a U.S. origin label and those that require labeling products from another country. A similar provision requires labeling for seafood products and an indication of whether the fish is farm-raised or wild-caught. Additional country-of-origin labeling applies to macadamia nuts, peanuts, honey, and ginseng.

Pressure to provide country-of-origin labeling is the result of the many imported food recalls over the last few years that have consumers worried about food safety. The number of meat and poultry products has increased dramatically — due both to increased imports and domestic production — but the ability of regulatory agencies to keep up with the increase has lagged well behind.

Another provision of the bill creates a bipartisan food safety commission consisting of 19 members from federal agencies, Congress, consumer groups, public health experts, and agricultural and livestock producers and processors. The primary function of the commission is to produce a report that 1) summarizes information about the U.S. food safety system, and 2) makes recommendations on a variety of ways to improve the system.

The bill is quite specific about the range of statutes, reports, and studies the commission is to review. More importantly, the bill requires the commission to recommend ways 1) to

modernize the food safety system, 2) to update and coordinate the various food safety statutes, 3) to emphasize a preventive approach instead of a reactive approach, 4) "to ensure that regulations, directives, guidance, and other standards and requirements are based on best-available science and technology," and 5) to ensure that agencies receive the funding necessary to carry out their regulatory responsibilities.

The Bush administration is opposed to the new reauthorization bill, claiming it is too expensive and maintains too many subsidies to wealthy farmers, according to an April 24 *Washington Post* story. The White House favors extending the existing farm legislation for one year.

Report Documents Political Meddling with Science at EPA

U.S. Environmental Protection Agency (EPA) scientists are faced with widespread political interference that has significantly increased under the Bush administration, a new report from the Union of Concerned Scientists (UCS) shows. Hundreds of the scientists surveyed (60 percent) reported some degree of political meddling, ranging from unnecessary delays to forced resignations.

The EPA's budget has declined in real terms by almost 25 percent since Bush took office, lower than it was in the 1990s. The UCS investigation reveals an agency additionally weakened by a political agenda with little basis in, or respect for, science. From the blatant manipulation of climate change reports to the intimidation of scientists whose professional opinions clash with a political agenda and the closing of agency libraries, the current administration has undermined the scientific autonomy of the EPA more than any other recent administration. A majority of the survey respondents with at least 10 years tenure reported that political interference has increased over the last five years alone. Russell Train, EPA administrator under Presidents Nixon and Ford, was quoted in the UCS report saying that neither of those presidents ever attempted to bully him into a decision.

Disgruntled EPA Scientists

UCS surveyed over 5,000 EPA scientists during the summer of 2007, receiving completed responses from 1,586 individuals. Most of those responses were from veteran employees who had worked at EPA for more than 10 years. Surveys came from every region and from many of the agency's research laboratories.

Survey results indicated that while EPA staff is involved in quality scientific research, political interference affected how the research is handled; often, it is ignored, misinterpreted, or misstated. Almost half of respondents (47 percent) felt that EPA does not "make use of the best judgment of its scientific staff" to some degree, and the Office of Air Quality Planning and Standards was particularly egregious in this regard. Similarly, program offices with regulatory duties and EPA headquarters had the highest incidence of political manipulation.

The report also showed:

- 24 percent of respondents experienced frequent or occasional "disappearance or unusual delay" of websites, reports, or other documents
- 31 percent personally experienced frequent or occasional "statements by EPA officials that misrepresent scientists' findings"
- 43 percent knew of "many or some" cases where EPA political appointees had inappropriately involved themselves in scientific decisions, and 42 percent knew of situations where commercial interests did the same
- 62 percent do not have enough resources to adequately do their jobs
- 36 percent consider that the changes and closures within the EPA library system have impaired their ability to do their jobs; in regions where libraries had closed, this figure leapt to 48 percent

The Role of the Office of Management and Budget (OMB)

The survey found that OMB has played an increasingly significant role in controlling EPA's rules and policies. The Office of Information and Regulatory Affairs (OIRA) has taken an unusually active approach to regulatory reviews. It has tried to set scientific assessment guidelines and risk analysis parameters and has taken to reviewing the science upon which EPA bases decisions with its own "experts."

In just one example of OMB overstepping its role, the office refused to allow EPA to increase air quality standards for fine particulate matter based on OMB's scientific evaluation, in spite of the consensus of EPA specialists and advisory committees to do so.

Survey respondents were particularly vocal about OMB interference with their work:

- "Get the OMB and their inexperienced staff out of the review and decision-making process."
- "Restrain [the] Office of Management and Budget. This administration has not only watered down important rules protecting public health ... they have also altered internal procedures so that scientific findings are accorded less weight."
- "In this administration, self-censorship is almost as powerful as political censorship. Options that OMB or the White House wouldn't like aren't even put forward."

The concerns of EPA scientists about the role of OMB and the White House were recently bolstered by a Government Accountability Office (GAO) report about White House interference with EPA's work on screening chemicals for cancer or other health risks. According to the Associated Press, this involves assessments of chemicals used in "everything from household products to rocket fuel." Because of bureaucratic delays put in place by the White House, reviews of nearly a dozen major chemicals are now years overdue.

Recommendations from the Report

EPA scientists were evenly split on whether or not EPA was moving in the right direction. UCS has no such hesitation in declaring EPA's mission to protect the environment and public health

as compromised.

UCS recommends:

- Congress should step up to the plate to protect scientists and increase EPA's budget so there are adequate resources for programs, particularly monitoring and enforcement
- EPA should institute a transparency policy for all meetings, allow scientists to communicate freely with the media, and ensure the timely release of reports
- Congress should reform the regulatory process to better balance the White House's role in it
- EPA should ensure that its decision making is grounded in science by reviewing when scientific input is required and tightening its conflict-of-interest restrictions.

The House Committee on Oversight and Government Reform is investigating possible incidents of manipulation of EPA decision making. There will be a hearing in May.

The scientific community will likely be discussing these and other issues affecting the integrity of the science used by agencies at the Integrity in Science Conference on July 11. The conference, sponsored by Center for Science in the Public Interest, will address issues such as the need for increased science funding, more independent regulatory science, and the need to protect public sector scientists from political meddling and corporate influence. Planned sessions include tackling the climate crisis, protecting and empowering scientists at federal agencies, insulating clean energy research from special interests, protecting endangered species, and reducing conflicts of interest on federal advisory committees.

Bill Requires Disclosure of Product Defects

In an effort to improve transparency following litigation on defective products, the House last week introduced the Sunshine in Litigation Act (H.R. 5884).

Settlements of product safety lawsuits sometimes include secrecy agreements in which the parties agree not to disclose information relating to a product defect that may implicate public health and safety. Introduced by Reps. Robert Wexler (D-FL) and Jerrold Nadler (D-NY), H.R. 5884 restricts the authority of federal judges to approve settlements that include such restrictive measures.

"Too often, American consumers are left in the dark about a defective toy that has resulted in the injury of a child, or an automobile part that has led to deadly car accidents," stated Wexler.

The Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights held a hearing in December 2007 on the Sunshine in Litigation Act (S. 2449), introduced by Sens. Herb Kohl (D-WI) and Lindsey Graham (R-SC). At the hearing, Judge Joseph F. Anderson of the United States District Court for the District of South Carolina said, "Many

judges all too often acquiesce in the demands of court-ordered secrecy."

Some predict that if judges are unable to approve settlements that include secrecy agreements, it will result in more cases going to trial and flooding the already overburdened court system. However, Judge Anderson, who presides in the only district to adopt a rule restricting court-ordered secrecy, reported that contrary to expectations, there have actually been fewer such cases going to trial in the five years following the rule's enactment than in the five years before.

The other concern raised against the Sunshine in Litigation Act is that it could violate private agreements reached between parties. The litigating parties should be at liberty to reach an agreement that settles their private matter. Moreover, the disclosure of information may also violate the parties' privacy.

Public interest advocates reply that, though the dispute may be a private matter, many have large public consequences affecting public health and safety. Many of these product defect and liability cases involve goods that are consumed by millions of Americans, and if the agreements would deny the public information about faulty products, as it was with Firestone tires, silicon breast implants, or toys from China, the public's right to know about potential harm outweighs the rights of private litigants to reach an agreement. Moreover, provisions to protect personal privacy and confidentiality are included in the bills.

The House and Senate bills revise the Federal Rules of Civil Procedure to require a showing that the public interest in the disclosure of information is either met or outweighed by specific concerns of privacy and confidentiality in order to allow the inclusion of nondisclosure agreements about product defect information in any settlements.

Contract Reform Takes Center Stage in House

A group of reform bills that would bring accountability and transparency to the federal contracting process has been approved by the House in the last few months, potentially setting the stage for federal contracting reform to be a major area of legislative action in the remaining months of the 110th Congress.

In the last two weeks, the House has approved five separate bills related to contractor accountability or oversight of the federal procurement process. These bills represent an excellent first step in bringing much-needed reform to the way the federal government oversees and implements federal contracts, a process that is rife with secrecy, corruption, waste, and abuse.

On April 14, the House passed H.R. 4881, the Contracting and Tax Accountability Act of 2007, which would require all firms bidding on federal contracts to submit a declaration that they are not delinquent in their taxes. The bill would also bar firms on which the IRS has placed a tax lien from being awarded a federal contract. This legislation seeks to recoup over $7 billion owed to the Treasury by firms receiving payments from the federal government. The legislation

was first introduced by Rep. Brad Ellsworth☼ (D-IN) on Dec. 19, 2007.

The next day, the House Oversight Subcommittee on Government Management, Organization, and Procurement held a hearing on H.R. 5712, the Close the Contractor Fraud Loophole Act, which would require all contractors, including those working outside of the United States, to report criminal violations and fraud by their employees. Existing law exempts certain contractors, including those working overseas, from informing the government if an employee breaks the law in obtaining or implementing a federal contract, or if an employee is significantly overcompensated. The subcommittee approved the legislation, sponsored by Rep. Peter Welch☼ (D-VT), and the full House passed the bill by voice vote on April 23.

Also on April 23, the House debated and approved two other pieces of legislation by voice vote. H.R. 3928, the Government Contractor Accountability Act, would amend the 2006 Transparency Act to require certain large government contractors that receive more than $25 million and 80 percent of their annual gross revenue from federal contracts to disclose the names and salaries of their five most highly compensated officers unless such information is already publicly available. The bill was introduced by Rep. Chris Murphy☼ (D-CT) in the fall of 2007.

H.R. 3928 would help increase transparency in the contracting process. Although publicly traded firms are required by the Securities and Exchange Commission to disclose the names and salaries of top-level managers, many firms that contract with the federal government, like private security company Blackwater USA and AEY, Inc., are private entities for which this information is not publicly available.

The third bill approved on April 23 was H.R. 3033, the Contractors and Federal Spending Accountability Act, introduced by Rep. Carolyn Maloney☼ (D-NY). This bill would require the General Services Administration to create an online database of information on federal contractors who have broken federal law or regulations, as well as include information on contractor performance. This bill would mandate a federal database that would be similar, but more expansive, to one created by the Project on Government Oversight, called the Federal Contractor Misconduct Database.

Such a database would be effective in improving pre-award contracting decisions and help procurement officers in identifying (and hopefully avoiding) abusive, risky, or dishonest contractors, particularly those who repeatedly violate standards of conduct. The Maloney bill was modified before it passed, stripping a controversial provision that would have forced federal officials to start suspension or debarment proceedings against firms with two judgments or convictions for the same offense during any three-year period. The final version of the bill merely requires contract officers to justify why they awarded a contract to a company with two or more debarment-worth offenses on its record.

H.R. 3033, like the other bills, likely faces an uphill battle to final passage in the Senate. Two reform-minded freshman senators, Claire McCaskill (D-MO) and Barack Obama (D-IL), are leading the charge for two of these bills in the Senate. McCaskill introduced a companion

measure to H.R. 3033 on April 23 and hopes to add it as an amendment to the Defense Authorization bill being considered the week of April 28. Obama has introduced a mirror bill (S. 2519) for the Ellsworth tax delinquency bill (H.R. 4881), but the Senate has not taken any action on that legislation.

Whether any of these bills are passed into law depends in large part on the Senate — where a razor-thin majority and more strident Republican opposition to these common-sense proposals might stall the progress made to date.

Lack of Action in Congress on Pivotal Fiscal Policy Issues

Congress continues to wrestle with a number of high-profile budget and financial bills that will have broad impact on citizens throughout the United States and around the world, including legislation on war funding, economic stimulus, housing, and the last budget of the Bush presidency. Despite significant congressional rhetoric and media coverage of these efforts, Congress has made little real progress on reaching compromise or instituting policies.

As contrasting election-year pressures will intensify heading into the summer — pushing Congress to enact more proposals but also making it harder to do — it's likely there will be additional rhetoric emerging from Washington, but little real progress. Below is a summary of the latest action (or lack thereof) on these efforts.

War Supplemental Package Remains Unfinished

Congress has been deliberating on a war supplemental package for most of 2008 and may finally put forward a bill late in the week of April 28. While specific elements of the bill are still the subject of rumor, the consistent message emanating from House Democratic leadership has been that the bill will likely be composed of the remainder of President Bush's FY 2008 request, which is now $108 billion; his full $70 billion request for an FY 2009 "bridge" fund that would partially cover FY 2009 war expenses; and some additional domestic spending measures.

By giving Bush enough war spending authority to obviate additional requests for the remainder of his term, Congress hopes to secure adequate leverage to attach several domestic spending initiatives that would likely by vetoed should they pass in a standalone bill. Such domestic spending may include funding for an unemployment insurance extension, a Food Stamp benefit increase, a child nutrition program enhancement, infrastructure repairs, and wildfire fighting efforts. However, Democratic lawmakers have stopped short of designating such items as "economic stimulus."

Second Stimulus Waiting on War Supplemental

Although House Majority Leader Steny Hoyer (D-MD) notes that "there may very well be matters in the [war supplemental] that have a stimulative effect," House Democratic leadership is "thinking more in terms of you have a supplemental, but you also have a separate stimulus." Following the release of March's sour jobs data, House Speaker Nancy Pelosi (D-

CA) reiterated the need for an additional round of economic stimulus legislation, with the White House quickly responding that the effects of the first economic stimulus package have yet to kick in (the Treasury Department began sending tax rebates to direct deposit accounts on April 28 and will soon begin mailing rebate checks to those without direct deposit).

Although items that many outside organizations and experts consider stimulative may appear in the war supplemental bill as items of additional discretionary spending, Democrats appear to still believe an additional proposal will be necessary outside of that legislation. The contents of a second stimulus bill would likely include whatever items do not make it into the final version of the war supplemental. In particular, extended unemployment insurance benefits, Food Stamp spending increases, and infrastructure repair projects are sure to be included in at least one of the bills, if not both.

Housing: House and Senate Moving in Opposite Directions

On April 23 and 24, the House Financial Services Committee began marking up the Housing Stabilization and Homeownership Retention Act (H.R. 5830), a plan by Committee Chair Barney Frank (D-MA) to provide $300 billion in federal loan guarantees in an effort to stem the growing national tide of foreclosures. Frank says he plans to conclude the mark-up by May 1, with the hope of moving the bill to the House floor by Memorial Day. The House Ways and Means Committee adopted a companion piece to the Frank bill on April 9 that consists of $11 billion in tax cuts, all targeted at the housing sector and fully offset.

Meanwhile, the House Judiciary Committee is slated to consider changes to the 2005 bankruptcy law on April 30. The bankruptcy law made it more difficult for consumers and homeowners to file for Chapter 7 bankruptcy and is viewed by many groups — including the Center for Responsible Lending, the Consumer Federation of America, and the National Consumer Law Center — as contributing to the steep increases in foreclosures, now occurring at a rate of 20,000 a week, according to *The New York Times*.

The House action is the next step after the Senate adopted the Foreclosure Prevention Act earlier in April, a package mainly made up of tax cuts, as well as modest counseling and financial assistance for homeowners. The bill is aimed more at easing the housing credit crunch by restoring liquidity to the sector than at addressing foreclosures like the House proposal does. This bill provides $11 billion in tax cuts and credits, though they are less targeted to the housing sector and homeowners at risk of foreclosure than in the House proposal. In addition, the Senate did not include offsets in its bill, choosing to deficit-finance the tax cuts. While the Senate version is sharply different from Frank's efforts, Sen. Christopher Dodd☼ (D-CT), chair of the Banking, Housing and Urban Affairs Committee, says he will resurrect an earlier proposal that is similar to Frank's and re-introduce it shortly in the Senate. This vastly increases the chances for a conference on housing crisis legislation.

Related resources: "Senate Housing Legislation Highly Disappointing: Three-Fifths Of Cost Of Senate Bill Goes For Tax Cuts That Will Do Little Or Nothing To Address The Foreclosure Crisis"

Budget Resolution: Despite Glimmer of Hope, Final Resolution Still a Long Shot
It has been six weeks since the House and Senate adopted $3 trillion budget resolutions for Fiscal Year 2009 by close votes of 212-207 and 51-44, respectively. In the time since then, House and Senate conferees have been unable to bridge the gaps between the chambers' versions. If a resolution is not jointly adopted by the two houses, or "deemed" adopted by the houses separately, appropriators will not have any discretionary spending caps or allocations to guide them in crafting annual spending bills.

The conferees' main impediments to compromise on a resolution are the $3.5 billion difference in discretionary spending and whether to offset the cost of a one-year patch to the Alternative Minimum Tax (AMT). The House version mandates offsets while the Senate version does not.

A glimmer of hope appeared during the week of April 21, when the Blue Dog caucus of Democratic fiscal hawks announced they might be willing to relent on their insistence that the $70 billion AMT patch be paid for. On April 24, a leading Blue Dog, Rep. Allen Boyd☼ (D-FL), indicated (subscription) the coalition was willing to look at other strategies to pay for the patch than forcing it to be spelled out in the budget resolution. If this concession is formally agreed to by the caucus over the next couple of weeks, there may be reason to expect passage of an FY 09 budget resolution. If not, the appropriations process will likely proceed as soon as Congress wraps up the war supplemental bill. If this happens, it will be the second time in the last three years Congress has operated without a budget blueprint.

Related Resources: FY 09 Budget Resource Documents

IRS to Continue Flawed Enforcement Program on Partisan Activities

In an April 17 letter, the Internal Revenue Service (IRS) announced that its enforcement program on partisan activities by charities and religious organizations will remain in effect for the 2008 election season. The IRS announcement provided some helpful information on how the agency will consider cases involving charities' websites, but it muddied the waters for organizations that publish voter guides. The announcement does little to mitigate the vagueness of the standard, a problem Rep. Adam Schiff☼ (D-CA) addressed in a hearing where he called for a bright-line rule defining what is and is not allowed.

The tax code prohibits 501(c)(3) organizations, including charities and churches, from intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. In 2004, the IRS created new procedures, now referred to as the Political Activities Compliance Initiative (PACI), to review and fast-track enforcement action on allegations of improper intervention in elections. The new IRS letter said the goals of the program are to "educate the public and relevant community, and provide guidance, on the prohibition..." and to "maintain a meaningful enforcement presence in this area."

To meet its goal of increased awareness of the ban, the IRS said it will target education efforts

to segments of the charitable community that may not be fully aware of it. The IRS did not provide examples of what organizations the agency believes "may not have been reached with past efforts." The IRS also plans to employ newer outreach methods, such as web-based technology, to circulate its educational messages. In a press release accompanying the letter, the IRS said it is sending correspondence to the national political party committees explaining the prohibition of political intervention by charities and churches. The IRS stated that it will "concentrate on allegations of more egregious violations and the cases that result from them." Because the IRS relies heavily on complaints from the public as a means for discovering potential violations, this policy could encourage retaliatory or harassing complaints.

Issue advocacy

The IRS letter commented on cases involving issue advocacy and potential campaign intervention but only added to the confusion surrounding this difficult issue. Although charities can legally take positions on public policy issues, including issues that divide candidates in an election for public office, issue advocacy cannot be used as a guise for intervention in an election. IRS guidance on this topic has been extremely vague, and the commentary in question did little to mitigate confusion. Lois Lerner, Director of the IRS Exempt Organizations Division, said the agency "must be prepared to face taxpayer challenges, which may lead to court, regarding IRS published position on issue advocacy..." She acknowledged that the IRS has encountered "a number of cases with varied fact patterns" that differ from its guidance in Rev. Rul. 2007-41.

Using the example of voter guides, the IRS letter said these may or may not be considered campaign intervention, depending on the context. The IRS states, "Distribution of a communication that on its face appears to satisfy the requirements of a permitted issue advocacy communication may become impermissible campaign intervention if it is accompanied by a statement, or an action, that ties a position articulated in the communication to a particular candidate or election." Unfortunately for charities concerned with matters of public policy that legally advocate on issues, the IRS provides no further details or examples as to what type of "statement" or "action" would create the connections that the IRS deems to be in violation of the ban.

Websites of 501(c)(3) organizations with links to other websites

In its letter, the IRS also provided details on how it views links on the websites of 501(c)(3) organizations, drawing a distinction between links on an organization's website to related organizations (i.e., an affiliated 501(c)(4)) versus links to unrelated sites. In the case of links to unrelated organizations, the IRS said it "will pursue the case if the facts and circumstances indicate that the 501(c)(3) organization is promoting, encouraging, recommending, or otherwise urging viewers to use the link to get information about specific candidates and their positions on specific issues."

In the case of links to related organizations, the IRS said the agency will "not pursue, at this time, cases involving a link between the Web site of a section 501(c)(3) organization and the home page of a Web site operated by a related section 501(c)(4) organization." In its discussion of these situations, the IRS referred to the 1983 U.S. Supreme Court decision in *Regan v.*

Taxation with Representation of Washington, where Justice Harry Blackmun's concurring opinion stressed the importance of formal separation between 501(c)(3) and 501(c)(4) affiliates.

Rep. Schiff calls for bright-line rule

The widespread confusion in the charitable community caused by the IRS' vague facts and circumstances test and uneven enforcement (see OMB Watch's report *Overcaution and Confusion: The Impact of Ambiguous IRS Regulation of Political Activities by Charities and the Potential for Change*) has led to calls for the IRS to implement a bright-line rule on political intervention. Rep. Adam Schiff (D-CA) endorsed this idea during an April 15 hearing of the House Appropriations Financial Services Subcommittee that centered on testimony by new IRS Commissioner Douglas Shulman. According to BNA, Schiff told Shulman that a bright-line test is needed. He also asked the IRS to respond within 30 days to a Sept. 21, 2007, letter from All Saints Episcopal Church to the IRS, in which the church requests information about the two-year IRS investigation into the church's activities.

Court Upholds Stealth Lobbying Disclosure

The National Association of Manufacturers' (NAM) legal challenge to the stealth lobbying disclosure provisions in the 2007 lobbying and ethics reform law was rejected by the U.S. District Court for the District of Columbia on April 11. After the U.S. Court of Appeals and the U.S. Supreme Court refused to grant a stay pending appeal, NAM announced it would comply with the law while its appeal proceeds by disclosing members who contributed more than $5,000 toward lobbying in a quarter and have supervision, control, or active participation in NAM's federal lobbying efforts.

NAM filed suit in February 2008, challenging Section 207 of the Honest Leadership and Open Government Act of 2007 (HLOGA) and charging that the disclosure rules violate the group's First Amendment rights, are "vague, overbroad and burdensome," and could result in boycotts, shareholder suits, and other negative public reaction. In an April 11 opinion, the U.S. District Court for the District of Columbia rejected these arguments, holding that Congress had drafted the law to address a compelling need to stop corruption and that the law is narrowly tailored to meet that goal.

On April 18, Judge Colleen Kollar-Kotelly denied NAM's request for a stay of her decision. Her opinion noted Congress's intent to bring transparency to stealth coalitions with misleading names, such as "The Coalition: Americans Working for Real Change," which represents pharmaceutical companies. Her ruling was upheld by the U.S. Court of Appeals for the District of Columbia, which denied a stay and said NAM did not meet the narrow criteria for such relief. On April 21, Chief Justice John Roberts of the U.S. Supreme Court also denied a stay.

Section 207 of HLOGA limits coalition disclosure to non-individuals that contribute $5,000 or more to the lobbying efforts of an organization that meets registration and reporting thresholds under the Lobbying Disclosure Act (LDA) if the entity "actively participates in the

planning, supervision or control of such lobbying activities." Disclosure can be made by providing a web address to a site that lists these members. It is not necessary for the coalition to be a legal entity for the disclosure requirement to apply, so ad hoc coalitions are also covered.

NAM had claimed that all 11,000 of its members may be subject to disclosure, since many companies volunteer support for NAM's legislative agenda. However, this was an overly broad reading of the law, as it is unlikely that all 11,000 members actively supervise or control NAM's efforts. On April 23, after the Supreme Court rejected its application of a stay, NAM's blog post admitted as much in announcing it would file the required reports on April 21. The post said that the threshold requirements mean that "our larger member companies will comprise the list, that is, the sample is not representative of the membership." Although NAM will pursue its appeal, it said, "On balance, it makes sense not to complicate things at this point by inviting an enforcement action."

When HLOGA was being considered in Congress, many trade associations and conservatives voiced strong opposition to proposed provisions that would have required disclosure of grassroots lobbying activities. The fight over that provision obscured debate over the stealth lobbying disclosure requirements, although at the last second, a number of organizations voiced opposition to those provisions, too.

Many good government groups have noted the role coalitions play in various lobbying campaigns. Prior to HLOGA, the LDA only required disclosure of the coalition name but not its members — or how much each is paying in to the coalition. Another approach often used is when a company provides the funding for a campaign but gives the money to one lobby firm, which then hires another firm. The second firm may choose to create a coalition with such funds. Prior to HLOGA, only the two lobby firms would need to disclose their activities, but the actual client would remain hidden.

