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The Watcher
April 17, 2007 Vol. 8, No. 8

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## Recess Appointment Makes Dudley Head of White House Regulatory Policy Office

On April 4, President George W. Bush used a recess appointment to make Susan Dudley the head of the White House's regulatory policy office. Dudley's new position will afford her great power over the federal regulatory process. The appointment comes despite strident opposition from public interest groups concerned about her views on regulation. The recess appointment of Dudley, along with that of other controversial officials, has also provoked anger in the Senate and raised questions about the constitutionality of the method.

Dudley is now the administrator of the Office of Information and Regulatory Affairs (OIRA), an office within the White House Office of Management and Budget (OMB). As head of OIRA, Dudley holds significant authority and responsibility. OIRA reviews the most significant regulatory or deregulatory actions the federal government proposes. The

office has the power to alter or reject regulations as it sees fit. Dudley will also oversee the implementation of the Paperwork Reduction Act, which includes her approval of all information collected by the government from ten or more people, as well as establishing policy on agency information dissemination practices.

Dudley is the first OIRA administrator (other than acting administrators) not to be confirmed by the Senate. While recess appointments may occur in other parts of the government, it has never happened at OIRA. This may be because the position is so central to the operation of government that presidents have recognized the need for legitimacy through the Senate confirmation process.

Dudley will establish precedents as the first OIRA administrator to execute the White House's recent changes to the regulatory process. On Jan. 18, Bush amended Executive Order 12866 — Regulatory Planning and Review. The changes make agency guidance documents subject to OIRA review for the first time. Additionally, agencies will be required to provide to OIRA written identification of the market failure or other problem prompting regulation. OMB has not provided detailed instruction on either provision, thereby granting Dudley latitude in setting precedents.

Another of those amendments, the expanded role of agency regulatory policy officers (RPOs), raised concern over the status of Dudley's husband, Brian Mannix. The amendments to E.O. 12866 require that agency RPOs approve the commencement of all agency regulatory activity. Mannix had been serving as the RPO for the U.S. Environmental Protection Agency (EPA). The perception of a conflict of interest led Mannix to step down from his role as RPO and serve only as a senior EPA official, according to an agency memorandum obtained by the publication *Inside EPA*. The expanded role of the RPO would have deepened this perception of conflict with the OIRA administrator.

Notwithstanding the fact that Mannix will no longer have official capacity to communicate with OIRA on regulatory matters, EPA's memo on the matter leaves open the possibility that Mannix will be involved in internal agency decisions about regulations. EPA has not provided any public information on the role Mannix will play in this capacity. This seems like an area that Congress may want further oversight and clarification.

The primary point of contention over the Dudley appointment relates to her views on regulation. The public interest community, including OMB Watch, has scrutinized Dudley's past record and comments. A report by OMB Watch and Public Citizen finds Dudley to be ideologically opposed to government regulation. She overemphasizes the ability of the free market to self-correct. She also abuses the idea of monetizing the value of regulations, going so far as to support the senior death discount — a cost-benefit analysis calculation that devalues older individuals' lives compared to younger individuals.

Dudley's industry ties are also reason for concern. For three years, Dudley worked closely with industry executives at the Mercatus Center, an anti-regulatory think tank. According to the report, "Such ties to regulated industry suggest that Dudley...would use OIRA as corporate special interests' private backdoor for influencing policy."

OMB Director Rob Portman issued a statement defending Dudley. "She brings a balanced and comprehensive understanding of the regulatory process, and her principled approach emphasizes careful research and transparent analysis," Portman said. His statement did not address the decision to appoint Dudley during a Senate recess.

Bush's choice to use a recess appointment is controversial considering the Senate's intent to move forward on the nomination in the normal way. In December 2006, Dudley's nomination stalled in the Homeland Security and Governmental Affairs Committee as the 109th Congress came to an end. It was widely perceived that Dudley would not have been confirmed in the short lame duck session if the oversight committee had reported out the nomination. Nonetheless, Bush renominated Dudley in late January, and in late March, Sen. Joseph Lieberman ☼ (I-CT), the new oversight committee chairman, said he would begin moving forward with the nomination, indicating he had not yet taken a position on whether Dudley should be confirmed.

Preempting the Senate's constitutional role in confirming nominees prompted Lieberman to issue a statement through a spokeswoman. Lieberman aide Leslie Phillips said, "The Administration's decision to recess appoint Susan Dudley shows disrespect for the advise and consent responsibilities of the U.S. Senate and for the American people."

In addition to Dudley, Bush recess appointed three other officials, the most controversial of which was Sam Fox. Senate Democrats criticized Fox for funding attack ads aimed at Sen. John Kerry ☼ (D-MA) during the 2004 presidential campaign and appeared unlikely to confirm Fox. Bush withdrew the nomination hours before a scheduled vote, only to recess appoint him on April 4. Another appointee was Andrew Biggs, named as the new deputy commissioner of the Social Security Administration. Biggs, who has been a lower ranking official in the Social Security Administration, was at the center of Bush's past push for privatization. Sen. Max Baucus ☼ (D-MT), chair of the committee with Social Security oversight, objected to the Biggs nomination, but Bush went ahead anyway.