These stealth coalitions have proved very powerful. For example, in 2006, Public Citizen and United for a Fair Economy released a report that showed how 18 families worth a total of $185.5 billion financed and coordinated a 10-year effort to repeal the estate tax, a move that would have collectively netted them a windfall of $71.6 billion. These wealthy families, such as those associated with Wal-Mart, Gallo, Campbell's, and Mars, kept their activities anonymous by using associations to represent them and by forming a massive coalition of business and trade associations dedicated to pushing for estate tax repeal.

As a member of the House Ways and Means Committee, Rep. Lloyd Doggett☼ (D-TX) saw the role of these stealth coalitions in various tax bills. As early as 2002, Doggett spoke out for the need for more disclosure, noting that powerful companies joined with Republicans to keep such disclosure from occurring when the Lobbying Disclosure Act initially passed in 1995. Accordingly, he introduced legislation requiring the disclosure of stealth lobbying. Ultimately, a version of his bill made its way into HLOGA and became law. As soon as HLOGA was enacted, the American Society of Association Executives and others said they would challenge

this provision in the courts.

Current enforcement of the stealth lobbying provisions, which are in effect, appears to be questionable. According to an April 29 article in *Politico*, many stealth coalitions aren't reporting who is funding their lobbying efforts; the article notes that some may be taking advantage of the fact that grassroots lobbying disclosure was dropped from HLOGA. Those coalitions that are reporting are doing so in a circumspect way, burying links to lists of coalition members deep within long disclosure reports. In fact, *Politico* noted that more information appears in many coalitions' SourceWatch profiles than in lobbying disclosure reports. SourceWatch is a project of the nonprofit Center for Media and Democracy.

HHS Proposes Restrictive Rules for HIV/AIDS Grantees

On April 17, the Department of Health and Human Services (HHS) published a notice of proposed rulemaking that seeks public comments on special requirements for organizations that receive HIV/AIDS funding from HHS. The rule would require "legal, financial, and organizational" separation between a grantee and any affiliate organization that does not adopt mandatory language opposing prostitution and sex trafficking. This "pledge requirement" is being challenged in court by groups that say the policy might stigmatize and alienate the people in need of HIV/AIDS prevention services and violates First Amendment rights because it applies to other programs that are not federally funded. Comments on the proposed regulation are due May 19.

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the "Leadership Act"), which authorized the President's Emergency Plan for AIDS Relief or PEPFAR. The act mandates that "no funds made available to carry out the Act ... be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." Therefore, all organizations receiving PEPFAR funds are required to adopt an organization-wide policy opposing prostitution. The law is now up for congressional reauthorization (H.R. 5501) with the "prostitution pledge" left intact.

In July 2007, the United States Agency for International Development (USAID) and HHS issued guidelines that allow recipient organizations to establish affiliates that may operate free of the pledge requirement. The proposed rule requires the grantee to have an extraordinary degree of separation between itself and the privately funded affiliate(s).

The proposed rule states, "Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. HHS will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient physical and financial separation exists. The presence or absence of any one or more factors will not be determinative." Factors considered will "include but will not be limited to":

- Separate personnel, management, and governance;
- Separate accounts, accounting records, and timekeeping records;

- Degree of separation from facilities, equipment, and supplies used by the affiliated organization to conduct activities inconsistent with an anti-prostitution policy, and the extent of such activities by the affiliate;
- Extent to which there are materials that could be associated with the affiliated organization; and
- The extent to which HHS, the U.S. government, and the project name are protected from publicly being associated with the affiliated organization.

The anti-prostitution pledge requirement is being challenged in court by grantees who argue that the requirement violates their rights under the First Amendment. In *Alliance for Open Society, Inc. v. USAID*, the plaintiffs challenge the "pledge policy." In February 2008, Global Health Council and InterAction, which are membership organizations of international development and public health groups, were added as plaintiffs. The case is currently pending in the District Court for the Southern District of New York, which will wait to assess the policy's constitutionality until after the rulemaking process has ended.

Critics claim there are problems with vague language throughout the proposed rule. For example, as InterAction and Global Health Council point out in their motion, "The vagueness of the Policy Requirement and Guidelines is exacerbated by the particular vagueness of the factors the Defendants will consider in deciding whether recipients are 'physically and financially separate, many of which use vague terms 'the extent to which' and 'the degree of.' USAID Guidelines at 4. Recipients have no way of knowing how much of any of these factors is too much." There is also no definition of "affiliate."

The proposed HHS rule is modeled on a Legal Services Corporation (LSC) regulation, which requires legal aid programs that receive LSC funds to remain separate from other organizations that do work that cannot be paid for with federal funds. The HHS notice says the proposed criteria were "upheld as facially constitutional by the U.S. Court of Appeals for the Second Circuit in *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 767 (2d Cir. 1999), and *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 229-33 (2d Cir. 2006)," but does not note that the courts are still considering the constitutionality of how the LSC rule is applied.

Since 1996, LSC has placed severe restrictions how its funds can be used and extended these restrictions to private funds raised by legal services programs. In December 2001, a legal challenge against the restrictions was filed in the United States District Court for the Eastern District of New York. In 2004 the court struck down the physical separation requirement but denied the plaintiffs' challenge to the restrictions on direct LSC funding. Both parties appealed, and the U.S. Court of Appeals for the Second Circuit sent the case back to the lower court for reconsideration using a different legal standard to determine the constitutionality of the physical separation requirement.

Unlike the LSC rules, HIV/AIDS grantees operate internationally, which entails additional burdens that are not taken into account. For example, establishing a completely separate affiliate organization would require a new registration in a foreign country. Many countries

may be suspicious of such activity and refuse to issue visas or work permits for more American workers. As InterAction and Global Health Council's motion stated, "The establishment of new and separate affiliates would also almost certainly cause havoc and long delays in the receipt of funds from abroad."

Written comments on the proposed rulemaking are due by May 19. They may be submitted online at regulations.gov or by e-mail to OGHA_Regulation_Comments@hhs.gov.

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In This Issue

Criminal Investigation of Utah Mine Officials Urged

On May 8, Rep. George Miller☼ (D-CA), chair of the House Education and Labor Committee, released the results of a nine-month committee investigation into the collapse of the Crandall Canyon mine in Utah. In the memorandum summarizing the investigation, Miller reveals that he sent a letter of criminal referral to the U.S. Department of Justice (DOJ) recommending the agency investigate the mine's general manager.

The committee's staff began an investigation in late August 2007, shortly after the mine collapse that entombed six miners and led to the deaths of three rescue workers ten days later. In the memo to committee members, Miller outlined the events that led to the collapse, how the staff conducted the investigation, and its conclusions. The staff reviewed about 400,000 pages of documents and interviewed officials from the mining companies involved with

Crandall Canyon, officials from the Mine Safety and Health Administration (MSHA), and family members of those who were killed in the collapse, among others.

As part of the investigation, the committee took depositions in January from three MSHA officials and tried to depose three employees of the mine operator, including Laine Adair, the general manager of the Crandall Canyon mine. Adair works for Utah-American Energy Inc., which operated the mine and is a subsidiary of Murray Energy Corporation, the owner of the mine. All three employees of the mine operator invoked their Fifth Amendment right against self-incrimination. In February, the committee sought depositions from Robert Murray, president of Murray Energy, and Bruce Hill, president of Utah-American. Both men invoked their Fifth Amendment right as well. Other private sector employees also refused to sit for depositions.

The committee hired its own independent engineering consultants to review the roof control plan submitted to MSHA by Utah-American and approved by the agency in June 2007. At the time MSHA approved the plan, the agency was still inspecting the mine's roof. The inspection began in May 2007 and had not been completed at the time of the August collapse.

A roof control plan is required to detail the stability of a mine's roof and walls where mining operations take place. MSHA must approve the plan in order for work to proceed. According to Miller's memo, the consultant's report questioned the sufficiency of the plan MSHA approved for the Crandall Canyon mine and was highly critical of MSHA's actions leading up to the August incident.

The committee investigation concluded that both the mine operator and MSHA should have realized that the roof control plan was inadequate and that it was unsafe to engage in high-risk retreat mining. In March 2007, another collapse in a section of the mine only about 900 feet away from where the miners died should have been a signal that it was unsafe to conduct retreat mining and that the supporting pillars were unstable. Although no one died in the March collapse, the operator was required to report the incident to MSHA.

In his referral letter to DOJ, Miller questioned the honesty and completeness of the mine operator's report to MSHA. Miller's letter indicated that Adair and other managers not only knew about the March collapse and did not report it as required by regulations, but once they did tell MSHA about the March incident, they "significantly downplayed" its extent.

According to a May 9 article in *The Salt Lake Tribune*, the U.S. attorney for Utah, Brett Tolman, received Miller's referral letter, dated April 28, and takes Miller's request "very seriously." Miller is asking the office to investigate whether charges should be brought against Adair.

Miller wants Tolman's office to investigate whether Adair "individually or in conspiracy with others, willfully concealed or covered up" or made "false representations" to MSHA officials about the March 2007 collapse. Those reporting errors would be a violation of federal law and could warrant criminal prosecution by DOJ. Had MSHA known of the full extent of the March

collapse, it might not have approved the roof control plan.

MSHA is conducting its own investigation of the causes of the August collapse but is still a few months away from finishing it, according to the *Tribune* article.

White House Blocking Whale Protection Rule

Multiple White House offices are working in concert to block a new policy that would expand federal protections for the North Atlantic right whale. The offices, including the office of Vice President Cheney, are questioning the findings of scientists at the National Oceanic and Atmospheric Administration (NOAA), the agency attempting to finalize the rule.

NOAA is proposing speed limits on large ships traveling in Atlantic Ocean whale migration areas during seasons when the right whale is most active. NOAA says collisions with ships are a major cause of death of the right whale — one of the most endangered whale species in the world.

Newly released memos sent from NOAA staff to White House officials indicate the White House is trying to undermine NOAA's conclusion that collisions with ships need to be reduced. The memos were obtained by the Union of Concerned Scientists and released by Rep. Henry Waxman☼ (D-CA) on April 30.

In one memo, NOAA staff responded to objections from the White House Council of Economic Advisors (CEA). CEA reanalyzed statistics in a model intended to determine the relationship between ship speed and the risk to right whales. CEA tweaked certain data points to alter the model's outcome and suggested the relationship is not as strong as NOAA had first concluded. NOAA rejected CEA's claims and called its analysis "biased."

Another memo shows an unidentified White House office questioned NOAA's data on the birth rate of right whales and suggested the species population is increasing more quickly than NOAA had concluded. In response, NOAA officials said they "used the latest, peer-reviewed, scientific data when developing the rule," as required by law.

NOAA also continued to defend its proposal in the memo. NOAA wrote that the option to impose speed limits was chosen because it would "protect right whales while also minimizing economic impact to the shipping industry." NOAA selected the speed limit option from more than 100 policy options considered.

A third memo shows interference by the office of Vice President Cheney. According to the memo, Cheney's staff "contends that we have no evidence (i.e., hard data) that lowering the speeds of 'large ships' will actually make a difference." In response, NOAA staff cited records of collisions in which right whales were killed or seriously injured and again argued in favor of ship speed limits.

Cheney does not often involve his office in specific rulemakings. However, the most frequent targets of his attention have been environmental and homeland security rulemakings, according to an OMB Watch analysis.

The interference in NOAA's effort to protect right whales is being coordinated by the Office of Information and Regulatory Affairs (OIRA). OIRA routinely reviews and comments on federal agency rulemakings and solicits the opinions of other offices or agencies. However, it is rare for White House offices to conduct their own research or to see such extended back-and-forths.

Waxman wrote to OIRA Administrator Susan Dudley asking for an explanation of the White House's role. Waxman wrote, "I question why White House economic advisors are apparently conducting their own research on right whales and why the Vice President's staff is challenging the conclusions of the government's scientific experts."

President Bush installed Dudley by recess appointment in April 2007 after opposition from public interest groups, including OMB Watch, and labor unions. Those groups argued Dudley is ideologically opposed to government regulation and that she would put special interests ahead of public need.

In his letter to Dudley, Waxman notes, "The appearance is that the White House rejects the conclusions of its own scientists and peer-reviewed scientific studies because it does not like the policy implications of the data."

The right whale rule has been stuck at OIRA since February 2007. Under Executive Order 12866, which governs the federal rulemaking process, OIRA is supposed to complete its review in no more than 120 days. OIRA also reviewed the rule before NOAA initially proposed it in June 2006.

Environmental advocates and White House critics believe OIRA should discharge the right whale rule quickly because of imminent danger to the species' survival. According to NOAA, only about 300 of the mammals remain. Two right whales have been struck by ships, and one has likely died, in the time the rule has been under OIRA review, according to Waxman. NOAA officials warn that even one more dead female could set the species on an irrevocable path toward extinction.

Congress is considering a bill that would end the OIRA review. On April 24, the Senate Commerce Committee approved a bill (S. 2657) that would require NOAA to quickly finalize the rule. That bill now awaits consideration by the full Senate. A companion bill has been introduced in the House (H.R. 5536).

OMB Interference under Scrutiny in Congress

The White House Office of Management and Budget's review of federal agencies' draft regulations and scientific information was highlighted in two congressional hearings the week

of May 5. The review process gives Office of Management and Budget (OMB) officials an opportunity to delay or undermine public health and safety standards. One hearing examined the constitutional implications of OMB review, the other the scientific implications.

On May 6, the House Judiciary Committee's Subcommittee on Commercial and Administrative Law heard complaints from witnesses about OMB's role in advancing the unitary executive theory through rulemaking.

Under the unitary executive theory, President Bush and conservative constitutional scholars have argued that the president has complete control over implementation of federal law and can ignore the input of Congress in doing so. Bush has used this rationale to dramatically expand the use of presidential signing statements and to ignore the opinions of Congress in his conduct of the war in Iraq.

White House involvement in agency rulemaking is also a battleground for interpretations of executive power, according to hearing witnesses. Congress often delegates regulatory decision making directly to the head of a federal agency. Because agency heads report to the president, the situation becomes murky when agency officials and OMB officials disagree about the substance of regulations.

Noted administrative law scholar and Columbia University law professor Peter Strauss attempted to clarify these situations by defining the president's role as one of oversight. "Our Constitution is very clear, in my judgment, in making the President the overseer of all the varied duties the Congress creates for government agencies to perform, including rulemaking," Strauss testified. "Yet our Constitution is equally clear in permitting Congress to assign duties to administrative agencies rather than the President. When it does, our President is not 'the decider' of these matters, but the overseer of their decisions."

Other witnesses identified several examples where the White House, specifically OMB, has intruded into the substantive work Congress has delegated to federal agencies. Curtis Copeland of the Congressional Research Service discussed the recent revision to the national air quality standard for ozone, or smog.

U.S. Environmental Protection Agency (EPA) Administrator Stephen Johnson had wanted to set a new, tailored standard that would provide greater protection from ozone to sensitive plant life during the summer months. However, OMB's Office of Information and Regulatory Affairs (OIRA) disagreed and pushed for Johnson to abandon his proposal. EPA and OIRA were unable to resolve their disagreement, and Bush was brought in to settle the dispute.

Bush sided with OIRA, even though the Clean Air Act explicitly gives the EPA Administrator the authority to set standards for ozone exposure. As Copeland pointed out, Johnson ultimately claimed responsibility for the decision not to set a summer standard. "[T]he preamble to the final rule that was published in the *Federal Register* on March 27, 2008, indicated that the EPA administrator made the final decision — although the correspondence between OIRA and EPA, as well as subsequent statements by the EPA administrator, indicate

that the EPA administrator was adopting the President's and OIRA's position on the matter," Copeland testified.

Rick Melberth, director of regulatory policy for OMB Watch, discussed OMB's recent interference in a National Oceanic and Atmospheric Administration (NOAA) rule to protect the North Atlantic right whale. In that instance, White House officials have actively worked to undermine the scientific basis for NOAA's policy recommendation. (See related article in this issue of *The Watcher*.)

The ability of OMB to interfere in the science that informs regulatory decisions "give[s] the president unique and unparalleled power ... to shape the substance of agency rulemakings — all behind the scenes," according to Melberth. He added, "In doing so, the implementation of agency statutory requirements may become secondary to the policies and priorities of the president as interpreted by the OIRA staff."

OMB review also drew attention in the Senate. On May 7, an oversight hearing of the Senate Environment and Public Works Committee examined the scientific basis for regulatory decisions at EPA. Throughout the hearing, panel members and witnesses pointed to OMB as a barrier to strong, science-based environmental and public health protections.

In one example, senators and witnesses discussed EPA's recent changes to its process for evaluating the toxicity of industrial chemicals. Under the revised process, EPA allows OMB to review draft versions of its scientific findings and allows OMB to solicit the opinion of other federal agencies or outside interests.

David Michaels, director of the Project on Scientific Knowledge and Public Policy at George Washington University, called OMB's involvement "a black hole" because the scientific studies "go in [to OMB] and they don't come out." A recent Government Accountability Office report concluded that OMB's presence in the chemical assessments can sometimes lead to years of delay.

Sen. Sheldon Whitehouse☼ (D-RI) chided the agency for the lack of transparency associated with OMB's role in the chemical assessments. Although EPA claims the process is transparent, its communications with OMB are classified as deliberative and are not made available to the public. In the hearing, Whitehouse asked rhetorically, "What could be less transparent than secret meetings with OMB?"

Whitehouse also suggested that, unlike EPA, OMB officials do not carry the scientific qualifications requisite to review these assessments.

The Senate panel also heard from Francesca Grifo, the director of the scientific integrity program at the Union of Concerned Scientists (UCS). Grifo testified about a recent survey conducted by UCS that found widespread political interference in the work of EPA scientists. Of the 1,586 EPA scientists that responded to the UCS survey, nearly 100 explicitly identified OMB as a hindrance to scientific work at the agency. In her testimony, Grifo recommended,

"The expanded reach of the Office of Management and Budget must be pushed back."

EPA Official Forced Out for Being Effective

U.S. Environmental Protection Agency (EPA) Region 5 administrator Mary Gade felt the full force of Dow Chemical's influence in Washington when on May 1, she was told to resign or be fired by June 1. Gade, who used to represent industries and often advocated against increased regulation, was on the other side of protracted negotiations with Dow over clean-up of dioxin contamination at its plant in Midland, MI. Gade chose to resign following the ultimatum.

Gade, appointed as head of Region 5 (which covers Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin) by President Bush in September 2006, is an EPA veteran and former director of the Illinois EPA, where she co-founded the Environmental Council of States, an organization that promotes dialog across states. In past jobs for EPA, both in Region 5 and at headquarters, she worked on emergency response, Superfund cleanup, and pollution prevention.

Though EPA officials refuse to comment on the connection between her strong actions against Dow and her forced resignation, Gade has been much more forthcoming, telling the *Chicago Tribune*, "There's no question this is about Dow. I stand behind what I did and what my staff did."

Years of Dioxin Contamination

A regional institution, Dow Chemical Company is one of mid-Michigan's leading employers. The Michigan Operations manufacturing site in Midland is Dow's original production site. In operation for more than 100 years, it spans 1,900 acres.

The mustard gas used in World Wars I and II and the herbicide Agent Orange are among the many chlorinated chemicals that Dow has manufactured at the Midland site. A byproduct of chlorophenol production, dioxin wastes were originally disposed of in on-site ponds, which were allowed to overflow into the Tittabawassee River as needed. Dow released dioxin directly into local waterways for years this way, until EPA outlawed the practice in the mid-1980s.

EPA classifies dioxin as a persistent, bioaccumulative toxin (PBT), a category of chemicals considered to be the most dangerous. Even among PBTs, dioxin is recognized as one of the most toxic chemicals known to humans and is measured on a scale many times smaller than other PBTs. The Toxics Release Inventory threshold for dioxin is 0.1 grams, as opposed to the 10-pound threshold for mercury or 100 pounds for lead. Peer-reviewed studies have implicated dioxin as a cancer-causing agent and in immune and reproductive system disruption.

Dow has been aware of the human health threat of dioxin since the mid-1960s, but the company initially disavowed any responsibility for its presence in the Midland area, claiming

forest fires and wood-burning fireplaces to be the culprit.

The Midland Clean-Up Dispute

In the mid-1980s, EPA began to take notice of dioxin contamination around Dow's Midland plant when fish in the Saginaw Bay were found with high levels of dioxins in their bodies. After first denying responsibility for the toxins, Dow later resisted any claims of dioxin's dangerous health effects. The company used such positions to engage in protracted negotiations with EPA over the issue for more than a decade.

Clean-up guidelines were finally negotiated in 2003, but Dow then continuously delayed implementation, taking only minor steps outlined in the plan. Dow has disputed both the size of the contaminated area, which currently includes 50 miles around the Midland plant, and the severity of the area's contamination, formally filing suit this February.

Dissatisfied with continual wrangling with Dow since she became the EPA regional head in 2006, Gade took increasingly aggressive measures over the past year. She invoked emergency powers in the summer of 2007 to compel Dow to clean up three particularly contaminated areas. In November 2007, she ordered dredging in the waterways that revealed dioxin levels of 1.6 million parts per trillion, *17,000 times* the level that triggers a state clean-up. This is the highest level of dioxin contamination ever recorded in the U.S.

After Dow continued to delay, Gade cut off negotiations in January, and the Michigan Department of Environmental Quality (DEQ) slapped Dow with an "interim response action" (IRA) on April 16, directing the company to take immediate action on parts of the clean-up plan. Two weeks later, EPA gave Gade their ultimatum to quit or be fired. Five days after Gade's forced resignation, on May 6, Dow appealed the IRA determination in yet another lawsuit.

Community Outcry

Local residents have long battled for clean-up of Midland waterways and soils in the area. At a May 7 community briefing, Michigan DEQ and Dow officials assured residents that aspects of the clean-up would continue, regardless of the legal actions, but did not address Gade's resignation.

Tittabawassee River Watch and the Lone Tree Council, local citizens' groups in the Midland area, are not reassured. "Denial and delay has been part of Dow's game plan for years," Michelle Riddick, a Lone Tree Council member, told the *Tribune*. "They still haven't delivered." Tittabawassee River resident Carol Chisholm is fed up. She said, "We pay tax-dollars and expect those agencies who work for us to respond." A group of residents has already sued Dow, alleging that the pollution has devalued their property.

Rep. John Dingell☼ (D-MI), chair of the House Energy and Commerce Committee, is taking notice. He has directed his oversight staff to look into the matter. Sen. Sheldon Whitehouse (D-

RI) protested Gade's resignation in a floor speech as "just the latest in a growing pile of evidence of troubling and destructive forces ... from an administration that values compliance with a political agenda over the best interests of the American people." Whitehouse called for a May 7 hearing to investigate political interference at EPA, but he is still not satisfied after hearing from the agency. Whitehouse was not convinced by Assistant Administrator for Research and Development George Gray's testimony, praising only his "ability to say preposterous things and be completely straightfaced throughout."

Meanwhile, Dow continues to maintain that the Midland area, a designated Superfund site, is safe. As company spokesman John Musser told the *Chicago Tribune*, "There is all of this mystique about dioxin. Just because it's there doesn't mean there is an imminent health threat."

The Rule of Secret Law in the Bush Administration

The Senate Judiciary Subcommittee on the Constitution held a hearing on the proliferation of secret law in the Bush administration. In particular, the subcommittee focused on the role of the Office of Legal Counsel (OLC) in the Justice Department in the development of secret law governing the executive branch.

The hearing began with disagreement between the chairman and ranking member, Sens. Russ Feingold (D-WI) and Sam Brownback (R-KS), respectively, over what constituted secret law. Feingold argued that OLC memoranda and Foreign Intelligence Surveillance Court opinions are binding law and are often issued in secret. Brownback maintained that those issues do not comport with the notion of "secret laws," which he argued were limited to secret agency rules and regulations.

The OLC provides legal advice to the president to guide his decisions and executive agency actions. OLC memoranda are regarded as binding on the executive branch and often go unreviewed by courts and Congress. The OLC is infamous for John Yoo's secret 2002 torture memorandum, which limited the definition of torture to interrogation which results in "death, organ failure or the permanent impairment of significant bodily function."

A set of principles were developed by nineteen former OLC lawyers to guide the office in the wake of the recent controversies. The guidelines recommend, "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure."

Dawn Johnsen, former acting head of the OLC, testified that a contributing factor in the failure to provide the president with accurate legal advice is the failure to make such advice public. "OLC has been terribly wrong to withhold the content of much of its advice from Congress and the public — particularly when advising the executive branch that in essence it could act contrary to federal statutory constraints."

Johnsen stressed that the OLC should be required to disclose opinions that state the president

has the authority to operate in contravention to existing statutes or executive orders. It is particularly important that these memoranda be released, because without such disclosures, Congress and the public would not be given any notice that the president is not abiding by written law. Moreover, OLC memoranda often persist as binding on the executive without being reviewed by courts because they are never challenged or even known to exist.

John Elwood, current head of the OLC, disagreed. He argued that the president needs confidential advice and that the relationship of the OLC to the president should be regarded as an attorney-client relationship. "[T]he Executive Branch must be able to come to a unified interpretation of the law in order to carry out the President's constitutional duty to execute the law faithfully, and doing so necessarily requires the ability to seek and obtain confidential, authoritative legal advice within the Executive Branch," said Elwood.

Elwood also noted that the OLC under his leadership has maintained consistent publication procedures that resulted in a significant portion of memoranda being published on the office's website every year.

Steven Aftergood of the Federation of American Scientists countered Elwood, stating that there has been a "precipitous decline" in the number of OLC memoranda published during the Bush administration. From 1995 to 1997, there were 117 memoranda published, but from 2005 to 2007, there were only 23.

William Leonard, former director of the Information Security Oversight Office, remarked that the OLC torture memorandum never should have been classified in the first place. "The classification of this memo was wrong on so many levels," noted Leonard. It did not contain any sensitive information, only legal analysis, did not identify who marked the document as classified, and did not contain any reasons for why it was classified, all in violation of classification procedures and all done, presumably, by a high-level government official in the Justice Department. Moreover, the administration has never pursued an investigation of who inappropriately classified the document.

The OLC has also been at the center of controversy regarding its advice on the National Security Agency's secret warrantless wiretapping program and the secret Central Intelligence Agency prisons.

The role of the Foreign Intelligence Surveillance Court's issuance of secret opinions, the issuance of secret presidential directives, and the Transportation Security Administration's issuance of secret security regulations were also covered during the hearing. All of these activities have created an environment in which the American public is subject to secret laws, a notion that is anathema to a democratic government. The hearing also attempted to grapple with the role of Congress in examining the magnitude of the problem and restraining the rule of secret law.

Sen. Patrick Leahy☼ (D-VT), chairman of the Senate Judiciary Committee, noted, "Secret law

is not a check on government; when law is kept secret, the rule of law suffers."

White House Issues Memo on Controlled Unclassified Information

The White House released a memorandum on May 9 establishing new rules governing the designation and sharing of Controlled Unclassified Information (CUI). By creating a single designation and consistent procedures, the memo attempts to resolve the growing problem of multiple Sensitive But Unclassified (SBU) designations, which slow the sharing of information.

The memo replaces the multiple SBU categorizations and establishes three universal CUI designations for all agencies; agencies are then barred from creating new CUI categories unless prescribed by the National Archives and Records Administration (NARA). Open government advocates have supported simplifying the more than 100 different SBU categories but fear the memo does little to reduce growing secrecy.

In the wake of the 9/11 terrorist attacks, federal agencies created numerous new SBU categories in an attempt to better protect information believed to have the potential to be used to harm the United States. In doing so, the agencies unwittingly expanded already existing, but little recognized, difficulties that such vague and inconsistent designations carried. This includes confusion among officials as to how to manage information; less and slower sharing of designated information with other federal, state, and local agencies regardless of their need for the information; and near-automatic withholding of such information from the public.

The memo orders several changes that will go far in simplifying the information sharing problems, not the least of which is the creation of CUI as the single SBU category for federal agencies, coupled with a clear ban on the creation of new agency-created SBU categories. However, the definition of CUI remains very broad: information that is "pertinent to the national interests of the United States or to the important interests of entities outside the Federal Government" and requires protection from unauthorized disclosure, special handling safeguards, or prescribed limits on exchange or dissemination. Additionally, the memo appears to only establish a framework for managing "CUI terrorism related information," leaving any CUI that is unrelated to terrorism, which could be a considerable amount of information, largely unaddressed.

The memo creates three possible designations:

- Controlled with Standard Dissemination — Information that requires standard safeguarding to reduce the risks of unauthorized disclosure and dissemination is permitted to the extent that it is reasonably believed to further the execution of a lawful or official purpose.
- Controlled with Specified Dissemination — Information that requires standard safeguarding to reduce the risks of unauthorized or inadvertent disclosure and dissemination is permitted only with additional instructions.

- Controlled Enhanced with Specified Dissemination — More stringent safeguarding measures than those normally required as unauthorized disclosure would risk substantial harm, and material contains additional instructions on what dissemination is permitted.

The absence of any Controlled Enhanced with Standard Dissemination designation implies that any information requiring enhanced safeguarding procedures automatically qualifies as also needing specified dissemination instructions.

The White House memo tasks NARA with being the "Executive Agent" in charge of the new CUI effort, with detailing the safeguarding procedures and dissemination guidance, and several other responsibilities, including:

- Develop and issue CUI policy standards and implementation guidance
- Establish and chair a CUI Council
- Establish, approve, and maintain safeguarding standards and dissemination instructions
- Publish the CUI safeguarding and dissemination standards in the CUI Registry
- Monitor department and agency compliance with CUI policy, standards, and markings
- Establish baseline training requirements and develop a CUI training program to be implemented by departments and agencies
- Provide appropriate information regarding the CUI Framework to Congress; to state, local, tribal, and private sector entities; and to foreign partners
- Advise departments and agencies on the resolution of complaints and disputes concerning the proper designation or marking of CUI
- Establish a process that addresses enforcement mechanisms and penalties for improper handling of CUI.

It appears the purpose of this effort is to eliminate bureaucratic difficulties and to create smoother information sharing with little concern for public access to the information. While the memo's instructions that "CUI markings may inform but do not control the decision of whether to disclose or release the information to the public, such as in response to a request made pursuant to the Freedom of Information Act (FOIA)" acknowledge the possibility that CUI designation could prevent public disclosures of information that merits release, they do little to prevent such outcomes.

The memo offers no instructions that indicate the government is concerned with limiting the amount of information designated CUI. There are no instructions to restrict the number of officials capable of assigning the CUI markings and only some simple acknowledgement that the designation should not be used to conceal information on waste, fraud, or abuse, nor assigned to information that is either already public or ordered to be made public by statute. There are also no time limits on CUI designations; when one considers the fact that classified information is automatically declassified after 25 years unless officials intervene to maintain the information restrictions, it seems strange that CUI designations will be permanent. It may be that NARA will create such procedures to prevent the growth of CUI from encroaching on

public access in the policy standards and implementation guidance the agency is tasked with, but the White House memo does not specify that such steps be a part of the effort. Moreover, it is not clear whether NARA will be given additional resources to implement these new tasks.

For years, the government has been working to resolve this multi-headed SBU problem and streamline the sharing of unclassified information. In December 2005, President Bush issued a memorandum directing SBU procedures to be standardized across the government. Two years later, in December 2007, the Department of Defense issued a memorandum to prepare government officials for an administrative overhaul of the numerous SBU categories to the single CUI designation. The memo explained that a policy had been recommended to the president and that approval was expected shortly. Open government advocates had requested a meeting to discuss the issues, but that request was ignored. The current CUI memo explaining the new policy to executive departments and agencies is not the final step in this long journey; work remains to ensure that the public has access to unclassified information.

Whistleblower Week in Washington

Whistleblower advocates convene in Washington, DC, this week (May 12-16) for events dedicated to honoring whistleblowers, promoting their protection, and educating the public and Congress about the most pressing issues for whistleblowers today.

Whistleblowers play a vital role in ensuring we have a functioning, effective, and accountable government. When governmental checks and balances fail to prevent waste, fraud, and abuse, the responsibility to call notice to a problem and hopefully bring about a resolution often falls to employees. Unfortunately, the Whistleblower Protection Act of 1989, which was enacted to protect federal employees against reprisals for the exposure of government inadequacies, has been rendered largely toothless by judicial decisions. Additionally, there have been recent administrative policies that seek to control and/or limit the speech of scientists, researchers, and policy personnel that might give voice to facts and opinions that differ from the current political agenda.

The whistleblower events this week are part of an ongoing effort over the past several years to restore the needed protections to those employees who have the courage to stand up and draw notice to unaddressed problems. Sponsors hope the events will raise awareness of the shortcomings of our current whistleblower policies among members of Congress as well the general public.

This is the second annual Washington Whistleblower Week (W3), which has organized hearings and workshops on Capitol Hill with congressional leaders' participation. The Government Accountability Project, No FEAR Coalition, Semmelweis Society, U.S. Bill of Rights Foundation, and National Whistleblower Center are among the sponsors of these events.

In a coordinated effort, the International Association of Whistleblowers is simultaneously

hosting the International Assembly of Whistleblowers (IAW), in which public interest groups have gathered to strategize and lobby Congress for greater whistleblower protection.

Some events of note at both conferences:

- Congressional No FEAR Tribunal: Ongoing testimony all day Wednesday, May 14, to members of Congress as part of W3. Public and private sector employees and public interest professionals will provide their insight about the issues and solutions for strengthening whistleblower protection. Rep. Sheila Jackson Lee (D-TX) will chair the event.
- Walter E. Fauntroy No FEAR Awards: May 14 awards reception for members of Congress and citizens who have had a significant role in advancing whistleblower rights.
- Judicial Accountability: IAW-focused events on Thursday, May 15, to discuss issues of whistleblower oversight and accountability in the courts. A debate in the morning will provide context for an afternoon of testimony from a diverse, bipartisan panel.
- Whistleblowers at International Organizations: IAW panel on May 15 focusing on the lack of protections for employees at International Financial Institutions (i.e., World Bank). These institutions operate under the cover of special immunity from national laws and present a particular set of challenges.

The 110th Congress has made significant progress toward re-establishing strong whistleblower protections. Both the House and the Senate have passed bills to reestablish strong whistleblower protections, going beyond the 1989 provisions, but their differences have yet to be negotiated in conference. Those participating in the whistleblower events this week are being strongly encouraged to contact their representatives and senators to express support for key provisions in the respective bills.

Both bills close many of the loopholes left open in the 1989 law and widened by court rulings. The House Whistleblower Protection Enhancement Act of 2007 (H.R. 985) includes federal contractors under the protection mantle, while the Federal Employee Protection of Disclosures Act (S. 274) limits its scope to federal employees. Though President Bush has promised a veto, the bills have strong support and could possibly override a veto should it come with enough time remaining in the session for Congress to respond.

Gas Tax Holiday Would Yield Little for Consumers

Increasing gasoline prices have spurred federal lawmakers to propose policies designed to help consumers at the pump. One such proposal that has garnered considerable attention is a "gas tax holiday." Unfortunately, this proposal would do little for consumers because it would be unlikely to lower the price of gas.

The proposal would entail suspending the 18.4-cent-per-gallon federal tax on gasoline for the summer. Not only has the proposal received wide media attention, it has been universally

panned by experts of all ideological stripes (including *Motor Trend* magazine). At the heart of the criticism is the likelihood that the tax break would mostly serve to inflate the profits of oil and gas companies, and consumers would enjoy little benefit. The basic economic principles described below explain why the benefits of a sales tax break do not wholly accrue to consumers.

The willingness and ability of producers (suppliers) to sell a given amount of gasoline at a given price is known simply as the "supply of gasoline." To maximize profits, gas producers will supply the market with larger quantities of gas as the price of gas increases. For example, when the price of gasoline is $4 per gallon, suppliers will maximize profits by supplying to the market 1 million gallons; when the price of gas is $3.50 per gallon, profits are maximized when 900,000 gallons are sold.

The behavior of the consumer (buyer) is described by the quantity of gas he or she is willing to purchase at each price, and typically this quantity decreases as prices increase. This behavior is known as "demand." And rather than profit maximization, consumers are driven by utility maximization. (Utility is simply the value, or usefulness, that a consumer gains from consuming goods.) When suppliers and buyers meet in the marketplace and exchange goods for dollars, a price will be determined.

When the government becomes a participant in the market — when it imposes a tax on goods — the response of market participants can be described in terms of either a change in demand or a change in supply. To the consumer, it appears that suppliers are supplying smaller quantities of gas at each price (i.e., supply is reduced). To the supplier, it appears that buyers are willing and able to purchase smaller quantities of gas at each price (i.e., demand is reduced). Described either way, the result is an increase in price and a decrease in the quantity of gas sold on the market.

But who would benefit if the gas tax is sent on a "holiday"? If suppliers pay the tax, their profits will increase during a gas tax holiday. If buyers pay the tax, then their ability to purchase other goods is enhanced if the gas tax is temporarily repealed. And, the proportion that each pays, the incidence, is determined by how responsive each is to changes in price. If the consumer is relatively more responsive to changes in prices (i.e., when prices increase, the decrease in his or her quantity consumed is greater than the increase in quantity supplied), then the producer pays the greater share of the tax and will benefit more than the consumer from a repeal. Vice versa for the consumer.

A suspension of a sales tax, then, mostly benefits the market participant that is less responsive to changes in prices. So, some portion of the tax on gas will go toward higher profits for gasoline suppliers, and the rest will go to the pockets of consumers. As it turns out, according to one study, the gas tax incidence falls almost equally on buyers and suppliers of gas in the United States. If we assume that $9 billion would have been collected in federal gasoline taxes over the summer, then a temporary suspension of the gas tax would have at least four results:

- The Highway Trust Fund would see nine billion fewer dollars

- Gasoline producers (Exxon, Chevron, etc.) would see their profits increase by $4.5 billion
- Motorists would save $4.5 billion — about $40 per driver over the summer
- Motorists would be willing and able to drive more, consuming more gas, spending more time on the road, creating more pollution — and possibly not saving even the $40 per driver over the summer.

A crucial caveat to these numbers, however, is the nature of the short-term supply of gasoline. Decisions of how much gas to produce are made months in advance, and changing production quantities over a three-month period is a costly endeavor that may not even be possible to undertake at this point. This implies that during the summer driving season, a time span for which production decisions have already been made, the ability of producers to change the quantity of gasoline supplied is severely impaired, making suppliers considerably less responsive to changes in gas prices. The upshot is that the vast majority of a "gas tax holiday" tax cut — nine billion dollars — would go toward increasing gas suppliers' profits.

Most major oil companies have been making historic profits in recent years. The largest company, ExxonMobil, reported profits for the most recent quarter of $10.9 billion, the second-largest quarterly profit in U.S. history. This quarter is not an anomaly. Just the quarter before, ExxonMobil reported the largest-ever quarterly profit for a U.S. company at $11.66 billion.

A suspension of the federal gas tax would ultimately inflate the profits of the most profitable companies of the world while providing miniscule relief to consumers. And as motorists would see marginally cheaper gas, they would drive more miles on the bridges and roads that depend on a trust fund deprived of $9 billion in revenues for repairs.

House Foreclosure Legislation Meets GOP Ambiguity

Despite a worsening housing crisis across the country, Congress continues to move slowly to enact legislation intended to ease the burden for homeowners. On May 8, the House adopted comprehensive legislation (H.R. 3221) that would seek to reduce foreclosures in the face of an administration veto threat issued just days before. But Senate negotiations between the chair and ranking member of the Banking, Housing, and Urban Affairs Committee have gone on for weeks, with no deal in sight. Most members' eagerness to pass a bill to address the crisis before Memorial Day has thus far been thwarted by key GOP leaders in Congress and some in the Bush administration.

While the debate in Congress drags on, the nation's housing situation continues to deteriorate. Home prices have fallen ten percent in the last year, and 20,000 more American homes enter foreclosure each week. In just the last two months, the number of homes in foreclosure has gone from one in 557 to one in just 194.

It appeared there was consensus forming around the recently-passed approach in H.R. 3221,

the American Housing Rescue and Foreclosure Prevention Act drafted by House Financial Services Committee Chair Barney Frank (D-MA). The bill would provide $300 billion in mortgage refinance loan guarantees through the Federal Housing Administration (FHA), helping Americans across the country refinance their mortgages and avoid foreclosure.

Yet continuing mixed signals from the administration throughout the spring regarding H.R. 3221 have cast doubt on the bill's prospects. Housing and Urban Development Deputy Secretary Roy Bernardi wrote a letter to Frank on April 24 opposing the bill. "Americans don't want to pay for the risky financial behavior of others," Bernardi said. "And they don't want to make the federal government the lender of last resort, with the private sector dumping bad loans on FHA and the taxpayers themselves."

At the same time, Treasury Secretary Henry Paulson said the administration had already proposed a similar plan and indicated he was open to Frank's bill. "There are not huge differences," Paulson said, within days of the Bernardi letter. "We are behind the objectives. We like some parts of it better than others and we have not issued a veto threat," he told Reuters.

Speculation about the administration's position halted momentarily on May 6 when President Bush released a Statement of Administration Policy (SAP) threatening to veto H.R. 3221. The SAP argued that:

- The administration's FHASecure program "has already helped more than 180,000 borrowers refinance"
- The Frank plan's "$1.7 billion price tag would be passed on to taxpayers who are not participating in this new FHA program. This attempt to shift costs to taxpayers constitutes a bailout"
- Frank's concession to administration demands to include "GSE Reform and FHA Modernization ... in H.R. 3221 is largely symbolic"
- The bill is "likely to prove ineffective. The requirements to write down a portion of the principal balance and to waive prepayment penalties by existing lenders will likely result in only the worst loans being approved by servicers to participate in the program"

Rejoinders by Frank and others have disputed each of these claims. The Congressional Budget Office estimated the Frank plan would forestall at least three times as many foreclosures as FHASecure. OMB Watch estimated the Frank foreclosure prevention plan would, at most, cost the average taxpayer *$4 dollars a year*. Against this backdrop is the cost of the housing crisis, which Princeton Professor Paul Krugman projects will be six to seven trillion dollars in lost home equity value.

It was not just outside analysts and experts who questioned the Bush administration's tactics, as some congressional Republicans openly doubted the sincerity of Bush's veto threat. Sen. Mel Martinez☼ (R-FL), who served as Bush's first Secretary of Housing and Urban Development was quoted in *The New York Times* as being "surprised" by the White House's

actions and felt the inconsistent message and late and "obtuse" threat was issued merely as a negotiating tactic. An even more telling response to the SAP came from the 39 Republican House members who joined the majority in the May 8 vote to pass the Frank bill 266-154. As one of them, Rep. Steven LaTourette☼ (R-OH), told the *Washington Post* after the vote:

> What's offensive is some of the rhetoric. They say it rewards speculators. No, it doesn't. It's limited to homeowners. They say it's a $300 billion bailout. No, it's not. It costs $1.7 billion. Would I have written the bill the way Chairman Frank did? No, but we're not in charge anymore ... People are expecting us to do something.

Whether Congress does anything depends largely on what Senate Banking, Housing, and Urban Affairs Committee Chair and Ranking Member, Sens. Christopher Dodd (D-CT) and Richard Shelby (R-AL), respectively, plan to do with Dodd's housing bill. That bill is modeled on H.R. 3221 but provides up to $400 billion in FHA loan guarantees. Dodd's legislation was originally included in, then dropped from, the Senate housing package adopted on April 10. Dodd recently reintroduced his original FHA loan guarantee proposal in a separate, stand-alone bill.

The final Senate package has been roundly criticized, especially for its tax provisions. The Center on Budget and Policy Priorities reported those provisions "will do little or nothing to help either homeowners or hard-hit communities and that in one case will actually worsen the problems facing local governments."

Prospects for the Dodd bill may have been complicated on May 9 when a front-page article in *The New York Times* broke a story detailing Shelby's real estate interests. The article noted that critics of Shelby believe his "ties to the mortgage industry and the Alabama real estate market, and the generous campaign donations he receives from financial services companies, have distorted his perspective and led him to delay critical legislative remedies" to the point where, some feel, Shelby should not be playing a leading role in drafting solutions to the housing crisis. Frank in particular feels that during the recent negotiations, Shelby has been a major obstacle to passing compromise proposals.

With a cloud over Shelby's role in negotiations with Dodd on a Senate companion piece to the Frank bill, the White House's apparent determination to veto the bill, and continued opposition to it from the GOP congressional leadership, the road ahead for the Frank bill is far from certain. But the salience of the issue and election-year imperatives may push Congress past the current obstacles to enact some kind of relief package before the year is over.

Congressional Hearings Explore Contracting Waste, Fraud, and Abuse

The Senate Democratic Policy Committee (DPC), the political arm of the Democrats in the Senate, has been holding a series of investigatory hearings concerning contracting problems

during the Iraq war. The series of hearings has been aimed at increasing accountability and oversight of the federal contracting process, particularly related to the reconstruction of Iraq and the increased outsourcing of key military functions during the war.

The committee held two hearings at the end of 2007 and has followed those with two more in 2008 in a 14-hearing series dating back to the 109th Congress. The most recent hearing was held May 12, and focused on waste, fraud, and abuse in reconstruction contracts and the failure of anti-corruption efforts by the United States in Iraq. The committee heard testimony from two former State Department officials from the Office of Accountability and Transparency (OAT) — an office designed as the federal government's premier effort to combat corruption in the Iraqi government. Arthur Brennan, the former head of OAT, and James Mattil, the former chief of staff for OAT, testified that the U.S. government repeatedly ignored warnings and recommendations from OAT about corruption in the Iraqi government and kept secret many pieces of information that could embarrass the Iraqi government.

The DPC hearings during the 110th Congress started in the fall of 2007 with two hearings investigating problems with contracting in Iraq. The first hearing, held on Sept. 21, delved into abuses by private security firms operating in Iraq and the lack of protections for whistleblowers who report corruption or waste in reconstruction contracts. The hearings saw two panels of independent witnesses, the first focusing on private security contractors, particularly BlackwaterUSA, amid reports of misconduct by that and other security companies. The second panel heard from witnesses who have been demoted, fired, threatened, and even detained for speaking the truth about Iraq contracting practices.

The DPC held a second hearing in 2007 on Dec. 7, where two additional former contractor employees who had witnessed and reported waste, fraud, and abuse in contracting in Iraq shared their experiences. These witnesses reported a similar pattern of retaliation by their companies after reporting problems. In addition, two defense policy experts, Phillip Coyle of the Center for Defense Information, and Larry Korb of the Center for American Progress, testified about wasteful spending practices within the Department of Defense.

The first DPC hearing of 2008 took place on April 28 and focused on waste and abuse in contracting in Iraq, hearing from two former employees of KBR, Inc., a large defense contractor operating in Iraq, and another witness who was employed by a subcontractor of KBR. The witnesses discussed rampant theft and destruction of military equipment and materials, billing fraud, and contract fraud, including awarding contracts to subcontractors for work that was never completed. The witnesses also reported being retaliated against for reporting misconduct or corruption. Specifically, they suffered threats and detainment.

The recent hearings in the DPC have been particularly timely, as there have been a variety of legislative initiatives introduced in both the House and the Senate in 2008 that would help to bring greater accountability and transparency to the federal contracting process, especially in Iraq. The House has passed a number of these reforms in recent months, but the Senate has not yet taken up those proposals. The proceedings in the DPC hearings continue to confirm the need to enact these reform proposals as a first step in reforming the federal contracting

system.

However, these bills have not been enacted, and there continues to be a need to expose wasteful and corrupt practices and hold contractors and others responsible for abusive behavior. Sen. Byron Dorgan☼ (D-ND), the chairman of the DPC, stated that one of the themes that has emerged from these hearings is the level of impunity contractors in Iraq operate under.

What's more, continued and repeated reports of corruption and waste in federal contracting show there are still significant and consistent problems in the federal procurement process, particularly in defense contracting. In addition, federal government employees who are supposed to oversee contracting are overworked and undertrained. While this workforce has increased 6.8 percent since President Bush took office, federal contracting dollars have increased close to 100 percent (from $219.8 billion in FY 2001 to $430.1 billion in FY 2007).

It is clear more oversight is needed, and the DPC hearings are making an important contribution to that effort. Yet because the hearings are being held in a political setting (the DPC was established by an act of Congress but operates to promote Democratic Party policies), they will be less effective in building momentum for enactment of reforms than traditional Senate hearings. The DPC is filling an oversight void left in the Senate by inaction from the usual, bipartisan committee structure on corruption and waste in federal contracting. The Senate Homeland Security and Governmental Affairs Committee (HSGAC) has held only six hearings since the beginning of 2007 related generally to federal procurement, and only one hearing during that period covered contracting in Iraq. The House counterpart, the Oversight and Government Reform Committee, held 13 hearings related to federal procurement, and 11 of those hearings were directly related to the Iraq war.

Unfortunately, the DPC hearings are unlikely to further contracting reform efforts in the Senate because of the partisan perception of the hearings. The HSGAC needs to focus more attention on the federal contracting process, an apparatus in need of immediate and drastic reform, in order to advance any number of common-sense reforms.

Veterans Administration Bars Voter Registration Drives for Wounded Soldiers

On April 25, the Department of Veterans Affairs (VA) issued Directive 2008-023, "Voting Assistance for VA Patients," allowing voter registration drives in VA hospitals, only to reverse itself on May 5 with Directive 2008-025. Without registration drives, it appears that each veteran will have to request support individually, placing the burden on veterans who are staying in hospitals, long-term care facilities, or nursing homes. Litigation on the issue is pending.

Under the April directive, viewed as a positive response to pressure from voting rights advocates and Capitol Hill, all VA facility directors were to ensure "that the facility has a policy

that addresses assistance to VA patients who seek to exercise their right to register and vote."

The May VA policy states, "It is VHA policy to assist patients who seek to exercise their right to register and vote; however, due to Hatch Act (Title 5 United States Code (U.S.C.) §§ 7321-7326) requirements and to avoid disruptions to facility operations, voter registration drives are not permitted."

A May 6 letter from Sens. John Kerry (D-MA) and Dianne Feinstein (D-CA) to Secretary of Veterans Affairs James B. Peake expressed skepticism about the VA rationale, saying, "The Office of Special Counsel has made clear that federal employees, even those who are considered to be in sensitive positions, may 'assist in voter registration drives.' It is also clear from numerous policy statements issued by the Office of Special Counsel that federal employees can participate in nonpartisan voter registration drives on federal property and on official time. Moreover, the veterans the VA should support are not subject to any restrictions under the Hatch Act — because they are not federal employees." The letter also said, "It appears to us that the Department took one step forward for our veterans and the right to vote by directing that assistance be provided with voter registration and with securing absentee ballots, but then took a large step back by prohibiting voter registration drives."

VA Has Opposed Voter Registration Drives for Months

The VA's latest rejection of voter registration drives follows months of determined opposition by the VA in response to calls for the agency to help veterans vote. Kerry and Feinstein had earlier requested that the VA be designated a "voter registration agency" under the National Voter Registration Act (NVRA) — also known as the "Motor Voter Act." The Act requires states to offer voter registration opportunities at all offices that provide public assistance, services to the disabled, and motor vehicle registration services.

VA Secretary Peake responded to the earlier appeal in an Apr. 8 letter, obtained by AlterNet's Steven Rosenfeld. Peake wrote, "The VA remains opposed to becoming a voter registration agency pursuant to the National Voter Registration Act, as this designation would divert substantial resources from our primary mission." In their May 6 letter, the senators responded by saying, "We would appreciate knowing the type of disruptions the VA envisions might occur during voter registration drives by nonpartisan organizations, such as the League of Women Voters or veterans' organizations, and why any potential disruption could not be addressed by less restrictive means."

California Secretary of State Takes Action

In a request similar to that made by Kerry and Feinstein, California Secretary of State Mary Bowen sent a letter to Peake on May 1, also requesting that the VA register as a "voter registration agency." In her letter, Bowen wrote, "Offering the opportunity to register — or re-register — is particularly important for veterans who change their address as a result of accepting federal benefits, such as entering a VA nursing home, emergency housing, or rehabilitative care center. My goal as Secretary of State is to provide voters with a simple and

convenient registration process."

In a connected case, on June 12, the U.S. Court of Appeals for the Ninth Circuit will hear oral arguments in *Preminger v. Nicholson*. The case challenges the absence of a uniform published VA policy on voter registration, as well as the distribution of unpublished instructions that authorize staff to exercise discretion in allowing or prohibiting voter registration activities. This case follows a decision by the U.S. Court of Appeals for the Federal Circuit in August 2007 in *Preminger v. Secretary of Veterans Affairs* that permitted the VA to exclude voter registration by third-party groups in VA facilities.

Group Plans to Challenge IRS Election Standard

The Alliance Defense Fund (ADF), an Arizona nonprofit organization, has launched an effort to encourage ministers to "preach from the pulpit a sermon that addresses the candidates for government office in light of the truth of Scripture." "Pulpit Freedom Sunday" is planned for Sunday, Sept. 28, slightly more than a month before the presidential election. The group will intentionally use sermons to challenge the Internal Revenue Code's ban on partisan electioneering by 501(c)(3) organizations. It hopes any investigations lead to a lawsuit and a court decision finding the prohibition to be unconstitutional.

The May 9 Wall Street Journal reports this as "the latest attempt by a conservative organization to help clergy harness their congregations to sway elections." ADF argues the ban on election intervention is government intrusion that prevents clergy from advising their congregations, forcing pastors to choose between speaking about candidates and losing their tax-exempt status. Its executive summary states, "Churches have too long feared the loss of tax exempt status arising from speech in the pulpit addressing candidates for office. Rather than risk confrontation, pastors have self-censored their speech, ignoring blatant immorality in government and foregoing the opportunities to praise moral government leaders."

An ADF white paper describes the group's initiative in further detail, outlining its rationale for this effort. ADF believes that the electioneering ban:

- Violates the Establishment Clause by requiring invasive government monitoring of religious organizations' speech to ensure they are not intervening in an election
- Violates the Free Speech Clause because it requires the government to discriminate against speech based solely on the content of the speech; therefore, there are conditions of tax exemption based on refraining from certain speech
- Violates the Religious Freedom Restoration Act (RFRA), which requires that before any law can burden the exercise of religion, there must be a compelling reason, and the government has no compelling reason for the ban

ADF would like 40 or 50 houses of worship to take part. As a part of this litigation strategy, ADF will prepare and provide legal defense for participating pastors. An ADF frequently asked questions sheet explains that the sermons will be written "with the assistance and direction of

the ADF to ensure maximum effectiveness in challenging the IRS. Should the IRS investigate the church, the church may then participate as a client in a lawsuit against the IRS and will assist the ADF in winning the lawsuit by communicating with the ADF and following counsel's advice concerning litigation strategy."

Americans United for Separation of Church and State (AU), a group which often initiates complaints to the IRS of prohibited partisan activity, responded with a press release denouncing the initiative, saying the "Religious Right group's plan to ask churches to violate federal tax law on electioneering is deplorable." Other opposition to this effort includes the Interfaith Alliance, which issued a statement noting, "When religious leaders endorse candidates from the pulpit, they weaken both the sanctity of religion and the integrity of democracy."

This project overlooks some fundamental rights of 501(c)(3) organizations and the capacity of church leaders as individuals. 501(c)(3)s can discuss issues, even those of importance to an election. Religious organizations may engage in voter education campaigns, invite candidates to speak at their facilities, or release voter guides, as long as such activity does not support or oppose a candidate. In addition, as individuals, church leaders may endorse candidates without any negative consequences to the church.

However, given vague rules and unclear enforcement by IRS, many places of worship are likely to be confused. ADF references the All Saints Episcopal Church case as an example of such ambiguity; the IRS closed the examination without penalizing the church, even though the agency determined that the church engaged in direct campaign intervention.

Rep. Walter Jones☼ (R-NC) introduced related legislation, H.R. 2275, which would repeal the prohibition on campaign intervention for all 501(c)(3) organizations. If the bill were enacted, religious organizations and charities could engage in campaign activities without risking their tax exemption but would still have to abide by appropriate campaign finance laws. Jones introduced similar bills in past congressional sessions, but those only exempted houses of worship. S. 178, the Religious Freedom Act of 2007, introduced by Sen. James Inhofe☼ (R-OK), would only exempt houses of worship. OMB Watch has opposed the Inhofe bill, arguing religious organizations should not be able to engage in activities that would remain prohibited for secular 501(c)(3) groups. At the core of the prohibition is the principle that taxpayers should not be required to fund partisan activities through tax exemption.

A recent Congressional Research Service report, *Churches and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, noted, "The line between what is prohibited and what is permitted can be difficult to discern. Clearly, churches may not make statements that endorse or oppose a candidate, publish or distribute campaign literature, or make any type of monetary or other contribution to a campaign.... In many situations, the activity is permissible unless it is structured or conducted in a way that shows bias towards or against a candidate. Some biases can be subtle and whether an activity is campaign intervention will depend on the facts and circumstances of each case."

The blurry line between what is and is not considered partisan electioneering has led to calls for the IRS to issue a bright-line rule so that nonprofits can comfortably know what they can and can not do prior to an election.

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In This Issue

White House Involved in EPA's California Waiver Decision

A report released May 19 by the House Committee on Oversight and Government Reform concluded the White House improperly intervened in a decision by the U.S. Environmental Protection Agency (EPA) to deny California's request for a waiver under the Clean Air Act. The waiver would have allowed the state to set standards for greenhouse gas emissions from new vehicles. In denying the waiver, EPA Administrator Stephen Johnson went against the recommendation of EPA staff, who concluded there was no legal or scientific basis to deny the waiver.

The Clean Air Act allows for two separate standards for controlling motor vehicle emissions, a federal standard and a waiver for one state, California, which already had in place its own standard. The latter may be adopted by other states, but those states do not have the authority

to create different standards. The law requires the EPA to grant a waiver to California if the agency determines that the state's standard is at least as protective of public health as the Clean Air Act regulations.

EPA may deny California's waiver requests, under this section of the law, if the Administrator finds that "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with" certain federal statutory requirements.

According to the report prepared by the majority staff of the committee, California has historically been granted waivers by EPA over "several decades." The discretion given to California to set its own standards is quite broad due to the unique characteristics of the state, and therefore, the burden of proof is on those opposing the waivers. The report details the process used internally at EPA regarding this particular waiver request, which California submitted to EPA in December 2005. The report concludes that the "career staff at EPA unanimously supported granting California's petition."

The investigators interviewed or deposed eight EPA officials and subpoenaed documents that EPA refused, at first, to provide to the oversight committee. On April 8, committee chair Henry Waxman (D-CA) issued another subpoena for documents related to the communications between the EPA officials and the White House, but EPA has withheld some of the documents requested. Investigators have reviewed more than 27,000 pages of documents from EPA.

The staff report chronicles the series of briefings EPA staff gave to Johnson. These briefings, conducted between June and late October 2007, made clear the conclusions of the technical and legal experts at EPA, including:

- That California's unique geography, climate, and driving population "remain compelling and extraordinary" and that the state is "highly vulnerable to climate change."
- The impacts of climate change are likely to exacerbate California's existing ozone problem. More importantly, "climate change impacts on California's wildfire, water resources, and agricultural situation may be the state's greatest concerns."
- "California exhibits a number of specific features that are somewhat unique and may be considered compelling and extraordinary with regard to both the need for mitigation actions and its potential vulnerability to climate change."

These briefings apparently led Johnson to conclude in the fall of 2007 that he should grant the waiver or at least a partial waiver (granting the waiver for only few car model years). According to the deposition of one EPA official, Associate Deputy Administrator Jason Burnett, after Johnson met with officials in the White House, he changed his conclusion and moved to deny the waiver. Burnett refused to tell the committee with whom Johnson and other EPA officials communicated. Burnett also did not confirm that Johnson's change was a direct result of those communications, but, in answering questions from the investigators, Burnett provided some

evidence that such was the case. He had been directed by EPA not to answer questions about those internal deliberations between the agency and the White House.

Johnson announced his decision to deny the waiver Dec. 19, 2007, in a letter to California governor Arnold Schwarzenegger, citing California's lack of compelling and extraordinary conditions. Burnett told committee investigators that there was "White House input into the rationale in the December 19th letter."

According to the staff report, EPA administrators typically announce these final decisions and issue formal legal justifications for the decisions at the same time. In this instance, EPA did not release the justification document until March 6. It included additional justifications for the denial, including that the waiver provisions of the Clean Air Act were not intended "to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems." The legal justification also stated that Johnson did not believe the impacts of climate change are greater on California than the rest of the nation.

Johnson's denial of the waiver not only led to the investigation by the Committee on Oversight and Government Reform but also to congressional proposals to overturn the decision. Sen. Barbara Boxer☼ (D-CA) introduced legislation in January to override Johnson's decision and to approve this particular waiver request. The legislation would allow California and as many as nineteen other states to move forward with adopting California's motor vehicle emission standards. On May 21, the Senate Committee on Environment and Public Works, which Boxer chairs, reported the bill out favorably. A companion bill, H.R. 5560, was introduced in the House March 6 by Rep. Peter Welch☼ (D-VT) and has been referred to the House Committee on Energy and Commerce.

For Bush-Era Regulations, the Clock Is Ticking

In a memorandum to regulatory agencies, White House Chief of Staff Joshua Bolten has set a Nov. 1 deadline for any new regulations agencies wish to finalize by the end of the Bush administration. The memo will shape the work of White House officials and federal agency heads as they consider which regulations to push through in the coming months, with an eye toward securing an administrative legacy for President Bush.

Bolten issued the memo under the guise of reversing "the historical tendency of administrations to increase regulatory activity in their final months" — commonly known as midnight regulations. In reality, the memo may simply change when the clock strikes midnight in order to insulate potentially controversial rules from disapproval by a new administration. Other rules moving slowly through the regulatory pipeline may be delayed until after Bush leaves office.

Bolten sent the memo on May 9 to the heads of executive branch departments. The memo states, "Except in extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be

issued no later than November 1, 2008."

While the November 1 deadline is clear, the June 1 deadline can be interpreted in two ways. The term "proposed" likely refers to a federal agency's publication of a notice of proposed rulemaking in the *Federal Register* — the usual point at which a rule is first revealed to the public and opened for comment. However, because the memo does not specify to whom the rule must be proposed by June 1, it may also refer to the Office of Management and Budget review process, which is the final intra-governmental clearance before public release of a proposed rule.

The memo gave agencies 22 days, including weekends, to adjust to this new schedule. Inevitably, this will have an impact on the ability of agencies to complete work that may have been in the pipeline for later in 2008. While there is no way to know which rules will be delayed and which accelerated, it is clear that rules still in the developmental stage as of June 1 are not likely to be finalized if the Bolten memo is followed.

For example, President Bush said in 2007 that he would act on climate change. In response, EPA Administrator Stephen Johnson described plans to publish an advanced notice of rulemaking on climate change in a March 27 letter to the Senate Committee on Environment and Public Works. The advanced notice is expected to be issued some time in June. Presumably, this would mean that the administration has decided it will not finalize any rules on this topic during the remainder of Bush's term.

This may also create a series of unintended consequences. For example, there is a controversial rule being considered that would force international HIV/AIDS grantees to choose between adopting government policy explicitly opposing prostitution and sex trafficking for their entire organization or setting up a completely separate affiliated organization. The rule is in response to a 2003 law requiring a pledge to oppose prostitution and sex trafficking in order to receive government funding, and that law is being challenged in court. According to the Brennan Center for Justice, "During oral argument, the government's attorney informed the court and the plaintiffs that USAID and HHS [Department of Health and Human Services] intended to issue guidelines that would permit Global AIDS Act grantees to form privately funded affiliates that could operate free of the pledge requirement....HHS has informed the court that it will put its July 2007 guidelines through a notice and comment process by April 2008. The court will wait to assess the constitutionality of the guidelines until after that process has ended."

The comments on the proposed guidelines were issued before June 1, which means it is possible that the agency could issue a final rule during Bush's remaining time in office. HHS would need to review the comments, draft a final rule, clear it internally within HHS, send it to OMB for review, and publish it by November 1. If that schedule is not followed, there will be no final rule, according to the Bolten memo. If there is no final rule, it is unclear how the court will proceed.

The only publicly available list of rules in the pipeline is the most recent Unified Agenda, the semiannual listing of an administration's planned regulatory actions. It is notorious for

inaccurate timetables but may provide some clue as to what regulations could be affected by the Bolten memo.

The following is a list of important environmental, public health, and public safety regulations that might or might not make the cut off date for the Bolten memo. All of these rules have been proposed and opened for public comment. Most of these are efforts to weaken public protections. If they were to be stopped by the Bolten memo, it would allow the next administration to revisit the decisions to chip away at the regulations. On the other hand, if accelerated, it would simply move the midnight regulations up in time to November 1.

Rule topic, agency	**Timetable***	**Description**
Revision of the definition of solid waste to allow recycling of hazardous materials (Environmental Protection Agency).	Proposed Oct. 28, 2003. Planned completion date: July 2008.	This rule would redefine the term solid waste to exclude certain hazardous materials. The rule would allow more industrial waste to be introduced into the recycling stream.
Revision of federal standards for roof strength in passenger vehicles, National Highway Traffic Safety Administration (Department of Transportation).	Proposed Aug. 23, 2005 and Jan. 30, 2008. Planned completion date: July 2008.	This rule would strengthen existing standards for roof-crush resistance in order to reduce injuries and fatalities during vehicle rollovers. Critics charge the rule is too weak to make a marked improvement in vehicle safety and does not require automakers to adopt readily available technology that would significantly increase roof strength. The rule would also prohibit future damages claims brought by injured persons in state courts. More information...
Mandatory public notification of retail outlets that have received recalled meat and poultry products, Food Safety Inspection Service (Department of Agriculture).	Proposed Mar. 7, 2006. Planned completion date: July 2008.	This rule would require USDA to disclose to the public the names of retailers that have received recalled meat or poultry products. Currently, neither USDA nor meat and poultry processors are required to release the information. While the rule would be a positive step, critics fear USDA may only require disclosure for Class I recalls (the most serious kind) and not Class II and III recalls. More information...

Permitting exemption for farms claiming "no discharge" into waterways (Environmental Protection Agency).	Proposed June 30, 2006 and Mar. 7, 2008. Planned completion date: July 2008.	This rule would exempt concentrated animal feeding operations, sometimes called factory farms, from applying for discharge permits if they claim they do not discharge pollution into waterways. Critics charge EPA would be unable to substantiate the farms' claims. Critics also claim, by waiving permitting requirements, EPA would be unable to monitor and enforce provisions of the Clean Water Act.
Revision of air pollution control requirements for industrial facilities operating near national parks (Environmental Protection Agency).	Proposed June 6, 2007. Planned completion date: October 2008.	This rule would change the way air pollution in national parks is measured and, in turn, allow more power plants to meet air emissions requirements. Critics charge the revision would lead to more pollution in national parks, which would increase health risks and reduce visibility. More information...
Permission for surface mining operations to place excess material in waterways, Office of Surface Mining (Department of the Interior).	Proposed Jan. 7, 2004 and Aug. 24, 2007. Planned completion date: November 2008.	This rule would allow mountaintop mining within 100 feet of streams and allow for the deposition of excess material in waterways. Currently, mining in the so-called stream buffer zone is prohibited, but rules are poorly enforced. According to Earthjustice, "1,208 miles of streams in Appalachia were destroyed from 1992 to 2002" because of mountaintop mining. More information...
Reporting exemption for farms emitting air pollution from animal waste (Environmental Protection Agency).	Proposed Dec. 28, 2007. Planned completion date: November 2008.	This rule would exempt farm animal waste from the definition of solid waste. Because of the exemption, farms would no longer be required to report air pollution caused by animal waste. More information...
Revisions to rules implementing the Family and Medical Leave Act, Employment Standards Administration (Department of Labor).	Proposed Feb. 11, 2008. Planned completion date: November 2008.	Critics charge this rule would make it more difficult for workers to claim unpaid leave under the Family and Medical Leave Act. Among other things, the rule would make it more difficult for workers to use paid vacation or personal time during FMLA leave; allow employers to speak directly to an employee's health care provider; and

		require chronic condition sufferers to visit their doctors every six months in order to recertify their condition. More information...
Limit on the number of hours a truck driver can drive in one day, Federal Motor Carrier Safety Administration (Department of Transportation).	Interim final rule issued Dec. 17, 2007. Planned completion date: December 2008.	In July 2007, a federal court rejected a rule allowing truck drivers to drive for up to 11 hours per day. On Dec. 17, 2007, FMCSA issued an interim final rule reinstating the 11-hour standard that the court had struck down. It is unclear what FMSCA will require if it finalizes the rule. More information...
Repeal of the ban on carrying loaded guns in national parks, National Park Service (Department of the Interior).	Proposed April 30, 2008. Planned completion date: Not given.	This rule would end the 25-year-old ban on carrying loaded guns in national parks. Critics say the proposal is unnecessary because of the safety of national parks. More information...

* Proposal dates are based on when the notice of proposed rulemaking (NPRM) was published in the *Federal Register*. Where two dates are given, an NPRM was republished or a supplemental NPRM was published. Planned completion dates are based on projections from the Spring 2008 Unified Agenda of Regulatory and Deregulatory Actions, available online here.

Worker safety rules are conspicuously absent from the list above. The Bush administration has consistently failed to develop regulations necessary to protect workers under the Occupational Safety and Health Act. The administration apparently does not plan to finalize exposure standards for harmful chemicals such as beryllium or crystalline silica or safety standards for construction workers working in confined spaces, according to the most recent Unified Agenda. The administration may finalize rules to improve mine safety, as required by the Mine Improvement and New Emergency Response Act.

Options for the Next Administration and Congress

A new presidential administration, regardless of party affiliation, will have difficulty stopping rules the Bush administration finalizes by November 1 if those rules are not to his or her liking. Shortly after taking office in 2001, Bush rejected several Clinton-era rules. However, those rules had not yet taken effect. (The Administrative Procedure Act requires final rules take effect no less than 30 days after publication.) Both Bush and President Clinton suspended all rules that agencies had completed but not yet published in the *Federal Register*.

The Nov. 1 deadline should allow enough time for controversial rules to take effect before a

new president enters the White House. In those cases, the only option for a new president would be to initiate a brand new rulemaking to cancel out the other rule.

Congress will likely have options if it finds fault with any Bush administration rules. Congress could invoke the Congressional Review Act — a little-used tool that gives Congress a 60-day window to disapprove of executive branch regulations.

Under the act, congressional members have 60 working days after a rule is finalized to introduce a resolution to reject it. In order for the rule to be rejected, a majority of both houses of Congress must then approve the resolution, and the president must not veto it. Since a president is unlikely to disapprove of one of his own agency's rules, and since presidential vetoes are difficult to overcome, the act is virtually impossible to utilize successfully.

However, if that 60-day window does not close by the end of a session of Congress — a likelihood for regulations finalized later in 2008 — the time period starts over. Indeed, the only time Congress has used a Congressional Review Act challenge successfully was in rejecting a Clinton administration rule (setting standards for ergonomics in the workplace) shortly after Bush took office.

Krill Protection Rule Clears White House

The National Oceanic and Atmospheric Administration (NOAA) is proposing to prohibit fishing for krill, an important species in the marine ecosystem, in U.S. waters. The proposed rule comes after NOAA responded to objections from the White House.

The proposed rule, published in the *Federal Register* on May 20, would ban any harvesting of krill in the Pacific Ocean from three to 200 miles off the west coast, the so-called U.S. Exclusive Economic Zone. State regulations in California, Oregon, and Washington ban krill harvest up to three miles off the coast of those states.

NOAA is proposing to provide krill with federal protection because of krill's critical position in the marine food chain. Krill are small, shrimp-like crustaceans abundant in the Pacific Ocean, and they serve as a food source for a variety of marine animals including whales, salmon, and some sea birds.

Conservationists hailed the proposal as a victory for the Pacific ecosystem. Michael LeVine, an attorney with Oceana, a nonprofit conservation group, called the proposal "a watershed moment for responsible ocean management and conservation."

NOAA proposed the ban on krill harvests at the behest of its Pacific Fishery Management 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.

In a prior attempt to propose the ban on krill harvests, NOAA was rebuffed by the White House Office of Information and Regulatory Affairs (OIRA). In an October 2007 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."

NOAA had acknowledged a market for krill does not exist but framed its proposal as a proactive measure. In support of the ban, the Pacific Fishery Management Council said, "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."

NOAA resubmitted a draft proposed rule on Feb. 27 for OIRA's review. On May 13, OIRA cleared the proposal for publication.

LeVine, of Oceana, is pleased the review period has ended and the proposed rule is moving forward. "We commend all the policymakers involved in implementing the kind of proactive visionary protection we need to move forward with healthy and resilient ocean ecosystems," he said.

To meet OIRA's objections, NOAA did not alter the details of its proposal to ban krill harvests; rather, it changed its justification for the proposed action. As a result of the OIRA review, NOAA includes a more robust discussion of the economics of the rule.

Unlike the original proposal submitted to OIRA in 2007, the agency now claims a market for krill does exist. The proposal states, "A market for krill currently exists in Washington and Oregon, where salmon farms use krill products as a supplemental feed."

NOAA also weighed the costs and benefits of alternatives to an outright ban. The proposal says the agency also considered creating exemptions from the ban if potential harvesters met certain conditions; the agency also considered taking no action. In the October 2007 letter, Dudley criticized NOAA for failing to consider options other than an outright ban.

The public may comment on the rule until June 19.

USDA Dropping Shroud over Pesticide Use Data

The U.S. Department of Agriculture (USDA) announced May 21 that it is eliminating the only program that tracks pesticide use in the United States. The USDA claimed it can no longer afford the program, known as the Agricultural Chemical Usage Reports. Consumers, environmental organizations, scientists, and farmers oppose the move.

The Agricultural Chemical Usage Reports, collected by the National Agricultural Statistics Service (NASS), are the only publicly available data on pesticide use in the country. Since at least 1991, NASS has produced the detailed annual report widely used for scientific, consumer, and business research. The U.S. Environmental Protection Agency (EPA) and local governments have also depended on this information in developing chemical risk assessments and pesticide use policies.

The USDA announcement marks the final blow to a program that has been steadily eroded over the last few years. The annual survey had been reduced to a biennial report, and in 2007, reports were only collected on cotton, apple, and organic apple crops. NASS announced that only "key" surveys will be done during the 2008 growing season. According to NASS acting administrator Joe Reilly, these will include monthly crop and livestock reports, meaning a comprehensive year-end survey or report will not be produced.

NASS officials claimed they regret having to cut the program but said that they can no longer dedicate the resources required to run the program, which costs $8 million of the service's $160 million annual budget. Reilly said he "hates eliminating any program that is actually needed out in the American public," but justified doing so since similar data is available from private sources.

The private reports are cost-prohibitive to most, however — as much as $500,000 per year for some — and only a few of the major agricultural chemical companies buy them. According to a coalition of environmental and public interest organizations, these private data sets are of lower quality and reliability than the NASS data. Proprietary concerns inhibit the disclosure of collection methodology and perhaps even compromise it. NASS's Advisory Committee on Agricultural Studies estimated that "a large number of the area wide estimates ... are based on individual or statistically unrepresentative observations."

Without these reports, farmers' decisions about what pesticides to use on their crops will be less informed and could lead to significant errors. Don Lipton from the American Farm Bureau also sees the accurate reports as the best defense against allegations of irresponsible chemical use. "Given the historic concern about chemical use by consumers, regulators, activist groups, and farmers," he said, "it's probably not an area where lack of data is a good idea."

For the American public, the lack of information on pesticide use is also a problem. "If you don't know what's being used, then you don't know what to look for," said Charles Benbrook, chief scientist at The Organic Center. "In the absence of information, people can be lulled into thinking that there are no problems with the use of pesticides on food in this country."

"What we'll end up doing," said Steve Scholl-Buckwald, managing director of Pesticide Action Network, "is understanding pesticide use through getting accident reports." A coalition of 44 environmental, sustainable farming, and health advocacy organizations called on USDA to reverse its plan to eliminate the pesticide reporting program and to restore surveys of a wide variety of crops on an annual basis.

Committee Passes Sewage Right-to-Know Bill

The House Transportation and Infrastructure Committee approved the Raw Sewage Community Right-to-Know Act (H.R. 2452) May 15, bringing the American public one step closer to knowing when it is safe to swim in local waters. The bill amends the Clean Water Act to provide stricter standards for public notification of sewage overflows.

Over 850 billion gallons of raw sewage are released into local waterways each year. H.R. 2452 requires publicly owned water treatment facilities to provide timely notice of any overflow to local authorities, public health officials, and the public at large. More detailed weekly and monthly reports would also be mandatory. Should the full Congress pass the legislation, it would create the first national public notification requirement for this type of pollution.

Introduced a year ago by Reps. Tim Bishop (D-NY) and Frank LoBiondo (R-NJ), the Sewage Right-to-Know Act has recently picked up speed in Congress. Following the committee vote, it now awaits consideration by the full House. With bipartisan support, the bill is expected to be scheduled for a vote before the August recess.

American Rivers, a prominent supporter of the bill, has been joined by over 150 other organizations to promote the legislation's passage. "Clean water isn't and shouldn't be a political issue," said American Rivers president Rebecca Wodder. She added, "Passing this law isn't about assigning blame, but rather shining a light on a rather odious problem to build support for solutions."

The main culprit in the massive sewage overflows is the aging — and in many cases, broken — water quality infrastructure in the country. As *USA Today* reported on May 7, billions of dollars will be spent over the next 20 years to repair and upgrade what the U.S. Environmental Protection Agency (EPA) estimates to be 1.2 million miles of aging sewer lines.

A Gannett News analysis found that at least one-third of the sewage treatment systems the bill is aimed at were in violation of the Clean Water Act and other laws over the past five years. Gannett has developed a site to search for these sewage discharge violations on a state-by-state basis.

The Senate companion bill, S. 2080, was introduced by Sen. Frank Lautenberg☼ (D-NJ) on Sept. 20, 2007, and has been referred to the Committee on Environment and Public Works. The National Association of Clean Water Agencies, which represents publicly owned wastewater utilities, is in full support of the bill.

A Failure of Access, a Shortcoming of Technology

Access to government data and other information often falls behind expectations due to the government's failure to use advanced technologies to meet the needs of modern day society. In "Hack, Mash, & Peer," Jerry Brito, Senior Research Fellow of the Mercatus Center at George

Mason University, discusses the shortcomings of government access and technological solutions to create broad access to government records.

The analysis, published May 14 in the *Columbia Science and Technology Law Review*, shows that many government data sources are essentially inaccessible to the general public. For instance, the government only permits information regarding the financial disclosures of members of Congress to be viewed in paper format at the House or Senate offices in Washington, DC. Even though disclosure of the records is required by law, and even though those records are stored in a searchable electronic database, government denies the general public easy online access to that information.

Other data the government makes available online in centralized locations but publishes in cumbersome formats, which makes it difficult to search and find information. "While efficient in theory," states Brito, "consolidation may be a step backward if the centralized database does more to obscure data than to make it easily accessible."

Filling the access gap, private sector third parties have stepped in with "ingenious hacks" to provide the functionality the government has failed to achieve. The Center for Responsive Politics (CPR) runs the OpenSecrets.org website, which provides the general public with easy online access to many useful government data sources including campaign finance information, lobbying information, and congressional travel. CPR took upon itself the labor-intensive effort to digitize the paper records of congressional members' financial disclosures and posted the data in a searchable database. Another example is the FedSpending.org website, developed by OMB Watch, that provides access to federal contract spending and financial assistance. The GovTrack.us website, developed by a linguistics graduate student, provides access to legislation information by scraping and collecting information from government web pages.

Often these "hacks" present the government data in a structured and open format that allows others to combine various data sources in "mashups" that represent new novel tools for reviewing information. For instance, the MAPLight.org website pulls together data on voting records and campaign finance information to generate unique insights into the interaction of money and politics. The website shows when and how much money was contributed to campaigns by those supporting and those opposing legislation and then how votes on legislation turned out.

Third-party groups seeking to solve the problem of large amounts of information provided in cumbersome formats recently developed the "peer production" or "crowdsourcing" approach. Crowdsourcing is when massive numbers of documents or other information are reviewed en masse by a community of online users. The paper details an example in which over 3,000 pages of documents related to the firing of eight U.S. Attorneys were reviewed overnight by TPMMuckraker.com blog readers. The blog posted a request for help reviewing the materials and provided readers with a system for posting comments on read pages. In approximately seven hours, the site visitors had read and commented on almost all of the pages. Crowdsourcing leverages the cooperative effort of large numbers of people to accomplish huge

information tasks in an extremely short amount of time. The explosion of blogs also creates an online environment rich with opportunities to pursue crowdsourcing projects.

Rather than just relying on third parties to hack, mash, and peer government data, Brito recommends that government encourage the process itself by making data available online in "structured, open, and searchable formats." Structured means that the information should be provided in a way that can be read by feed readers and search engines. Open means that the data should be provided in a nonproprietary fashion to enable the combination of data with other sources and creation of different types of products, like overlapping housing data with mapping or providing information about toxics in a searchable format on a local community website. Finally, the data should allow for full-text searches.

To accomplish such access to government information, "Hack, Mash, & Peer" recommends that legislation specifically require such disclosure methods. However, if Congress fails to act, agencies should take it upon themselves to provide government information in robust and useable formats.

IRS Drops Investigations of United Church of Christ and First Southern Baptist

The Internal Revenue Service (IRS) has closed two investigations into accusations of illegal partisan electioneering by two religious organizations. The IRS determined that the United Church of Christ (UCC) did not violate its tax-exempt status by inviting Sen. Barack Obama☼ (D-IL) to speak at the denomination's national meeting in 2007. The IRS also found Pastor Wiley Drake's endorsement of Mike Huckabee to be a personal endorsement and not made on behalf of his church, the First Southern Baptist Church in Buena Park, CA. The IRS concluded the two investigations relatively quickly, compared to cases from the previous two election cycles.

All 501(c)(3) organizations, including religious organizations and charities, are prohibited from supporting or opposing candidates in elections. This includes endorsing candidates, making donations to their campaigns, or distributing statements for or against them. There are no set rules that define what is and is not allowed, although the IRS released guidance in a 2007 Revenue Ruling.

The IRS began investigating the UCC in February following a complaint regarding Obama's speech to 10,000 people at the church's General Synod in Hartford, CT, in June 2007. On Feb. 26, the UCC publicly released a letter from the IRS announcing the agency had launched a church tax inquiry. At the time of his appearance, Obama was a candidate for the Democratic presidential nomination. The IRS was also concerned that Obama volunteers staffed campaign tables to promote the campaign outside the center where Obama spoke. However, after the UCC responded to the inquiry, the IRS found the church took the necessary steps to avoid any appearance that Obama's participation in the meeting was an endorsement of his candidacy. Their letter stated, "The activity about which we had concern did not constitute an intervention

or participation in a political campaign in violation of the requirements of section 501(c)(3)."

According to the IRS letter, several factors led to the agency's determination, including:

- The invitation to Obama was issued in May 2006, before he announced his candidacy for president
- Obama was invited to speak in a non-candidate capacity about how his personal faith connected with his public life
- The UCC told those in attendance that Obama was there as a member of the church and not as a candidate for office and that the audience should not engage in any political activities
- The church's legal counsel advised the campaign of the rules for his speech
- Campaign volunteers set up tables near the entrances of the Hartford Civic Center, on public property and outside the control of the synod
- The UCC's website provides a link to the IRS fact sheet on Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations, and the UCC Nationwide Special Counsel advised UCC leaders about Revenue Ruling 2007-41

The IRS did not notify the UCC of the investigation until six months after the speech. UCC counsel Donald C. Clark told the *Washington Post* On Faith column, "Congress should require that the service communicate with the church before an inquiry, with its attendant costs and chilling effect on constitutionally protected associational rights, is launched. However, that currently is neither a Congressional mandate nor IRS practice, and was not done in this case."

Experts questioned the need for the investigation when it was announced. Attorney Gregory L. Colvin, an expert on tax law and exempt organizations at Alder & Colvin in San Francisco, told *Tax Analysts* on May 22 that the UCC case illustrates the difficulty the vague facts and circumstances standard creates for charities and religious organizations. He said, "We still need better guidance from the Service that organizes the relevant facts and circumstances into an analytical framework. Which factors are fatal and which are exculpatory? Which create a presumption of intervention and which may rebut such a presumption? And how do those factors mesh with rules of the Federal Election Commission that regulate the same behavior?" Americans United for Separation of Church and State Executive Director Rev. Barry Lynn released a press statement saying, "We looked into the situation and did not see a violation of IRS rules. We saw no evidence of UCC officials seeking to appear to endorse his candidacy."

Another IRS investigation into possible partisan electioneering was also closed with no finding of a violation. Pastor Wiley Drake of the First Southern Baptist Church in Buena Park, CA, announced that the IRS cleared him of any unlawful activity for endorsing Republican presidential candidate Mike Huckabee. In August 2007, Drake issued a press release on the church's letterhead that announced his endorsement of Huckabee, asking all Southern Baptists to support the candidate. He also announced his endorsement on his Internet radio show. Americans United for Separation of Church and State (AU) filed a complaint with the IRS

about Drake in August 2007.

Drake released the IRS letter May 12. It said the IRS found that Drake's endorsement was made as an individual and not on behalf of his church. The news release endorsing Huckabee listed his church position only for identification purposes. The IRS letter states, "The press release was sent from Rev. Drake's personal email account and sent to personal acquaintances and was not sent to any of the church's congregants. [...] and no church resources were utilized in preparing or sending the email. Additionally, the Wiley Drake Show is a separate entity.... The church does not own, financially support, sponsor, or have any legal rights to the Wiley Drake Show."

AU, disappointed with this outcome, commented in a blog posting, "There are some gray areas in federal tax law, but the bottom line remains the same: Pastors who choose to cross the line into politicking may get away with it or they may not. They must ask themselves if it is worth risking their tax exemption to endorse some candidate."

Drake was represented by the Alliance Defense Fund (ADF) and is part of their "Pulpit Freedom Sunday" initiative, which is encouraging pastors to preach about politicians on Sept. 28 in a manner that could spark an IRS investigation. ADF hopes an investigation will lead to a lawsuit challenging the ban on partisan electioneering.

Senate Report on Homegrown Terrorism and the Internet Generates Criticism

On May 8, staff for Homeland Security and Governmental Affairs Committee (HSGAC) Chair Joe Lieberman (I-CT) and Ranking Member Susan Collins (R-ME) published a report on homegrown terrorism and the Internet that has raised free speech and guilt-by-association concerns. A coalition of nonprofits and a group of Muslim organizations have both sent letters objecting to the assumptions in the report. In addition, YouTube parent company Google rejected a request from Lieberman to remove all content posted by terrorist organizations, saying videos with legal, nonviolent, and non-hate speech content would remain online.

The report, *Violent Islamist Extremism, The Internet, and the Homegrown Terrorist Threat*, follows six Senate hearings on the subject and is the first in a series planned by committee staff. It focuses on "how violent Islamist terrorist groups like al-Qaeda are using the Internet to enlist followers into the global violent Islamist terrorist movement ..." While the report frequently refers to "domestic radicalization" and "violent Islamist ideology," it never defines these terms. It cites the attacks on public transit systems in London and Madrid and three examples of terrorist plot arrests in the United States as evidence of a "growing trend that has raised concerns within the U.S. intelligence and law enforcement communities." It goes on to note that unlike Europe, the U.S. history of absorbing immigrants has provided a layer of protection against "homegrown terrorism," but "the terrorists' Internet campaign bypasses America's physical borders and undermines cultural barriers that previously served as a bulwark against al-Qaeda's message ..." It then provides examples of "highly sophisticated

operations that utilize cutting-edge technology", including websites, chat rooms, online magazines, songs, news updates, and more.

The report's exclusive focus on the Internet and on American Muslims generated an immediate response from the American Civil Liberties Union (ACLU). Senior Legislative Counsel Timothy Sparapani said, "Focusing on people with specific religious beliefs or backgrounds will not protect against the Timothy McVeigh's of the world. This narrow focus could cost us dearly in the future." On May 14, a coalition of Muslim organizations sent Lieberman and Collins a joint letter noting the committee's failure to get input from American Muslims at its hearings and expressing concern that the report encourages "suspicion of several million Americans on the basis of faith." The letter was signed by the American Arab Anti-Discrimination Committee, the Council on American-Islamic Relations, Muslim Advocates, and the Muslim Public Affairs Council.

Prior to release of the report, a broad-based coalition of nonprofits sent the committee recommendations that urged caution, saying, "It is critically important the articulation of the problem does not cause people merely exercising their First Amendment rights to fear being swept into the net of suspicion." It also pointed to the long-established principle, based on the 1969 U.S. Supreme Court ruling in *Brandenburg v. Ohio*, that "speech can only be curtailed when it is intended to and has the effect of causing imminent lawless conduct. Mere abstract advocacy of violence, however objectionable, may not be barred."

The coalition of nonprofits noted that the Internet has "become an essential communications and research tool for everyone. Our concern is that this focus on the Internet could be a precursor to proposals to censor and regulate speech on the Internet. Indeed, some policy makers have advocated shutting down objectionable websites." However, the committee report acknowledges that content is "mirrored" on many sites, so that "propaganda remains accessible even if one or more of the sites are not available."

Additional Nonprofit Concerns Cited

The nonprofit coalition that had earlier expressed its concerns to committee staff also criticized the report's heavy reliance on a 2007 New York City Police Department (NYPD) model of the radicalization process. The NYPD report describes a four-stage "path to radicalization" consisting of pre-radicalization, self-identification, indoctrination, and jihadization. The report applied this template to its analysis of Internet communications by terrorist organizations. The problem, according to the nonprofit coalition, is that the model "fails to note that millions of people may progress through these 'stages' and never commit an act of violence." The letter from the Muslim organizations also noted that the NYPD model had "prompted criticism for examining a statistically insignificant, unrepresentative sample set, as well as for drawing conclusions based on logical fallacies. In fact, federal counterterrorism officials have privately repudiated the NYPD report."

Google Rejects Lieberman Request

Fears of attempts to censor content on the Internet were quickly realized on May 19 when Lieberman sent a letter to Google asking them to "immediately remove all content produced by Islamist terrorist organizations from YouTube." Lieberman's letter cited the staff report and noted, "Searches on YouTube return dozens of videos branded with an icon or logo identifying the videos as the work of one of these Islamist terrorist organizations." As a result, Lieberman says YouTube "unwittingly" permits these groups to use the Web "to disseminate their propaganda, enlist followers, and provide weapons training." The letter says YouTube's Community Guidelines are not adequately enforced.

Google posted a response on its Public Policy Blog, which said "hundreds of thousands of videos are uploaded to YouTube every day. Because it is not possible to pre-screen this much content, we have developed an innovative and reliable community policing system that involves our users in helping us enforce YouTube's standards." However, it said that it had reviewed videos flagged by Lieberman's staff and removed those that "depicted gratuitous violence, advocated violence, or used hate speech." However, it did not remove videos that did not violate its Community Guidelines.

The Google response disagreed with Lieberman's request that all videos referring to or featuring terrorist organizations be removed, including content that is legal, nonviolent, or non-hate speech. It said, "While we respect and understand his views, YouTube encourages free speech and defends everyone's right to express unpopular points of view....users are always free to express their disagreement with a particular video on the site, by leaving comments or their own response video. That debate is healthy." The statement encouraged users to continue using the flagging tool in the Community Guidelines to report violent and hate-speech videos.

What's Next?

The committee's report concludes that, despite calls for a comprehensive approach to counterterrorism programs, "the U.S. government has not developed nor implemented a coordinated outreach and communications strategy to address the homegrown terrorism threat..." It asks what new laws or tactics are needed to "prevent the spread of ideology in the United States," and what a communications and outreach strategy should be.

Several members of the House and Senate have floated a legislative proposal to address concerns similar to those raised in the report. S. 1959, a bill that its sponsors say is designed to study "violent radicalization" and "extremist belief systems" that can lead to homegrown terrorism, passed the House in late 2007 but has stalled in the Senate. Free speech advocates vigorously oppose the bill and say it would usher in an era of "thought crimes" and violate the First Amendment.

Advocates say that for more appropriate answers, HSGAC staff should consult the recommendations from nonprofits, which suggest that "efforts to prevent people in the United

States from turning to terrorism can only succeed if we protect the free speech, religious and associational rights of those against whom these efforts are directed."

Comments Blast Proposed Affiliation Rule for HIV/AIDS Grantees

A proposed U.S. Agency for International Development (USAID) rule for international HIV/AIDS grantees has generated criticism and calls for change. If implemented, the proposed rule would force such grantees to choose between adopting government policy for their entire organizations or setting up completely separate affiliated organizations. Comments from OMB Watch, the Brennan Center for Justice, and two members of Congress contrast the harshness of the proposed separation requirements with the much more flexible standards the agency has adopted for its faith-based initiative.

The government proposed the rule after losing the first round of litigation challenging a provision of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the "Leadership Act"), which mandates that "no funds made available to carry out the Act ... be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." *Alliance for Open Society, Inc. v. USAID* is currently pending in the District Court for the Southern District of New York, which will assess the policy's constitutionality after a final rule is announced.

The plaintiffs argue that the requirement violates their First Amendment rights by forcing them to apply the government's viewpoint to their privately funded activities. They also say adopting the anti-prostitution "pledge" would make it difficult for them to provide effective outreach programs and stigmatize and alienate the people in need of HIV/AIDS prevention services.

The proposed rule purports to give grantees that object to the pledge requirement the option of creating an affiliate that could adopt the pledge in order to qualify for program funding. However, the degree of separation proposed is so severe that it is impractical to implement. As a result, as OMB Watch's comments noted, the proposed rule "is so overbroad that it would turn private, nongovernmental organizations into mouthpieces of government by imposing policy statements governing all activities, including those not funded by the federal government." The comment urged the Department of Health and Human Services (HHS), which wrote the proposal, to: "1. Withdraw the rule and allow the courts to decide the issue on the merits, or 2. Re-write the rule based on the superior framework provided by regulations and guidance adopted for the faith-based initiative."

The Brennan Center for Justice faulted the proposed rule on several fronts, saying it:

1. "does not even attempt to address the policy requirement's impermissible mandate that independent NGOs espouse the government's viewpoint;
2. "fails to define the most basic terms such as 'activities inconsistent with a policy

opposing prostitution';
3. "does not afford recipients a means to speak freely through privately funded affiliates;
4. "imposes separation requirements so burdensome that recipients will not be able to set up affiliates;
5. "violates Congressional intent to promote efficiency in foreign aid;
6. "undermines Congress's desire to promote public-private partnerships in the delivery of HIV/AIDS services; and
7. "contradicts HHS's own acknowledgment in the context of the faith-based initiative that separation requirements of the sort it imposes here are excessive."

Two members of Congress, Reps. Henry Waxman (D-CA) and Barbara Lee (D-CA), sent HHS comments asking that the rule be revised, saying it "represents poor policy for public health, inappropriately restricts free speech of grantees, and undermines Congress' intent that HIV/AIDS funds be spend in an efficient and integrated manner." They go on to say that the legal, physical, and financial separation requirements proposed "would unduly burden the cooperating agencies participating in our AIDS program and introduce wasteful duplication of costs. This is of particular concern because many funding recipients operate in multiple countries, and registering separate entities in each may be difficult or impossible."

President Bush: Veto Rhetoric vs. Fiscal Reality

Although Congress has not yet begun to consider any of the appropriations bills that will finance the federal government in FY 2009, the White House threatened to veto Democratic spending bills — even before any details were unveiled. With the flurry of veto threats late in his presidency, President Bush appears to be attempting to erase seven-plus years of reckless fiscal management of the federal government with token gestures that feign fiscal responsibility. Despite these recent actions, budget watchdogs say the Bush legacy on fiscal policy will be one of irresponsibility, inattention to detail, and futility.

Earlier in 2008, OMB Director Jim Nussle sent a pre-emptive letter to the House and Senate Budget and Appropriations committees, warning that "appropriations bills that exceed the President's reasonable and responsible spending levels will be met with a veto." This pre-emptive action is quite a change from the majority of Bush's tenure. Until he vetoed the Stem Cell Research Enhancement Act on July 19, 2006, Bush was approaching the record of Thomas Jefferson as the president who served the longest without issuing a single veto (he fell two years short). Even today, Bush has vetoed fewer bills than any president since Warren G. Harding, who served only two years.

But when the Democrats took control of Congress in 2007, Bush abruptly reversed course. According to the Office of Management and Budget (OMB), Bush issued a total of 28 veto threats during his first six years in office. Then, in 2007 alone, that number grew to 52, half of which were directed at congressional appropriations or authorization measures on the grounds that Congress was engaging in excessive spending.

During the years of his presidency when the GOP held control of Congress, Bush never saw fit to issue a veto threat against an appropriations bill on fiscal grounds. But on May 11, 2007, then-OMB Director Robert Portman announced a new White House legislative strategy, saying that Bush would veto "any appropriations bill that exceeds his request." During the course of the FY 2008 appropriations season, the House and Senate routinely approved spending bills larger than Bush had requested in the budget he submitted to Congress.

This sudden shift in White House strategy came, however, on the heels of years of approving larger increases in government spending than any president had approved since *before* the administration of Lyndon Johnson. The Cato Institute calculated that the annual growth of federal spending under Bush has risen 5.3 percent, compared to 4.6 percent during the Johnson years. The national debt under President Bush has increased by more than 60 percent, from under $6 trillion to just shy of $10 trillion.

The major factors accounting for this deterioration of the nation's fiscal position are well known and have been championed by Bush over the course of his presidency. The war in Iraq has cost approximately $525 billion in unanticipated spending. The 2001 and 2003 Bush tax cuts reduce federal revenues by about $200 billion a year. And Bush was also unwilling to veto some big ticket items sent to him when Republicans controlled Congress, including a 2002 farm bill that increased agricultural spending 76 percent over 1990s levels and the 2003 Medicare prescription drug bill costing an additional $60 billion a year. All three of these bills were deficit-financed.

Comparing Bush to some of his predecessors also shows his support for large increases in spending, not the fiscal rectitude he portrays lately, as the Cato Institute has pointed out:

> George W. Bush will likely leave office with a government spending burden higher (around 20%) than it was when he came to office (18.5%). That's the way things trended in his first six years. Presidents Reagan and Clinton, on the other hand, presided over drops in the spending burden by this measure.

The contrast between Bush's veto-borne rhetoric of responsibility and the reality of his record aside, more specific analysis shows his new strategy has not even been targeted effectively. Last year, the Center for Budget and Policy Priorities (CBPP) looked at the funding levels of the veto-threatened appropriations bills for FY 2008 and compared those levels with inflation-adjusted figures from appropriations bills already passed by Republican-controlled Congresses and signed by Bush, from FY 2002 through FY 2006. What CBPP found is that the bills Bush said he would veto in 2008 cost *less* in 2008 than the corresponding bills had cost, on average, during 2002-2006. CBPP concluded the president's veto threats of appropriations bills had little to do with fiscal responsibility:

> In short, the President will likely sign those appropriations bills that are more costly than in the past (after adjusting for inflation and population growth). Yet he is likely to veto — purportedly on fiscal grounds — those appropriations bills, such as the Labor-HHS-Education bill, whose costs are lower than the

corresponding bills he signed in the past.

The facts behind Bush's fiscal record point to a president who not only squandered opportunities to fix the fiscal health of the country, but repeatedly made decisions and supported policies that helped that fiscal health to deteriorate further. Budget watchers note his attempts at such a late hour to stand firm against minor spending increases in discretionary spending bills also fall far short, both in timing and substance, of fixing his legacy on fiscal issues.

War Supplemental Bill Awaits Final House Approval

When Congress returns from its Memorial Day recess, the House will take up the Senate's $250 billion supplemental war spending proposal. After the Senate added on $165 billion for war funding to the House's bill (which contained no money for the wars), it also tacked on some $10 billion in additional non-defense discretionary spending above the House's level of $21.1 billion. Although similar to the House version, the Senate's bill differs in a few key aspects, and the House will have to approve the Senate version or continue negotiating by amending it and passing it back to the upper chamber.

On May 15, the House approved a war spending bill but curiously failed to provide funding for the wars in Iraq and Afghanistan. Democratic House leadership sliced the war bill into three amendments: one for the war funding itself; one for war policy; and one for non-defense spending. To avoid some potential parliamentary pitfalls, Democratic leadership decided to skip a markup in the Appropriations Committee and move the war funding measure through Congress by hollowing out and amending the previously approved but unsigned Military Construction-VA FY 2008 Appropriations bill (H.R. 2642).

In response to this strategy, 132 Republican House members expressed their ire by voting "present." Combined with the votes of anti-war Democrats, the amendment that would have added $163 billion to the bill for funding the wars in Iraq and Afghanistan through the first few months of the next president's term was defeated 141-149.

The other two amendments up for a vote — war policy language and non-defense spending measures — fared much better. By a vote of 227-196, the House approved language that would require troop withdrawals from Iraq to begin within 30 days of the bill's enactment, with a target for full withdrawal by the end of 2009.

The non-defense spending amendment garnered even more support, passing 256-166. Its adoption was secured only after Democratic leadership appeased the fiscally-responsible Blue Dog Coalition by including an offset to the measure's $52 billion expansion of the G.I. bill. The $54 billion revenue raiser would impose a half-percentage point increase to income taxes on individuals earning over $500,000 and married couples earning more than $1 million each year. The Blue Dogs insisted on including an offset for the G.I. bill provision to comply with

PAYGO rules because that program is mandatory, not discretionary, spending.

In addition to expanding the G.I. bill, the non-defense spending amendment would:

- Extend unemployment insurance benefits 13 weeks beyond the current limit of 26 weeks
- Prevent the enactment of several Medicaid regulations designed to reduce payments to states
- Provide $10 billion in foreign aid, including over $1 billion to help ease the global food crisis
- Partially close funding gaps for various federal agencies, including $200 million for U.S. Census Bureau cost overruns
- Fully fund President Bush's request for $5.8 billion for levee repairs in New Orleans

One week after House approval, the bill was taken up by the Senate, which overwhelming approved (70-26) the addition of $165 billion in war funding while striking the war policy language requiring soldier withdrawal from Iraq . Surprisingly, the Senate not only agreed to up the House non-defense spending level by $10 billion but passed this spending by a veto-proof margin (75-22).

The Senate's non-defense spending provisions differ somewhat from the House's, however. Although the Senate approved the G.I. bill expansion, it elided PAYGO and dropped the tax provision that would offset its costs. And, in addition to the $5.8 billion in levee repair provided for in the House bill, the Senate's version would add $4.6 billion for Gulf Coast reconstruction. The Senate amendment includes the House initiatives but also increases funding for local law enforcement grants; the Federal Highway Administration; federal food and drug inspection, rural schools, and firefighting; and various science initiatives.

When Congress reconvenes the week of June 2, the House Blue Dog Coalition and anti-war Democrats have decisions to make. If the House Blue Dogs or the Out of Iraq Caucus rejects the Senate's proposals, the Senate may think twice about its generous non-defense spending package and strip most of it out — except the G.I. bill extension — in order to attract enough Republican votes to ensure passage in the House.

House Relentless in Pursuing Contracting Reforms

In the last several weeks, the House has continued its efforts to address federal contracting reform. With bills stalling in the Senate, the House has begun to attach various reform provisions to legislative vehicles that are more likely to be enacted into law this year. Marrying these proposals to the war supplemental bill and the Defense Authorization bill, for example, greatly increases the chances these important reforms will be implemented in 2008.

This strategy has already paid dividends with the Fair Share Act (H.R. 5602). The Fair Share Act was originally introduced March 13 and would require U.S. firms that employ American

citizens overseas through foreign subsidiaries to pay Social Security and Medicare taxes when contracting with the federal government.

The House first attached the Fair Share Act to the Taxpayer Assistance and Simplification Act (H.R. 5719), a collection of provisions aimed at facilitating income tax compliance — especially among elderly and low-income taxpayers. The House passed H.R. 5719 by a vote of 238-179 on April 15, but the bill has not moved at all in the Senate and received a veto threat from President Bush, threatening the Fair Share Act provisions.

Tired of waiting for the Senate and not wanting to take their chances with a veto-happy president, the House amended another bill extending tax cuts to veterans (the HEART Act, H.R. 6081) to include the original provisions of the Fair Share Act shortly before the Memorial Day recess. The HEART Act was approved without opposition by both the House and Senate on May 22 (House vote: 403-0, Senate vote: approved by voice vote) and is expected to be signed by the president shortly.

The strategy employed to pass the Fair Share Act is being seen with other contracting reform legislation. Two bills, the Close the Contractor Fraud Loophole Act (H.R. 5712) and the Government Funding Transparency Act of 2008 (H.R. 3928), passed the House as independent bills on April 23. The first bill would close a loophole in the Federal Acquisition Register, a set of regulations governing the federal procurement process, that did not require contractors working oversees to report fraud to the government. The second would require the disclosure of the names and salaries of the five highest paid executives of private companies that receive more than 80 percent of their revenue from the government.

Both of these bills were added to the House's version of the war supplemental bill, which passed on May 15. After various changes, the Senate sent the bill back to the House for final approval, retaining the two contractor reform amendments.

The Path to Contracting Reform				
Policy Proposal	**Original Bill**	**First Attached To**	**Then Attached To**	**Chances of Approval in 2008**
Creation of contractor misconduct database	HR 3033 *(4/23/08)*	FY 2009 Defense Authorization bill *(5/22/08)*		Good
Closing fraud loophole in FAR	HR 5712 *(4/23/08)*	House version of war supplemental bill *(5/15/08)*	FY 2009 Defense Authorization bill *(5/22/08)*	Good
Requiring disclosure of names and salaries of top executives	HR 3928 *4/23/08)*	House version of war supplemental bill *(5/15/08)*	FY 2009 Defense Authorization bill *(5/22/08)*	Good
Prohibiting using offshore tax havens to avoid payroll taxes	HR 5602 *4/15/08)*	Taxpayer Assistance and Simplification Act *(4/15/08)*	HEART Act *(5/22/08)*	Approved
Prohibiting private tax collection at IRS	HR 695	Taxpayer Assistance and Simplification Act *(4/15/08)*		Unlikely
Prohibiting tax deliquent contractors from obtaining new contracts	HR 4881 *(4/14/08)*			Unlikely

Given the uncertain future of the war supplemental bill (it has been opposed at various points by the Bush administration), the House has also acted to include these two contracting provisions on the 2009 National Defense Authorization Act (H.R. 5658). While this bill will likely pass Congress in 2008, the scope of the contracting reforms would be limited to contracting activities related to the Defense Department and other agencies covered under the Defense Authorization bill. Nonetheless, on May 22, the House approved an amendment by voice vote offered by Rep. Henry Waxman☼ (D-CA) that would enact multiple contracting reforms, including the provisions of H.R. 5712 and H.R. 3928.

In addition, the Waxman amendment covered yet another important contracting reform by requiring the publication of a contractor integrity database that would provide information about criminal, civil, and administrative cases involving federal contractors. This proposal was introduced in the summer of 2007 as the Contractors and Federal Spending Accountability Act of 2007 (H.R. 3033) by Rep. Carolyn Maloney☼ (D-NY) and passed the House unanimously on April 23. While it is possible this proposal will be amended before the Defense Authorization bill is finalized, it is unlikely the misconduct database proposal will be stripped from the bill altogether.

For the most part, these contracting reform proposals are non-controversial efforts to bring transparency and accountability to the federal procurement process, no doubt aiding the

potential success of the strategy to attach them to multiple bills in 2008. There are additional proposals related to federal contracting, such as prohibiting the IRS from using private debt collectors to collect back taxes (H.R. 695) or prohibiting contractors from receiving contracts if they owe federal taxes (H.R. 4881), that might still be included in such a strategy. These proposals are unlikely to be enacted into law on their own.

Unfortunately, the window of opportunity to attach those bills to legislation that will pass Congress in 2008 is slowly closing. It is possible the war supplemental and Defense Authorization bill are two of the last pieces of legislation Congress will be able to enact before they adjourn before the fall elections.

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In This Issue

Obama and Coburn Shine Brighter Light on Government Spending

Sens. Barack Obama (D-IL) and Tom Coburn (R-OK) have joined forces again to craft legislation that would increase the transparency of how the federal government spends taxpayers' money. The Strengthening Transparency and Accountability in Federal Spending Act (S. 3077), introduced June 3, is a follow-up to the 2006 Transparency Act, which was also spearheaded by the two senators. Obama and Coburn, along with Sens. Tom Carper (D-DE) and John McCain (R-AZ), introduced the new legislation with the goals of making important new data easily accessible and enabling citizens to hold our government accountable for the fiscal stewardship of our shared resources.

In 2006, Obama and Coburn worked together to introduce and pass the Federal Funding Accountability and Transparency Act of 2006, which led to the creation of the government website USASpending.gov. The law required the Office of Management and Budget (OMB) to make it easier for the public to search and understand the complex information on federal

government spending. The site allows people to quickly get answers to questions such as who is getting federal funds, what the money is for, which agencies are spending it, and where in the country the money is going. The effort was heralded by many as a key example of progressives and conservatives finding common ground on the issue of increased government transparency.

The new Obama-Coburn bill has three key sections: technical corrections to the first bill, provisions to improve the quality of data in USASpending.gov, and requirements to make information on contractor and grantee performance easily accessible.

The provisions offering technical corrections would expand the data available to the public by requiring:

- Additional information about when payments are approved and disbursed;
- The name of the agency, department, subagency, or suboffice that approved the award, and whether the award is the result of a legislative mandate, set-aside, or other criteria;
- More detailed data on number and size of all bids submitted for contracts; and
- Socioeconomic characteristics of all recipients.

This additional data is important for the public to understand exactly how the government is spending federal resources. Several of these data fields are already being tracked and provided to the public on USASpending.gov, but the provisions would codify the process to ensure ongoing access.

A major new improvement created within the technical corrections is the requirement that the government provide copies of the request for proposal, announcement of award, actual contract, and scope of work documents, linked to the spending information. This information will allow citizens to more easily assess the value contractors are providing. Additionally, the bill requires all information on USASpending.gov to be accessible through an application programming interface (API), which will create an open architecture that promotes innovative use of the data by Internet programmers and public interest groups.

The data quality section of the bill proposes creation of a robust, user-generated, error reporting system that would enable users to report any suspected errors directly to federal agencies. Such a system will provide useful data on not only the extent of data problems but also on the efforts of the government to correct problems based on legitimate reports of incorrect data from the public. The provisions also include requirements for a government review system for data quality, with biannual audits from Inspectors General offices, to ensure the data is accurate and that agencies are following data standards. Another provision would mandate that company identifiers, including parent ownership, are correct and regularly updated and made available to the public, including through the API.

The new legislation's section on combining and disseminating information about contractor and grantee performance would create a new and useful accountability tool. The bill requires disclosure of instances of default, suspension, debarment, and any information regarding civil,

criminal, and administrative actions initiated or concluded by either federal or state governments in the preceding five years against federal award recipients. Publicly available data concerning worker safety, pay and leave rights, workplace discrimination, labor relations, civil rights, environmental protection, whistleblower protection, tax compliance, and other regulatory protections would be brought together to provide the public with a more complete picture of the entities receiving public funds. In providing such information about recipients of federal funds, the government will enable the public to easily see whether agencies are doing business with scofflaws.

The Strengthening Transparency and Accountability in Federal Spending Act was introduced the same day that Obama became the presumptive Democratic nominee for president. The bill garnered attention not only because of Obama's involvement, but also because he partnered with McCain, who is the presumptive Republican nominee for president. It is rare that two presidential nominees would jointly sponsor legislation, particularly during an election year. The fact that Obama and McCain did bespeaks strong support for the legislation.

Some have already speculated that, this being an election year, the bill has little chance of making it into law. Many have thought that federal contractors will attempt to slow down, if not derail the bill. Yet with both Obama and McCain as co-sponsors, it is much more likely the bill could be enacted before 2008 is over. Carper's subcommittee of the Homeland Security and Governmental Affairs Committee will likely hold a hearing on the bill sometime during the summer.

Covering Up Mistakes of Torture and Rendition

The Department of Homeland Security's (DHS) Office of Inspector General (OIG) has released a report that investigated the case of a Canadian citizen, Maher Arar, who was taken into U.S. custody in 2002 and removed to Syria, where he was held by authorities for fourteen months. Two House committees held a hearing June 5 on allegations of torture that Arar says occurred during his imprisonment.

The report was requested four and a half years ago by Rep. John Conyers☼ (D-MI), chairman of the House Judiciary Committee, but it falls short of a full disclosure of the facts and policies that led to the imprisonment and alleged torture of a Canadian citizen. The House Committee on the Judiciary's Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the House Committee on Foreign Affairs' Subcommittee on International Organizations, Human Rights, and Oversight held a joint hearing on June 5 to investigate the case.

In September 2002, Arar was traveling from Switzerland to Canada with a layover in New York. The Immigration and Naturalization Service (INS) took Arar into custody because an airport screening indicated that he was a high risk. The INS contacted the Federal Bureau of Investigation, which conducted a series of interviews with Arar over the next several days. The U.S. government alleged that Arar was associated with Al Qaeda. Arar was transported to New Jersey, then Washington, DC, and eventually to Amman, Jordan, where he was transferred to

Syrian officials. Fourteen months later, in October 2003, the Syrian government released and returned Arar to Canada.

Arar successfully sued the Canadian government for its cooperation with the U.S. in his transfer to Syria and the alleged torture that ensued. The U.S. courts, however, have thrown out Arar's suits against the U.S. government because government lawyers have claimed the state secrets privilege. Although, according to a report by *Harpers*, U.S. officials have secretly admitted wrongdoing in sending Arar to Syria and asserting ties with Al Qaeda, the government has failed to publicly acknowledge their mistakes or pay any reparation to Arar.

In 2003, Chairman Conyers requested an investigation of the matter, and it took DHS's OIG over four years to complete the investigation and release a report. The OIG report, however, is heavily redacted and falls short of a full disclosure of the events that transpired, the mistakes made, and the policy of rendition which led to the mistakes. Even the Inspector General's recommended policy changes are redacted as classified.

Furthermore, the OIG has objected to the release of paragraphs that are not classified and has even failed to disclose summaries of such paragraphs. The OIG, moreover, fails to appropriately explain the rationale for the numerous redactions. "It would be my view that those [unclassified] paragraphs should be publicly released," stated former DHS Inspector General Clark Ervin, who initiated the investigation in 2003.

After reviewing the unclassified OIG report, the House Judiciary Committee objected to many of the redactions. The committee requested a paragraph-by-paragraph rationale for the markings, but the OIG has denied such a request. Ervin stated that the OIG may not be legally required to provide such rationales but has "an obligation to provide an explanation for the view that [redacted] information should be classified."

As it stands, the OIG report is an additional effort to cover up the mistakes made in the case of Maher Arar. Essential facts and the needed policy changes are redacted, preventing oversight of the agency's progress in implementing changes. The OIG has an obligation to undertake a full investigation of failed policies and mistaken decisions and to provide public access to its findings.

EPA Asks Public, "What Do You Want to Know?"

The U.S. Environmental Protection Agency (EPA) has invited the public to participate in a week of online dialogue to develop ideas to improve access to environmental information.

The National Dialogue on Access to Environmental Information launched the week-long process to gather ideas for how the agency could improve its transparency and make accessing environmental information easier. The ideas generated by the online dialogue will be used to inform the development of a multi-year strategy on environmental information access, projected to be completed later in 2008. The EPA has already collected input from stakeholder

groups and is making background information and summaries of what has occurred so far available at the National Dialogue page.

The Bush administration's tenure has taken a heavy toll on EPA's reputation on transparency by raising the reporting thresholds for toxic pollution under the Toxics Release Inventory, closing numerous agency libraries, and accusations of interference with scientific research. However, with the imminent reality of a new administration, the ideas for improving access may find a receptive audience in 2009.

Ozone Standard Challenged in Multiple Court Actions

The U.S. Environmental Protection Agency's (EPA) new, stricter national air quality standard for ozone is being challenged in multiple court actions, all of which are asking a federal appeals court to review the final rule. Although the new standard, announced March 12, is an improvement over the previous standard, environmental groups, state and local governments, and business interests all have filed lawsuits hoping to force the EPA to reconsider its decision.

EPA regulates ozone under the Clean Air Act. Exposure to ground-level ozone is associated with a variety of adverse health effects including asthma attacks and premature death. The Clean Air Act requires EPA to reevaluate the standard for ozone every five years, although the agency had not revised the standard since 1997. Under the act, EPA sets a primary standard to protect public health and may set a secondary standard to protect special considerations such as ecologically sensitive areas and valuable farm crops.

EPA's decision to set both the primary and secondary standards at the same level drew attention for several reasons. First, the scientists advising the agency recommended more stringent standards than the final levels announced. The act requires EPA to base its decision on the best available science. The EPA Clean Air Scientific Advisory Committee recommended EPA set the standards within a certain range, but the final standards were set above this range.

Second, in its regulatory process, EPA chose for the first time to set the secondary standard at a different level than it had previously. Third, although EPA's final decision was based, in part, on using cost as a consideration, the act prohibits EPA from considering costs when setting the standards; costs may be considered at a later point when deciding how to implement the standards.

Perhaps the most contentious element of EPA's decision, however, was the apparent interference by President Bush and other White House staff. Documents released by EPA show that the agency's decision to set a separate, more protective secondary standard was overridden by Bush after the EPA and the Office of Information and Regulatory Affairs (OIRA), the White House office responsible for reviewing agency regulations, reached an impasse over the secondary standard. OIRA, on the basis of economic considerations, argued for the secondary standard to be the same as the primary standard.

Five environmental groups filed a review petition May 27 asking the U.S. Court of Appeals for the D.C. Circuit to review the final rule. The groups are challenging EPA's decision because the new standards were not set consistent with the best available science. The American Lung Association, Natural Resources Defense Council, Environmental Defense Fund, National Parks Conservation Association, and Appalachian Mountain Club filed the suit. They are represented by Earthjustice, a nonprofit environmental law firm.

Fourteen states and two cities also filed a petition May 27. They seek to have stricter ozone standards than EPA's final rule established. The states are New York, California, Connecticut, Delaware, Illinois, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, and Rhode Island. The cities of New York and Washington, DC, joined the suit.

According to the regulatory impact analysis EPA was required to prepare for the new regulation, the new standard will prevent at least 260 premature deaths, 890 heart attacks, and 200,000 missed school days every year starting in 2020. Had EPA adopted a standard at the weakest end of the range recommended by its scientific advisors, an *additional* 300 premature deaths, 610 heart attacks, and 440,000 missed school days could be prevented *every year*.

Mississippi filed a review petition May 23 hoping to have the standards relaxed. A coalition of industry groups also filed a petition May 27 objecting to the stricter standards. According to a BNA article (subscription), these lawsuits are likely to target the methods and interpretations of the scientific analyses EPA performed during the rulemaking process. Various business groups argued during the rulemaking process that the costs to industry would be too high if EPA chose to change the standard from the 1997 levels.

The coalition of industry groups is the Ozone NAAQS Litigation Group, representing organizations like the National Association of Manufacturers and the U.S. Chamber of Commerce. The Utility Air Regulatory Group, an association of electric generating companies and national trade associations, is also a party in the industry lawsuit.

Roof Crush Standard Flawed, Preempts State Efforts

The National Highway Traffic Safety Administration (NHTSA) has proposed a stricter federal standard for roof strength in passenger vehicles that would prohibit any action on roof safety at the state level — including damages claims brought by victims in state courts. During a June 4 Senate hearing, senators from both parties and auto safety advocates aired their complaints about the proposal.

In August 2005, NHTSA proposed a revision to the federal standard for vehicle roof crush resistance. The standard exists to help ensure the structural integrity of vehicles during rollover crashes and, in turn, prevent injuries and fatalities. NHTSA reopened the proposal for public comment in January 2008.

In the original notice, NHTSA claimed its final rule would prohibit states from enacting positive law — that is, laws passed by state legislatures and regulations developed by state agencies — different from the federal standard. NHTSA also claimed the rule would "preempt all conflicting State common law requirements, including rules of tort law," thereby eliminating a consumer's right to sue an automaker if the consumer is injured in a rollover crash.

NHTSA's decision to preempt tort law has drawn the most scrutiny. Federal agencies are responsible for enforcing the positive law enacted by Congress. However, even when positive laws and regulations work, citizens must have an opportunity to seek legal redress if a product causes harm. Tort law provides that opportunity by allowing citizens to seek damages from the makers of those products.

Senators complained about the preemption language during the hearing of the Senate Commerce Committee Subcommittee on Consumer Affairs, Insurance, and Automotive Safety. Sen. Claire McCaskill☼ (D-MO) claimed NHTSA would err by eliminating "every American's right to go to their courthouse in their state and have people from their community decide whether somebody has messed up or not."

Sen. Mark Pryor☼ (D-AR), chair of the panel, encouraged NHTSA Deputy Administrator James Ports to abandon the preemption language when finalizing the rule. Pryor said preemption is not in the public's best interest, is outside of NHTSA's authority, and would result in "bipartisan opposition in the Senate."

The preemption language has become a boilerplate provision included in many vehicle safety rules — an invention of President Bush's NHTSA. For example, in a February 2007 final rule on door locks and retention, NHTSA argued its regulation prohibits positive law at the state level. An April 2007 final rule mandating electronic stability control for vehicles used identical language.

McCaskill said, "All of the sudden preemption language is popping up like spring flowers" and expressed suspicion "that there is a plot somewhere in this administration to see if they can't wipe out the right of Americans across this country to access their local courts."

Preemption language at a glance

NHTSA is revising the federal standard for vehicle roof strength under the Motor Vehicle Safety Act. With regard to preemption, here is what NHTSA claims compared to the language of the act.

Preemption of state positive law

NHTSA's view:
"...section 30103(b) of 49 U.S.C. provides, 'When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.' Thus, all differing state statutes and regulations would be preempted." 70 FR 49245

Motor Vehicle Safety Act:
"Preemption.—(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter." 49 U.S.C. 30103(b)

Preemption of tort law

NHTSA's view:
"...if the proposal were adopted as a final rule, it would preempt all conflicting State common law requirements, including rules of tort law." 70 FR 49246

Motor Vehicle Safety Act:
"Common Law Liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. 30103(e)

NHTSA's decision to preempt state positive law and tort law through its regulation is in plain violation of the major federal law the agency enforces, the Motor Vehicle Safety Act. The act expressly states that NHTSA rules should be the floor, not the ceiling, for safety standards. The act permits states to adopt their own rules, so long as they are more stringent than the federal standard. On the issue of tort law, the act states, "Compliance with a motor vehicle safety standard" enforcing the law "does not exempt a person from liability at common law." (See sidebar above.)

Ports testified that NHTSA has not yet decided if it will pursue preemption when finalizing the rule.

The Bush administration has been criticized for inappropriately including preemption language in a variety of other public health and safety standards. For example, the Food and Drug Administration included tort preemption language in rules for prescription drug labeling, and the Consumer Product Safety Commission included a preemption clause in a rule to reduce the risk of mattress flammability.

In addition to the preemption language, critics of the roof crush proposal say it would not go far enough in protecting drivers. The rule would tighten the existing roof crush standard, which has not been updated since it was first promulgated in 1971. However, the rule does not meet the requests of safety advocates and would lead to relatively small increases in driver safety.

The crux of the roof crush standard is the strength-to-weight ratio. Currently, a vehicle's roof must be able to withstand pressure of at least 1.5 times the vehicle's weight. The proposed standard would strengthen the ratio to 2.5.

NHTSA estimates the rule change would result in 13 to 44 fewer rollover fatalities every year. Critics say a new rule should make significantly more progress than that. In 2007, more than

10,000 people died in rollover crashes. "Rollover crashes should be highly survivable," said Joan Claybrook, head of the consumer group Public Citizen, in testimony.

Other details of the rule also rile safety advocates. The rule would continue to require roof strength be tested by applying pressure on the vehicle using a metal plate, instead of attempting to model real-world situations in order to better understand the physics of rollover crashes. In testimony, Jacqueline Gillan, vice president of Advocates for Highway and Auto Safety, which represents consumer and public health groups and insurance companies, said some manufacturers are already using real-world modeling and urged NHTSA to require the technology for the safety testing of all vehicles.

Critics say the rule would also artificially inflate a roof's strength during crash testing by mandating the windshield remain intact and the side windows remain rolled up. In a crash, windshields may shatter or dislodge, and side windows may be rolled down.

NHTSA is updating the standard in response to legislation Congress passed in 2005, but Congress mandated a more aggressive approach to rollover safety, advocates say. "Despite legislative instruction to address the necessary safety measures in a coordinated manner to prevent deaths and severe injuries in rollover crashes, the sad truth is that NHTSA is taking an inadequate and piecemeal approach to rollover safety," Gillan said.

Congress mandated completion of the standard by July 1, 2008, but also gave NHTSA flexibility if the rule proved too difficult to complete by the deadline. During the hearing, Sen. Tom Coburn☼ (R-OK) said NHTSA should give higher priority to eliminating the rule's flaws than to meeting the deadline. "If we have a little increase in roof strength that doesn't result in a major decrease in fatalities and injuries, we've done nothing," Coburn said.

Congress Adopts Mixed-Bag Budget Resolution

A rare event occurred in Washington on Thursday, June 5: Congress approved a budget resolution during an election year, a feat not seen since 2000. This fact and a human needs-oriented approach to spending signal that Congress is addressing national priorities while attempting to more responsibly manage the country's finances. However, Congress's eliding of pay-as-you-go rules and unrealistic assumptions about war spending and Alternative Minimum Tax (AMT) relief have marred an otherwise responsible budget resolution.

By a vote of 48-45 in the Senate and 214-210 in the House, Congress adopted the $3.03 trillion budget resolution conference report. The plan's $1.013 trillion in discretionary spending bests the president's request by some $21 billion, setting up a showdown on spending bills later in 2008.

The plan reflects priorities more consistent with the needs of Americans, particularly under increasingly difficult economic conditions. For example, the budget resolution acknowledges sharp price increases in recent months for everyday necessities such as food and home cooling

that are stretching family budgets. To address these, the budget resolution adds funds for critical programs like Women, Infants and Children (WIC) and the Low Income Home Energy Assistance Program (LIHEAP), as well as the refundable Child Tax Credit and unemployment insurance. Equally important, the resolution staves off cuts proposed in the president's budget for housing, health care, nutrition, education, and employment that could further imperil living standards for millions of Americans.

Accepting that the Senate has little appetite for offsetting tax cuts, House conferees forged a compromise with their Senate counterparts that would omit filibuster-proof reconciliation instructions on implementing an AMT "patch" that would hold things even with today. The $70 billion AMT provision was the preeminent point of contention between the chambers, and the capitulation by House conferees enabled the resolution's passage in the Senate. It should be noted that while reconciliation instructions to enact a fully-offset AMT patch are not included in the budget resolution, Congress retains the option to provide revenue-neutral AMT legislation when it takes up the matter later in 2008. However, contrary to history and all indications for the future, the spending plan assumes all future AMT legislation will be revenue neutral.

Congress also unfortunately repeats the president's fantastical assumption that spending on the wars in Iraq and Afghanistan will cease after FY 2009, even though the most optimistic of anti-war advocates would not concede that this is a realistic forecast. Like the president, Congress has opted to reject a plausible war-spending scenario for the sake of claiming that budget surpluses will materialize in 2012 and 2013. This projection is very likely not to happen.

The budget resolution also allows for partial extension of the 2001 and 2003 tax cuts, including preserving the ten-percent tax bracket, maintaining the child tax credit, eliminating the "marriage penalty," and cutting the estate tax. The enactment of these tax cuts, however, depends on the materialization of those same unlikely projected budget surpluses in 2012 and 2013.

Congress's current approach to fiscal governance is encouraging compared to those of the recent past, because it emphasizes putting human needs before tax cuts for the wealthy. But the dubious assumptions on which it depends to arrive at budget surpluses indicates an unwillingness to confront the troubling realities of the longer-term fiscal outlook. Acknowledging that the nation's priorities and the revenue levels required to fund them are not in sync is the first step in enacting responsible budgets.

Spike in Jobless Rate Restarts Focus on Unemployment Insurance

On June 6, the Bureau of Labor Statistics (BLS) reported a jump in the national unemployment rate from 5.0 percent in April to 5.5 percent in May, the single biggest month-to-month increase in 22 years. Another 49,000 Americans joined the ranks of the unemployed in May, bringing the yearly total thus far to 324,000. The news took analysts by surprise, and

along with rising oil prices, helped push stocks down by three percent on all three major American exchanges and re-ignited talk of a possible recession.

The new jobs report also restarted discussions in Congress about extending state unemployment insurance (UI) an extra 13 weeks. Merely days before, the House Democratic leadership had indicated that it would remove a provision extending unemployment benefits that was added to the war supplemental bill by the Senate on May 22, but the BLS figures immediately spurred renewed talks in Washington and added pressure to pass a UI benefits extension.

The UI extension provision in the Senate bill is similar to one approved by the House Ways and Means Committee in April. It calls for up to 13 additional weeks of federal UI benefits in every state for workers who have exhausted the 26 weeks of regular state unemployment insurance payments. In states with unemployment rates exceeding six percent, extensions of 26 weeks would be available.

Two days before the May Senate vote that added UI benefits to the war supplemental, the Bush administration issued a veto threat of the Senate war supplemental bill, specifically disapproving the UI extension on the grounds that "the unemployment rate is 5.0 percent — a low rate by historical and economic standards." Following the recent BLS report, the administration released a "fact sheet" on June 6, stating it had already taken action to alleviate employment problems by signing the stimulus bill — an "economic growth package" that is expected to "help create more than half a million jobs by the end of 2008."

Unfortunately, the Bush administration badly misread the BLS numbers, which are worse than they may appear and indicate an extension of UI benefits is long overdue. Those most directly affected by ongoing troubles in the job market are the long-term unemployed, a sizable proportion of whom are not even counted in unemployment rate statistics because they have stopped looking for work and are deemed to be no longer in the workforce. These citizens, not those who are unemployed for short periods, are the ones most in need of a UI benefits extension.

In testimony before the Income Security and Family Support Subcommittee of the House Ways and Means Committee on April 10, University of Michigan Economics Professor Rebecca M. Blank said that the standard unemployment rate measures those actively looking for work. If the "marginally attached," those who want a job and have recently looked for a job, but are currently not looking because jobs are so scarce, and the underemployed — those available for full-time work but who have had to settle for a part-time schedule — are added to the unemployment picture, the unemployment rate as of March 2008 would have been 9.1 percent. Today, that figure would be closer to 9.5 percent.

According to a Joint Economic Committee press release on May 21, there are 1.4 million unemployed workers who have been out of work and searching for a new job for at least six months. Regardless of the overall unemployment rate, the average duration of a jobless spell today is longer than at any time Congress has taken action to extend unemployment benefits in

the past 30 years. The share and number of UI beneficiaries exhausting their benefits is already higher than at the beginning of the 2001 and 1990-91 recessions. 36.4 percent of unemployed workers had exhausted their UI benefits by the end of the first quarter of 2008.

These facts argue for immediate extension of UI benefits for the marginally attached and underemployed, and macroeconomic conditions support an even broader extension. The Congressional Budget Office has estimated that, once up and running, a national UI extension would put more than $1 billion per month in the hands of jobless workers and their families. As the Economic Policy Institute reminds us, Mark Zandi of Economy.com estimates that every dollar spent on unemployment insurance boosts the economy by $1.73. UI stimulus is effective because the long-term unemployed, who are likely to have depleted their savings, tend to quickly spend every dollar they receive on necessities.

The spike in the unemployment rate announced June 6 caught the attention of almost everyone in Congress, which is now much more likely to act. The proposal to extend benefits that the House Ways and Means Committee approved in April has seen no action since then, but the House leadership has announced that it seeks a floor vote on a stand-alone UI extension measure sometime during the week of June 9. It seems likely that the issue will be revisited by the Senate, although the method by which the extension is approved has not yet been determined. It could be attached to the war supplemental bill or a broader stimulus package, or passed as a companion to the House stand-alone bill.

It is unclear if the president would still veto an extension of UI benefits given the new economic and employment data, but strong support in Congress and an impending election could yield sufficient votes in Congress to override a presidential veto.

OMB Watch Calls for Clear IRS Rules for Election Activities

In response to an Internal Revenue Service (IRS) request for input on its 2008-09 guidance priorities, OMB Watch submitted comments that stated the top IRS priority should be the creation of a bright-line definition of prohibited political intervention for charities and religious organizations exempt under Section 501(c)(3) of the Internal Revenue Code (IRC). The IRS is continuing its public education efforts to inform groups about the prohibition on partisan election activities and will soon release two field directives for IRS agents to guide them in enforcing the rules.

Each year, the IRS seeks public input on it Guidance Priority List "to identify and prioritize the tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance." The OMB Watch comments said that clearly defining "what is and is not allowed for issue advocacy and voter education efforts by 501(c)(3) organizations is critically needed to guarantee basic constitutional rights of free speech and association. It is also necessary to remove the chilling effect of the current vague facts and circumstances test so that 501(c)(3) organizations can become fully engaged in

activities that support election reform and the goals of the Help America Vote Act."

OMB Watch recommends that the IRS consider the U.S. Supreme Court's 2007 decision in *Federal Election Commission v. Wisconsin Right to Life* in developing a bright-line standard. That decision exempted genuine issue advocacy 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. The IRS could adopt guidelines similar to what the FEC approved as permissible issue advocacy. According to the FEC rules, if the focus is on a legislative issue, and an officeholder is urged to support that position, or the public is called to support a position and contact an officeholder to urge him or her to do so, it is not an electioneering communication.

The OMB Watch comments included an attachment of a draft bright-line approach proposed by attorney Gregory Colvin of Adler and Colvin in San Francisco that can be used as the foundation for drafting bright-line guidance. Colvin's document distinguishes genuine issue advocacy from partisan political intervention. Colvin's safe harbor proposal considers that if the activity does not take a position on any candidate's character or fitness for office, it would not be considered partisan politicking by the IRS.

Meanwhile, during a May 28 District of Columbia Bar Section on Taxation luncheon, Judith Kindell, an IRS senior technical adviser in the exempt organizations area, announced two forthcoming field directives for exempt organizations agents that will guide them in enforcing the rules on prohibited political activity. One directive will discuss the issue of Web links and the other issue advocacy. In determining whether a 501(c)(3) organization engaged in partisan politicking, "issue advocacy is not just the statement, but the context of the distribution of the statement that we look to." Kindell said that for this election season, the IRS will not pursue cases where a website a 501(c)(3) organization is linking to is its related 501(c)(4) social welfare organization.

Another speaker on the same panel, Marcus Owens, an attorney with Caplin & Drysdale, said the IRS should issue bright-line regulations because of "differing interpretations of the facts-and-circumstances standard that IRS applies" and because "there are too many gray areas." He said some IRS offices have a more liberal interpretation where only allegations of explicit statements of campaign intervention lead to investigations, while other offices are more willing to look at allegations of implicit or indirect campaign intervention. Owens also discussed "inferential" intervention, which he described as "inferences derived from discussions of candidate's positions on an issue ... but somewhere else in the organization, another Web site or something off a Web site could carry with it a flavor of the organization's position on the same issue, and IRS could conflate those two and come to the conclusion that there was inferential intervention."

In addition, on May 27, the IRS posted the transcript of an interview with Steve Miller, commissioner of the Tax Exempt and Government Entities Division, discussing tax-exempt organizations and their involvement in elections. In describing enforcement of the ban on election activity, Miller said the IRS "read[s] the newspapers about possible problems that

have occurred. When we get that information, a team of folks takes a look and determines actually whether they think there's enough for us to go out and actually do an investigation." If the IRS determines that an entity acted illegally, "action can be as minimal as a letter to the charity explaining the rules or, in some cases, possibly an excise tax. In other cases, we could revoke the tax-exempt status." Use of such second-hand sources for enforcement purposes calls attention to the need for a bright-line rule that clearly defines prohibited political intervention activities for charities and religious organizations.

In an OMB Watch press release, Kay Guinane, Director of Nonprofit Speech Rights, said, "By protecting the ability of the nation's only nonpartisan sector to speak out on the issues of the day, on any day, on any issue, no matter how controversial, the IRS can ensure debate on public policy issues is informed by the expertise and public interest perspective of 501(c)(3) organizations."

Free Speech Questions Linger After Judge Dismisses Most Charges against Charity Leaders

Concerns about the freedom of association and the right to express unpopular points of view in organizational newsletters remain after conspiracy charges against three officers of a defunct Muslim charity, Care International, Inc., were dismissed in Boston on June 3. Two other convictions were upheld, including one against the former treasurer of the organization because he failed to report newsletters supporting "jihad" to the Internal Revenue Service (IRS).

Ruling from the bench, U.S. District Court Judge Dennis Saylor IV overturned three convictions for conspiracy to defraud the IRS by obtaining tax-exempt status in 1993 for Care International. The group ceased operations in 2003. Saylor said there was no proof of conspiracy when the group was created. The three leaders were convicted in January and have been in prison ever since. After the ruling, Samir Al-Monla was released, and sentencing for the other two defendants, Emadeddin Muntasser and Muhammed Mubayyid, is scheduled for June 12. Attorneys for both sides said they are considering appeals.

Prosecutors from the U.S. Attorney's office admitted the group spent funds to assist widows, orphans, and disaster victims around the world but also said the group supported violent jihad. However, the defendants were not charged with material support of terrorism, and the judge said no evidence of use of charities to promote terrorism was produced during trial, despite the extremely broad claims made by prosecutors. The evidence of the alleged support was limited to statements in the group's newsletter.

Failure to disclose the newsletter articles was one basis of Mubayyid's conviction for filing a false tax statement in 2000, which was upheld. The prosecution's theory that publication of such articles is a crime unless reported to the IRS raises fundamental free speech issues. Harvey Silvergate, attorney for Muntasser, told the *Worcester Telegram*, "There has never been a prosecution under this theory ... absolutely every — not most every — application for

tax-exempt status would potentially be the basis of a criminal charge.... Invariably you have to omit a huge amount of information or else have a 16,000 page application." In addition, the right to hold and advocate unpopular points of view is clearly protected. The 1969 U.S. Supreme Court ruling in *Brandenburg v. Ohio* said, "Speech can only be curtailed when it is intended to and has the effect of causing imminent lawless conduct. Mere abstract advocacy of violence, however objectionable, may not be barred." Muntasser's conviction for making a false statement about a visit to Afghanistan was also upheld.

The prosecution also argued that the defendants failed to report that Care International was an outgrowth of the Al-Kifah Refugee Center, which media reports linked to the 1993 attack on the World Trade Center. The basis of the argument appears to be Muntasser's past relationship to Al-Kifah, which he left after 1993. At trial, the defense argued that Al-Kifah was separate and that the defendants started Care to break away from it. News reports about the trial do not include information about evidence of control or a formal relationship between the two groups. More information may become available when the judge's written order is filed, but for now, the "outgrowth" theory raises questions about freedom of association and whether nonprofits must report all past affiliations of their leaders and employees in order to avoid possible criminal prosecution.

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In This Issue

Toxic Assessment Delays Block New Standards

A House panel recently examined efforts by the U.S. Environmental Protection Agency (EPA) to study human exposure to, and toxic effects of, common industrial chemicals. EPA is not assessing enough chemicals and is taking too long to complete the assessments it does undertake, lawmakers said. Witnesses complained that without rigorous scientific studies as a foundation, federal and state agencies cannot set air and water quality standards that protect public health.

The House Science and Technology Committee's Subcommittee on Investigations and Oversight held the hearing June 12. Much of the hearing focused on the Integrated Risk Information System (IRIS), EPA's program for studying toxins. IRIS is a publicly searchable database for studies on the human health effects of hundreds of industrial chemicals and other substances.

Although hundreds of new chemicals appear on the market every year, EPA's pace for completing IRIS assessments has slowed dramatically in recent years, panel members and witnesses said. Ranking Member James Sensenbrenner (R-WI) pointed out that EPA has completed only two IRIS assessments in each of the last two years. He called the process "broken down."

Critics say revisions to the IRIS assessment process, announced April 10, will worsen delays by adding additional steps to the process. One new provision gives other federal agencies, such as the Department of Defense and the Department of Energy, a guaranteed seat at the table during review of EPA's initial assessments.

Sensenbrenner said the new interagency review requirement, managed by the White House Office of Management and Budget (OMB), may further slow the pace of IRIS assessments. "The EPA needs to limit the time frame of assessments to prevent other agencies from indefinitely delaying the process," he said.

Documents released by the subcommittee show EPA experts unhappy with the OMB interagency review period. OMB began wading into the IRIS assessment process in 2004. IRIS program staff said OMB's presence "has added tremendously to the time it takes to release" draft and final assessments.

Giving certain agencies an opportunity to review IRIS assessments also creates a conflict of interest, critics say. The defense industry, including the Pentagon and its contractors, emit more pollution than any other sector. If EPA finds a chemical poses a risk to public health, these agencies may be held liable in court or forced to clean up the pollution.

Controversy surrounding a past IRIS assessment on perchlorate, a chemical found in rocket fuel, could foreshadow future interference by the Pentagon, according to Linda Greer, Director of the Health Program at the Natural Resources Defense Council. "The Defense Department mounted a years-long battle, and elicited White House support, against IRIS draft assessments in 1998 and in 2002 that had determined that even low doses of perchlorate may be harmful to early development of the human brain," Greer said in testimony.

The perchlorate assessment drew the attention of Pentagon officials and defense contractors because it is widely used in defense activity. Public health advocates have pushed for perchlorate regulation because it has been widely detected in public drinking water supplies and is a proven inhibitor of human thyroid functions. Greer said the delay means "the public remains years away from a national drinking water standard that will protect their health."

An IRIS assessment for trichloroethylene, another common contaminant, continues to be delayed. Lenny Siegel, head of the Center for Public Environmental Oversight, testified that the Navy Department has been integral in the long delay.

Witnesses said the defense agencies are able to delay assessments by questioning the scientific certainty of EPA's work and demanding further study be done before the assessment goes

forward. These constant claims of uncertainty keep EPA in an interminable quest for more data. Sensenbrenner does not believe complete certainty should be a prerequisite for finalizing an assessment. "Data gaps in risk assessments will always exist, as better science is always developing," he said.

The hearing was the second of two held by the subcommittee examining the revisions to the IRIS assessment process. The first hearing focused primarily on OMB's involvement in IRIS and how that involvement contributes to delay in the assessment process.

Following the first hearing, panel chairman Brad Miller (D-NC) wrote to Susan Dudley, head of OMB's Office of Information and Regulatory Affairs (OIRA), the White House office responsible for coordinating the interagency review. Miller accused OIRA of directly delaying and interfering in IRIS assessments. As with review of agency regulations, Dudley maintains OIRA's role is merely to coordinate the review among executive branch departments. "However, documents that have come to the Subcommittee suggest that OIRA plays a direct role in examining and challenging the science that informs EPA's proposed IRIS entries," Miller wrote.

Miller also criticized the lack of transparency in the revised process for IRIS assessments. Communications among EPA, OMB, and other agencies will be considered "deliberative," according to the document outlining the new process. EPA had hoped to make these back-and-forths among the agencies part of the public record, but OMB persuaded the agency to drop the disclosure policy, according to a recent report by the Government Accountability Office.

"The only reason to hide a discussion about science is if the discussion is actually not about science, but about other things that are being used to trump the science," Miller wrote.

Congress, FDA Explore BPA Dangers

Congress and the U.S. Food and Drug Administration (FDA) have begun to further explore the dangers posed by bisphenol A (BPA) and whether to regulate its use, especially in food and beverage containers. BPA is an industrial chemical used to make hard plastic containers, such as baby bottles, and is part of the lining of food cans, where it is used to prevent metal from leaching into foods. Congress recently held a hearing and is considering legislation to limit the use of BPA. The FDA is assessing the toxicity of the chemical to help determine the risk to consumers.

In April, the National Toxicology Program (NTP), part of the U.S. Department of Health and Human Services, and Canada's health ministry, Health Canada, released the results of studies on the toxicity of BPA to various subpopulations. According to Health Canada's press release announcing the results, "Canada is the first country in the world to complete a risk assessment of bisphenol A in consultation with industry and other stakeholders, and to initiate a 60 day public comment period on whether to ban the importation, sale and advertising of

polycarbonate baby bottles which contain bisphenol A."

NTP's brief on the effects of BPA concluded that there was "some concern" about neurological effects on infants and children from low levels of exposure. A peer review of the draft brief by a science panel concurred with NTP's concerns for all but one subpopulation, according to a June 12 BNA article (subscription) describing the results of the peer review. The review panel said there was sufficient evidence to support NTP's conclusions about the danger BPA poses to infants and children.

On June 6, FDA's lead scientist asked the agency's science board to convene a subcommittee to study the effects of BPA. That group is expected to report its conclusions in the fall of this year. The science board will also review the scientific literature from around the world to help better understand the implications of exposure to BPA.

On June 10, at a hearing by a subcommittee of the House Committee on Energy and Commerce, FDA's Associate Commissioner for Science, Norris Alderson, testified, saying, "A large body of available evidence indicates that food contact materials containing BPA currently on the market are safe, and that exposure levels to BPA from these materials, including exposure to infants and children, are below those that may cause health effects." Alderson said that if the FDA's science board concludes that BPA is not safe, the agency would consider regulating its use. The likely result of this process, however, is that FDA will not act to regulate or ban BPA in the near future.

Other witnesses at the hearing disagreed about whether BPA and phthalates, another class of chemicals used in children's toys and other products, should be regulated. According to a June 11 article in BNA (subscription), the American Chemistry Council witness said there is no need for concern about these two chemical substances and that "the scientific evidence supports the continued use" of them. Witnesses from public health organizations, however, argued that there is enough evidence for Congress to regulate these chemicals.

Manufacturers and retailers have already started reducing or eliminating the use of the chemicals. For example, after NTP and Health Canada released their studies in April, several companies began to voluntarily remove products that contain BPA. According to an April 19 *Washington Post* article, Wal-Mart Canada began to pull baby products containing BPA from store shelves, and Nalgene, the manufacturer of plastic water bottles, planned to discontinue production of bottles with BPA. Since that time, other manufacturers and retailers have begun to phase out various products.

Rep. Edward Markey (D-MA) introduced a bill June 10, H.R. 6228, which would amend the Federal Food, Drug, and Cosmetic Act and ban completely the use of BPA in food and beverage containers. It has been referred to the House Committee on Energy and Commerce.

House Caves on Telecom Immunity in FISA Bill

After months of negotiations and stalled efforts, the House leadership reached common ground with the White House in passing a bill that reforms the legality of foreign surveillance and grants telecommunications companies retroactive immunity for assisting in warrantless wiretapping. On June 20, the House passed the FISA Amendments Act of 2008 (H.R. 6304) by a vote of 293 to 129. Despite opposition from key senators and the public interest community, at this point it appears likely to pass the Senate as well.

The public interest community heavily criticized the bill for expanding government surveillance powers to permit wiretapping of American citizens without judicial approval and for essentially granting telecommunications companies a free pass for allegedly illegally participating in the National Security Agency's (NSA) warrantless surveillance program.

In the summer of 2007, President Bush signed the Protect America Act of 2007 (PAA), which granted 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 bill included sunset provisions that would automatically eliminate the surveillance powers after six months if Congress did not act to extend the authorities. The PAA provisions expired in March after negotiations between the Senate and House faltered. Since then, the House leadership has been in negotiations with the Senate leadership and the White House.

While hailed as a compromise bill by the House leadership, advocates have criticized the legislation for failing to preserve the Fourth Amendment's protection against unreasonable searches and seizures and for failing to provide adequate access to U.S. courts.

Telecom Immunity

The central issue of contention between the House and Senate has been whether to grant retroactive immunity to telecommunications companies alleged to be involved in the NSA's Terrorist Surveillance Program (TSP). Numerous lawsuits against the companies are currently proceeding through the courts, and the Bush administration, along with the Senate, has been pushing for some mechanism to dismiss these cases. As reported previously in the *Watcher*, Speaker Nancy Pelosi (D-CA) refused to compromise on this issue earlier in the year, and the PAA provisions were allowed to expire.

Under H.R. 6304, the "compromise" leaves the question of immunity for the courts to decide. However, the bill stipulates the use of an easy standard to qualify for the immunity. The bill requires courts to determine if there is "substantial evidence" showing that telecommunications companies received written requests stating that the wiretapping activity was authorized by the president. However, it is well accepted that telecommunications companies participating in TSP have such letters; therefore, the court test is widely viewed as meaningless.

"This immunity provision will effectively destroy Americans' chance to have their deserved day

in court and will kill any possibility of learning the extent of the administration's lawless actions," stated Caroline Frederickson of the American Civil Liberties Union (ACLU).

Expanded Government Surveillance Authority

While the PAA permitted the government to target anyone overseas for surveillance without receiving a warrant or judicial approval, H.R. 6304 limits the scope of such warrantless surveillance to non-Americans. However, warrants or judicial approvals still aren't required even if the overseas target contacts an American citizen. Such "reverse targeting" may provide an end-run around the protections of the Fourth Amendment. While the courts must approve the minimization procedures for collecting such intelligence, there is nothing requiring the government to seek individualized orders once the real target has shifted to an American citizen. Moreover, there is nothing preventing the government from engaging in the bulk collection of overseas communications.

"Congress could have given intelligence agencies the necessary authority to domestically collect the communications of targets abroad while preserving privacy protections for Americans," said Leslie Harris, President and CEO of the Center for Democracy and Technology. "Instead, under this flawed bill, intelligence agencies can authorize themselves to conduct surveillance. Meanwhile, court review of surveillance procedures will often be too little and too late to provide meaningful protection."

Modest Improvements

It appears H.R. 6304 contains a few modest improvements over the PAA without the major changes the Democratic leadership was insisting on at the start of the standoff. First, the bill asserts that the Foreign Intelligence Surveillance Act (FISA) is the exclusive means by which surveillance may be conducted. This may prevent a future administration from engaging in a secret surveillance program, like the NSA spying program, outside of the established legal framework. Second, the bill calls for a review of the TSP program by the inspector general. The administration has thus far successfully resisted a thorough review of the spying program. Third, the bill has a sunset of 2011, which will require the next administration and Congress to reconsider its provisions.

Despite these modest improvements, the public interest community has united to combat the bill in the Senate, where it is expected to come up for a vote on Tuesday, June 24. Several senators have voiced strong opposition to the compromise, including Sens. Russ Feingold (D-WI), Patrick Leahy (D-VT), Christopher Dodd (D-CT), and Arlen Specter (R-PA).

"It is totally insufficient to grant immunity for the telephone companies' prior conduct based merely on the written assurance from the administration that the spying was legal," said Specter.

Feingold asserted that the "proposed FISA deal is not a compromise; it is a capitulation."

Leahy issued a statement explaining his refusal to support the bill. "I have said since the beginning of this debate that I would oppose a bill that did not provide accountability for this administration's six years of illegal, warrantless wiretapping."

Dodd, who called the compromise on retroactive immunity by another name, stressed, "The President should not be above the rule of law, nor should the telecommunications companies who supported his quest to spy on American citizens."

Despite such opposition in the Senate, the bill is expected to pass. The bill is also expected to be signed by the president because it already has support from key administration officials. J.M. McConnell, the Director of National Intelligence, and U.S. Attorney General Michael Mukasey voiced their support, stating that H.R. 6304 provides "the Intelligence Community with the tools it needs to collect the foreign intelligence necessary to secure our Nation while protecting the civil liberties of Americans."

House Considers New Legislation at Chemical Security Hearing

On June 12, the House Energy and Commerce Subcommittee on Environment and Hazardous Materials held a hearing on the current status of the chemical security program at the Department of Homeland Security (DHS) and considered two bills to amend the program.

The current chemical security program was established after Congress mandated in Section 550 of the Department of Homeland Security Appropriations Act of 2007 that DHS develop a temporary program for instituting security performance standards for high-risk chemical facilities. The chemical security provisions of the bill were the result of a heavily criticized backroom deal that excluded bipartisan agreements worked out in the House and Senate. Among the criticisms were the fact that the legislative language specifically exempted approximately 3,000 drinking water and wastewater treatment facilities from the chemical security program and that review of safer technologies was not required as part of the program.

Robert B. Stephan, Assistant Secretary for Infrastructure Protection at DHS, reported that under the current chemical security program, DHS has reviewed approximately 30,000 questionnaires (called "top-screens") from chemical plants. These top-screens are the initial stage in the agency's review of facilities and are used to determine each facility's placement in the tiered risk assessment. Those plants placed in higher-risk tiers are required to address more issues in their vulnerability assessments and site security plans, which will also be reviewed by DHS. Stephan noted that facilities have not yet begun submitting vulnerability assessments, but that DHS would soon be notifying facilities of their obligations to do so.

Stephan also testified to the subcommittee that DHS now supported the inclusion of drinking and wastewater treatment facilities determined to be high-risk in the chemical security program. Benjamin Grumbles, Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA), agreed that the exemption for facilities regulated by the Safe

Drinking Water Act should be eliminated. Grumbles said that because of the exemption, the potential terrorist threat to U.S. water systems "remains alive and well."

The Two Bills

There are two chemical security bills currently pending in the House, and the subcommittee was considering them during the hearing. Rep. Bennie Thompson (D-MS), Chair of the House Homeland Security Committee, introduced H.R. 5577 (Chemical Facility Anti-Terrorism Act of 2008) on March 11; the legislation seeks to fully replace the temporary 2006 law with a more comprehensive program. The Thompson bill includes stronger consideration of safer technologies, greater involvement of plant employees, and would include the previously exempted water treatment facilities in the chemical security program.

Former Rep. Albert Wynn (D-MD), who left Congress after losing in his Democratic primary to challenger Donna Edwards, introduced H.R. 5533, which would essentially make permanent the criticized interim law from 2006 and the temporary DHS regulations that resulted. The Wynn bill would continue to exempt water treatment facilities and would not require consideration of inherently safer technology as part of the program.

Grumbles told the subcommittee that the administration had not taken a position on either bill, and Stephan did not discuss legislation. Several subcommittee members, however, took issue with a recent DHS letter to Thompson that expressed the agency's strong opposition to H.R. 5577. In the letter, DHS claimed that H.R. 5577 would have "a negative impact upon current and future efforts to secure the nation's high-risk chemical plants." Despite the subcommittee's scheduled hearing on the legislation just two days after the letter was sent to Thompson, no copy was sent to the subcommittee, and Stephan reported that he had not been authorized to share information in the letter with the subcommittee.

In Thompson's June 12 response to DHS, he expressed suspicion over the agency's timing and stated that he is "doubtful that DHS is still interested in continuing our good faith efforts at collaboration on this critical homeland security initiative."

Other Testimony

Among others testifying before the subcommittee was Philip J. Crowley, Senior Fellow and Director of Homeland Security at the Center for American Progress, who supported H.R. 5577 and the legislation's efforts to include water facilities and inherently safer technologies. Crowley also urged immediate action on the legislation, warning that chemical security was "too important an issue to fall victim to inter-agency or inter-committee rivalries."

Brad Coffey of the Association of Metropolitan Water Agencies explained that the association was opposing H.R. 5577 because of its belief that the legislation would undermine drinking water utilities' ability to operate effectively. Coffey expressed concern over the possibility that safer technologies could be required and claimed that "overall public health relies on our

undisputed ability to choose the optimal drinking water disinfection method."

Marty Durbin, Managing Director of Federal Affairs for the American Chemistry Council (ACC), voiced concern over provisions in H.R. 5577 that provide DHS the authority to require the use of safer technology. Durbin explained that ACC supported reauthorizing and making the current chemical security program permanent, but that "Congress should allow the program to be fully implemented before making any significant, substantive changes."

Dr. Andrea Kidd Taylor, an assistant professor at Morgan State University's School of Community Health and Policy and previously the labor representative on the U.S. Chemical Safety and Hazard Investigation Board, supported H.R. 5577 and stressed the importance of implementing safer technologies as apart of the effort to make chemical plants more secure. "Substituting more secure alternatives for hazardous substances, where technically and economically feasible and comparable risks are not shifted," Taylor explained, "is the best way to protect workers, their families, and their communities."

Improving Information Sharing at DHS

On June 11, the House Homeland Security Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment held a hearing on a bill (H.R. 6193) introduced by Rep. Jane Harman (D-CA), chair of the subcommittee, to improve information sharing at the Department of Homeland Security (DHS).

As previously reported in the *Watcher*, President Bush recently released a memo on improving information sharing through a new regime for controlled unclassified information (CUI). Since 9/11, restricted but unclassified categories for information, often broadly referred to as Sensitive But Unclassified, have proliferated throughout federal agencies. More than one hundred different categories with varying restrictions and definitions have severely impaired the flow of information within government and to the public. The presidential memo eliminated the numerous confusing categories and replaced them with one basic category for all agencies, CUI, with the hope that a consistent, well understood category would make it easier for agencies to share such information with other government officials. The memo placed authority for developing and implementing the new regime with the National Archive and Records Administration.

Harman's bill, the Improving Access to Documents Act of 2008, focuses on the implementation of the CUI framework at one particular agency — DHS. Considering the government-wide nature of the presidential memo, the single-agency focus of the bill is somewhat unconventional. Some critics of the legislation actually support the policy changes proposed by Harman's bill but would prefer the provisions apply to all agencies, not just DHS.

The bill seeks to limit the use of the new CUI category by restricting the number of employees who can designate something as CUI. Other provisions of H.R. 6193 establish transparency with regular auditing and reporting to Congress of the number of documents marked as CUI

and requirements that DHS publicly disclose the list of CUI documents withheld under the Freedom of Information Act (FOIA). The bill also explicitly distinguishes between CUI and FOIA exemptions, clarifying that CUI-marked documents are not automatically exempt from disclosure under FOIA.

Patrice McDermott of OpenTheGovernment.org, a broad coalition that includes OMB Watch, supported the legislation and advocated for greater public involvement in the process of developing and implementing CUI policy. Stating that the "public and the press have been almost entirely excluded," McDermott argued in her testimony before the subcommittee that public involvement is the only way to move from a need-to-know to a need-to-share environment.

Meredith Fuchs of the National Security Archive stressed the need to preserve the distinction between CUI and FOIA exemptions and to ensure that CUI does not become another mechanism for increased government secrecy. Failure to adequately define CUI and the creation of a highly malleable concept can easily lead to increased government secrecy. "The CUI framework sketched out in the Presidential Memorandum does not confront this problem directly," said Fuchs in her testimony.

The Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment forwarded H.R. 6193 to the full Homeland Security Committee with unanimous consent.

Fiscal Responsibility, War Critics Take a Back Seat in House War Supplemental

When the House Democratic leadership introduced a supplemental appropriations bill the week of June 16, chock-full of popular spending measures, it ensured easy passage of the $257 billion package. The Democrats and President Bush can each claim they won items in the negotiation over the bill: the Democrats won increased spending on domestic programs; Bush was able to kill any requirements for withdrawal of soldiers from Iraq. Yet the bill remained controversial because the Democrats refused to include fiscally responsible measures or accede to the opinion of 63 percent of Americans that soldiers should return home within two years.

The inclusion of a multitude of additional domestic spending items, including a pair of massively popular provisions to extend Unemployment Insurance (UI) benefits and expand the GI bill, presented members of Congress and Bush with an irresistible basket of fiscal goodies. This spending would provide, among other things, relief for thousands of victims of natural disasters, maintain important Medicaid services, increase disaster protection for the citizens of New Orleans, and help feed victims of the global food crisis.

In addition, the bill excludes fiscally responsible offsets to new mandatory spending, a previous stumbling block to passage of the bill for almost all Senate Republicans.

The House spending package is a response to a war supplemental bill the Senate approved on

May 22, and, like the Senate version, is composed of two amendments. The first amendment in the House bill is the version passed by the Senate in May and would provide $99.5 billion to fund the wars in Iraq and Afghanistan through the end of the current fiscal year (FY) on Sept. 30 and $65.9 billion for the first half of FY 2009. This amendment was approved by the House 268-155. The second amendment, approved by the House 416-12, would reduce this funding by $3.6 billion and provide about $95.7 billion in non-defense domestic spending. While ultimate passage in the Senate is not certain, final congressional approval of the bill is likely to occur the week of June 23.

Emergency Supplemental - Appropriations Breakdown *(in millions of dollars)*		
Amendment #1	**Bush Request**	**House Bill**
Department of Defense 2008	100,054	99,506
Department of Defense 2009	66,063	65,921
Subtotal Amendment #1	***166,117***	***165,427****
Amendment #2		
Foreign Aid	9,423	10,089
State Department/USAID FY08	*5,074*	*5,164*
State Department/USAID FY09	*3,605*	*3,680*
PL480 Food Aid FY08	*350*	*850*
PL480 Food Aid FY09	*395*	*395*
Military Construction & VA Hospitals	2,438	4,642
Disaster Relief	0	2,650
FEMA Disaster Relief Account	0	1,297
Army Corps of Engineers	0	606
SBA — Disaster Loans	0	267
Agriculture Assistance	0	480
Louisiana Levees (FY09)	5,761	5,761
Louisiana Housing Vouchers	0	73
Department of Justice	186	271
Program Shortfalls	0	1,048
FDA	0	150
Bureau of Prisons	0	178
Census Cost Overruns	0	210
Increased UI Claims	0	110
Science	0	400
Veterans Education Benefits — Admin. Costs	0	120
Defense Reduction	--	-3,578
Death Benefit — Mrs. Lantos	0	0.169
Subtotal Amendment #2	***17,758***	***21,075***
TOTAL COST FOR APPROPRIATIONS ITEMS	**183,876**	**186,502**
Estimates for GI Benefits and Unemployment Extension		

	2-Year Estimate	11-Year Estimate
Expanded GI Benefits	$769 million	$62.8 billion
Unemployment Extension	$12.5 billion	$8.2 billion

Source: House Appropriations Committee press release

Construction of the final war supplemental bill has followed a strange and arduous path. After the Senate passed its version, House Majority Leader Steny Hoyer (D-MD) anticipated that the Senate's war supplemental would likely be rejected by the House Blue Dog Coalition, because it omits a $54 billion tax increase to pay for the expanded GI bill. Hoyer also believed the chances of UI extension would fare better in a stand-alone bill (H.R. 5749). But when the Bureau of Labor Statistics reported June 6 that the unemployment rate jumped by the largest monthly change in over 20 years (from 5.0 to 5.5 percent), House Democratic leadership realized that the UI bill would help passage of the war supplemental. House Blue Dogs, meanwhile, kept mum on demanding that this increase in mandatory spending be offset by either increased revenues or cuts to other mandatory programs.

To further increase bipartisan support of the war supplemental package, House Democratic and Republican leadership worked out a compromise by which the UI extension would be limited to 13 weeks; language to add an additional 13 weeks to workers living in "high-unemployment" states was dropped. House Democratic leadership apparently also struck a bargain with the Blue Dog Coalition on offsetting a GI bill expansion. When the House added the GI bill expansion to its initial war supplemental (approved by the House and sent to the Senate in May), Democratic leadership placated the Blue Dogs by including a $54 billion revenue raiser. No such offset was included in this latest package, yet Blue Dogs overwhelmingly approved the $71 billion in new mandatory spending.

When President Bush issued an approving Statement of Administration Policy (SAP) on the war supplemental on June 19, it became apparent the House would be voting on an incredibly popular bill. Earlier this year, the president made his position on including domestic spending in a war supplemental spending bill clear:

> ...I will not accept a supplemental over $108 billion or a supplemental that micro-manages the war, ties the hands of our commanders.
>
> We will work with Congress on these veterans' benefits. I'm a firm believer that we ought to treat our veterans with respect. In the State of the Union I talked about the idea of transferring — a soldier being able to transfer educational benefits to a spouse or children. We've sent legislation to that effect up to Congress; we would like for them to move on it quickly. But the $108 billion is $108 billion.

Although previous SAPs (here and here) echoed this sentiment, the president's support for relief for victims of the Midwestern floods in this bill signaled a back peddling from opposition

to the inclusion of domestic spending. His opposition was likely softened after the Senate voted by a veto-proof margin (75-22) to approve UI extension and GI bill expansion. And when the House overwhelmingly approved an amendment to the revised supplemental spending bill, it became clear that any veto would almost certainly be overridden.

The Democratic leadership has chosen the politically expedient path of crafting a war supplemental package that would provide vital support to the unemployed, reward the nation's military for their service, and cover a host of other emergency spending needs, all while not asking for the necessary sacrifice to pay for these priorities. House Speaker Nancy Pelosi (D-CA), Hoyer, and Senate Majority Leader Harry Reid (D-NV) well understand that 60-vote majorities in the Senate for revenue increases or war-policy mandates are virtually impossible to achieve, let alone mustering two-thirds majorities in both chambers for veto overrides.

Congress Struggles with Tax Bills ahead of July 4 Recess

In the dwindling days before the July 4 congressional recess, the House and Senate will try to break the longstanding logjams on three critical pieces of tax legislation: a proposal to approve a "patch" to hold constant the number of taxpayers liable to the Alternative Minimum Tax (AMT), a bill to renew dozens of tax provisions collectively referred to as the "extenders," and the tax title of Rep. Barney Frank's (D-MA) Federal Housing Administration (FHA) foreclosure guarantee bill.

It is likely that Congress will enact some version of these bills before the legislative year is over. Without passage of the "patch," upward of 25 million Americans will find themselves paying an average of $2,000 in additional income tax under the AMT, according to White House estimates. In addition, hundreds of America's largest corporations have urged congressional leaders to pass the "extenders" package — even if it means offsetting the cost of the bill to get it through the House.

The disputes over these bills in recent weeks reprise arguments that the parties involved have been invoking for months, if not years. Foremost among the points of contention is the perennial issue of fiscal responsibility. The House and Senate PAYGO rules require that any tax cut or mandatory spending increase that adds to the deficit over five- and ten-year windows needs to be offset by the amount added to the deficit. The rule comes into play regarding the AMT patch and the extenders package. Currently, the FHA bill is revenue neutral.

The price tag of the patch is $61.6 billion. In his AMT patch bill, House Ways and Means Chair Charles Rangel (D-NY) proposes to pay for the patch with four main offsets: taxation of carried interest as ordinary income (which would raise an estimated $30.98 billion over 10 years), denial of Section 199 benefits for certain major integrated oil companies ($13.57 billion over 10 years), tighter tax enforcement of merchant credit card payments ($9.80 billion), and a limitation on the use of foreign tax havens ($6.94 billion). All but the credit card provision have passed the House in separate legislation that then died in the Senate, which has been the

graveyard of prior House efforts at fiscal responsibility. Rangel has been adamant so far about paying for the patch in 2008, but previous years' precedent of waiving PAYGO for the patch may still happen in the end.

Interestingly, the odds of a partial or fully PAYGO-compliant extenders package are better. Again, Rangel and the House leadership insist on paying for the $55.5 billion package. However, the Senate has sent mixed signals. Senate Finance Committee Chair Max Baucus (D-MT) has proposed a fully-paid-for package, but votes to cut off debate on the package failed on June 10 and June 17, with at least 40 Republican senators opposed. Meanwhile, a consortium of 379 large American corporations sent a letter to the Senate leadership on June 16, making clear that the extenders package was such a high priority that they would rather have it paid for if that would enable its passage in the House.

At the heart of the FHA bill is a $300 million loan guarantee program that CBO estimates would prevent half a million foreclosures. The sticking points in the FHA bill debate have changed often, as the administration issues new veto threats against different aspects of the bill after their old demands have been met by legislators. For example, when the administration demanded that FHA modernization and GSE (government-sponsored enterprises) reform be included in the bill, Rep. Frank added such provisions. After that, in a veto threat sent to Congress on June 19, the administration took issue with the bill's provision to pay for the loan guarantee program by tapping into a new affordable housing trust fund, saying that it now opposes the creation of such a fund. On June 24, the Senate invoked cloture to move forward on the bill.

Innumerable other issues relating to these three bills have yet to be resolved, but in an election year, it is more likely than not that those issues, as well as the ones described above, will be resolved before Congress adjourns.

Grassroots Lobbying Campaign on Climate Bill Runs into FEC Rules

Two recent grassroots media campaigns promoting action on climate change learned that campaign finance rules can be a trap for unwary advocates, illustrating how federal election law has reached beyond partisan campaigning to treat traditional grassroots issue advocacy like electioneering. Both ads appeared to comply with the Internal Revenue Service (IRS) prohibition on intervention in elections.

The Alliance for Climate Protection (ACP) and the Environmental Defense Action Fund (EDAF) both ran ads in April and May that supported action on climate change, timed to coincide with Senate consideration of the Climate Security Act. The ACP ad featured House Speaker Nancy Pelosi (D-CA) and former Speaker Newt Gingrich, a Republican, who said that while they disagree on many things, they agree that the climate change problem must be addressed. The ad was part of an "Unlikely Alliances" series in ACP's wecansolveit campaign. A previous ad featured Revs. Al Sharpton and Pat Robertson and a new ad, announced June 9,

features liberals and conservatives holding signs that highlight differences, such as "burgers" and "tofu," but saying they all agree on the need to address climate change.

None of the ACP ads mention the election, voting, political parties, or any officeholder's character or fitness for office. They address an issue central to ACP's mission and are part of an ongoing issue advocacy campaign. As such, they appear to be within criteria set by IRS Rev. Rul. 2007-41, which sets out factors the agency uses to distinguish genuine issue advocacy from partisan messages. However, a May 9 *New York Sun* article quoted Republican campaign finance attorneys Jan Baran and James Bopp, Jr., who said the ad may violate the Federal Election Commission's coordination rules. This is because Pelosi was also running for re-election in a June 3 primary; the ad aired nationally, including in her district in San Francisco, within 90 days of the primary election; the ad was not paid for by Pelosi's campaign; and she appeared in the ad. The FEC coordination rules prohibit references a candidate within 90 days of a primary and 120 days of a general election. If Baran and Bopp are correct, the ad would be considered an illegal corporate contribution to Pelosi's campaign.

On May 23, Judicial Watch filed a complaint at the FEC seeking an investigation of the ad. It said that no FEC disclosure reports have been filed. Pelosi's spokesman denied coordination between her campaign and ACP. A spokesman for ACP, which was founded by former Vice President Al Gore and partially funded with his Nobel Peace Prize, told the *Sun*, "This is clearly a nonpartisan issue ad that has a call to action to the public on climate change. We are confident that this ad is in compliance with the rules." Baran disagreed, saying, "Well-meaning ads still violate the statute." Bopp pointed out, "I've been arguing all along that these rules were going to entangle a member of Congress when they're simply doing their job working with a nonprofit group. Well, here it is."

The impact of the FEC coordination rules on grassroots lobbying efforts may become more serious as the result of a June 13 ruling of the U.S. Court of Appeals for the District of Columbia. The long-running litigation, brought by Rep. Chris Shays☼ (R-CT), challenges the FEC's coordination rule for being too lenient in applying the Bipartisan Campaign Reform Act of 2002 (BCRA). In particular, the 90-day limit on coordination restrictions was rejected by the court, which said, "Does the challenged regulation frustrate Congress's goal of 'prohibiting soft money from being used in connection with federal elections'? McConnell, 540 U.S. at 177 n.69. We think it does. Outside the 90/120-day windows, the regulation allows candidates to evade—almost completely—BCRA's restrictions on the use of soft money."

The court's assumption that all joint efforts between public officials and nonprofits are somehow campaign related could result in an even stricter FEC coordination rule. The FEC has not yet said whether it will appeal.

An EDAF climate change ad, part of a $4 million grassroots lobbying effort, triggered FEC electioneering communications rules because the broadcasts referred to federal candidates within 30 days of a primary election. A May 30 *New York Sun* article reported that 25 versions of the ads mentioned Pelosi and more than three dozen other members of Congress, including Sens. Elizabeth Dole (R-NC) and Mark Pryor (D-AR), in an effort to generate support for the

Climate Security Act. The article again quoted Baran, who said the FEC's electioneering communications rules require EDAF to file a report at the FEC and name donors who contributed more than $1,000 for the ads.

EDAF spokesperson Emily Diamond-Falk told the *Sun* that the ads "have nothing to do with Speaker Pelosi's primary election at all. This is strictly about the Climate Security Act." On June 18, the *Sun* reported that EDAF had filed a report at the FEC indicating the group spent nearly $710,000 on its grassroots lobbying campaign. A spokesman for the organization said it learned about the filing requirement from the reporter's earlier inquiry. The group did not file the names of individual donors since it did not raise funds specifically for the ad campaign.

On June 6 the Climate Security Act fell short of the 60 votes necessary to cut off debate and bring the issue to a vote.

Pastor Invites IRS Scrutiny with Opposition to Candidates

The Rev. Gus Booth of Warroad Community Church in Minnesota, a delegate to this year's Republican National Convention, gave a sermon in May urging the opposition of Democratic presidential candidates Barack Obama and Hillary Rodham Clinton. About two weeks after the sermon, Booth sent an e-mail message to Americans United for Separation of Church and State (AU), noting that he had used his pulpit for partisan purposes and attaching a copy of a newspaper article describing the sermon. As a result, on June 11, AU asked the Internal Revenue Service (IRS) to investigate the church for possible illegal campaign intervention in violation of its tax-exempt status.

501(c)(3) organizations, including churches, are not allowed to endorse or oppose political candidates. A pastor may make an endorsement as an individual, but not as a representative of the church. IRS Rev. Rul. 2007-41 states, "Leaders cannot make partisan comments in official organization publications or at official functions of the organization."

According to AU's letter to the IRS, Booth's sermon was profiled in a local weekly newspaper, the *Warroad Pioneer*, under the headline, "Local pastor uses scripture to oppose presidential candidates Clinton and Obama." In addition, the *Minneapolis Star Tribune* reported that Booth said during his sermon, "If you are a Christian, you cannot support a candidate like Barack Obama or Hillary Clinton for president because he/she stands opposite of every one of the Biblical mandates we have addressed today."

AU said the message Booth sent them said, "I am writing you to let you know that I preached a sermon in my church on Sunday, May 18, 2008, that specifically addressed the current candidates for President in the light of the Bible. As you can see from the attached newspaper article, I specifically made recommendations as to who a Christian should vote for."

ABC News said Booth invited an IRS investigation. "Booth, 34, is one of several religious leaders who this year hope to challenge federal law by flouting the regulations about endorsing

candidates from the pulpit — a move that could potentially cost them their tax-exempt status, creating financial ruin for many congregations." Booth told ABC News, "The government is trying to censor me and other religious leaders. I may be taking on the IRS, but the IRS has taken on the Constitution unchallenged since 1954. I feel like the only law that should dictate what I am allowed to say is the First Amendment."

Privacy laws prohibit the IRS from announcing its investigations, so it is currently unknown whether the agency has opened an investigation into this case. However, it is likely that Booth will make a public announcement if the IRS starts an investigation, considering he wrote a letter to the IRS explaining what he had said, challenging the agency to do something.

Nonprofit Input Sought on the Future of Communicating with Congress

The Congressional Management Foundation (CMF), a nonprofit, non-partisan organization working to improve communications between citizens and members of Congress, recently released two important documents that could have significant implications for Congress and the public. One report, *Communicating with Congress: How the Internet Has Changed Citizen Engagement*, reveals that the Internet has revitalized citizen communication with Congress. A draft report, *Communicating with Congress: Recommendations for Improving the Democratic Dialogue*, seeks public comment on a new model for constituent communications and makes specific recommendations for congressional offices, citizens, and advocacy groups.

CMF started the *Communicating with Congress* project to improve communications between Congress and American citizens and began extensively researching all stakeholders' problems and interests. This includes working with Congress, advocacy organizations, technology vendors, and good government organizations. CMF states, "We hope this collaborative approach will result in a new model for communications between constituents and their elected officials which will have the support and commitment of as many people as possible. It is our goal that the model we propose will, if implemented, reduce or remove the current frustrations and barriers, facilitate increased citizen participation in the public policy process, and promote a meaningful democratic dialogue that benefits our country."

CMF commissioned the Zogby International polling firm to conduct a telephone survey of over 1,000 adult Americans and an online survey from a panel of 9,500 people to learn about their interactions with Congress and their expectations. The report found that almost half of all voting age Americans contacted a member of Congress in the last five years. Unfortunately, the majority do not believe Congress is interested in what they have to say.

The Internet report has some important findings about citizens' use of the Internet to engage Congress. These include:

- The Internet has become the primary source for learning about and communicating with Congress
- Internet users who contacted Congress were motivated to do so because they cared about an issue, even if a request was made by a third party
- Information from interest groups was considered to be more credible than information from Congress
- Internet users generally felt disconnected from Congress but wanted to feel engaged
- Internet users felt strongly that advocacy campaigns are good for democracy
- Congress needs to improve online communications and needs additional resources to effectively manage Internet citizen participation
- The organizers of grassroots advocacy campaigns can help facilitate more positive communications between members and citizens, for example, messages that thank a member
- The organizers of grassroots advocacy have a duty to act as educator and facilitator

The culmination of CMF's nine-year project on communicating with Congress is a draft report for public comment, which will be followed by a final report. The draft report proposes a new model for constituent communications and includes specific recommendations for congressional offices, citizens, and advocacy groups. For example, it suggests that individual messages are more persuasive than identical form communications in grassroots advocacy campaigns. In addition, CMF recommends that constituents be adequately prepared when making calls to congressional offices. Details of this model are outlined in the draft report.

CMF has set up a ten-minute online survey to gather input on its recommendations. The deadline for completing the survey is July 18.

The draft report "concept for a new model of constituent communications relies on the development and implementation of a new dual-channel 'dashboard' view of electronic messages. Regardless of whether a message comes in through the Member's own Web form or as part of a grassroots advocacy campaign, this new model would treat all communications as individual messages from individual constituents. . . . The new model would allow offices to manage the volume without losing the meaning of the campaign or the sense of the involvement of the individual constituent behind each message."

More specifically, the model:

- Pulls all of the communications about a particular topic or advocacy campaign together;
- Can verify that grassroots communications are sent from real citizens;
- Clearly identifies the subject of messages; and
- Can identify the sponsoring organization and its vendor

These recommendations are intended to improve the current environment in which those who communicate with Congress do not think their members are interested in what they have to say and do not think their members keep them informed of what they are doing in Congress.

Instead, people are relying on the organizations they trust to inform them of what is happening in Congress and to help them communicate with members.

Meanwhile, congressional staffers doubt that the constituents are actually informed on the issues they are writing about and doubt mass e-mailing campaigns include messages from real people. This results in an ineffective circle of mistrust between citizens and the offices of elected officials.

Despite the frustrations, these new findings suggest that citizens really do want to hear from and interact with their members of Congress. The CMF draft report concludes, "We can either agree to work together to develop more effective solutions to address these new challenges, or we can continue on the current and unsustainable path."

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