The batch of controversial recess appointments has raised concerns about the constitutionality of the method. Norm Ornstein, a scholar at the conservative American Enterprise Institute, questioned the legality of the Dudley appointment. In an essay in *Roll Call*, Ornstein argues the recess appointment provision was included in the Constitution because early Congresses met for only a few weeks a year. According to Ornstein, the explicit language of the Constitution allows the power to be used only when the vacancy occurs during the recess and necessity obliges the president fill the vacancy

immediately.

Ornstein also points to the *Federalist Papers* in which Alexander Hamilton called for appointments to be a joint venture between the president and the Senate. He argued the recess appointment provision should be used sparingly for vacancies "which it might be necessary for the public service to fill without delay." Ornstein claims, "No one at the time — no one — argued that the recess appointment power was to be used for other, broader purposes, especially in cases where the president was simply trying to make an end run around the Senate."

Pundits now wonder whether the next congressional recess will bring similar controversy. On April 11, Bush withdrew the nominations of two controversial EPA officials, Alex A. Beehler and William Wehrum. Though environmentalists and Senate Democrats welcomed the withdrawals, concern remains as to whether Bush may be following the course of the Fox nomination — withdraw the nominee and appoint during a recess. *The Los Angeles Times* reports an unnamed lobbyist with ties to the Bush administration as saying "that was the plan all along" for Beehler and Wehrum. However, the article speculates the furor over the appointments of Dudley and others may stall the use of further recess appointments.

## Courts Rebuke Bush Administration's Forest Actions

On April 6, the Bush administration appealed the first of two recent federal district court decisions that held the U.S. Forest Service violated the National Environmental Policy Act (NEPA) and the Endangered Species Act when it overturned the 2001 Roadless Area Conservation Rule and rewrote forest management plans.

The Clinton-era rule declared more than 58 million roadless acres managed by the Forest Service off-limits to logging, road building, and oil and gas leases. It was passed after extensive public comment and protects some of the most remote and wild lands in the federal system. The rule was challenged through a number of lawsuits filed by extraction industries and several states and counties.

According to a BNA story, a district court in northern California in Sept. 2006 overturned a 2005 Forest Service rule that allowed states to petition the federal government to open these roadless areas because the Forest Service "failed adequately to consider the environmental and species aspects" when it issued the new rule. The court said the Forest Service should have conducted an environmental impact statement, required under NEPA, for such a significant rule change. The Forest Service argued it was exempt from NEPA because the new rule was merely a procedural change. The court rejected this argument.

According to the Heritage Forests Campaign, the Forest Service rule would have replaced "environmental protections for much of our national forests with a voluntary process

that allows governors to petition for protection of roadless areas in their states — or for more logging, mining, drilling or other forms of commodity development. In the end this new policy does not assure any type of federal protections for these national forestlands." The state petition process did not allow any elected officials or citizens outside those states containing the protected roadless areas any means of participating in the process.

Several states had already filed petitions under the Bush administration's new rule. The same district court that heard the case in September issued an injunction in November 2006 that halted all activity in the roadless areas. The court issued a final injunction on Feb. 6, 2007, that clarified the injunction covered oil and gas leases that had been issued under the Bush rule. The injunction also prevented the Forest Service from "approving or authorizing any management activities in inventoried roadless areas that would be prohibited by the 2001 Roadless Rule, including the Tongass Amendment, and issuing or awarding leases or contracts for projects in inventoried roadless areas that would be prohibited by the 2001 Roadless Rule" until it remedied the violations of NEPA and the Endangered Species Act.

The administration's decision to appeal the district court ruling comes on the heels of another district court rebuke of the way the Forest Service has ignored legal processes established for agency rulemaking. A different judge in the same California district court ruled that the administration illegally rewrote forest management rules governing 192 million acres of federally owned lands. According to a March 31 *Washington Post* story, the judge suspended rules issued in 2005 because the government "did not adequately assess the policy's impact on wildlife and the environment and did not give sufficient public notice of the 'paradigm shift' that the rule put in place."

The court ordered the administration to undergo another rulemaking analysis that considers the environmental and public participation requirements of NEPA, the Endangered Species Act and the Administrative Procedure Act. The court's decision describes the history and the arguments made by the Bush administration that NEPA's environmental impact assessment requirements didn't apply. Although acknowledging that the 2005 rule was a "paradigm shift," the administration argued that the rule was a strategic and aspirational change, not one that resulted in "on-the-ground" impacts and, therefore, were outside the scope of NEPA's impact assessment requirements. It argued that changes in the management plans do not impact the environment and so are exempt from NEPA.

Defenders of Wildlife, Sierra Club, The Wilderness Society, and the Vermont Natural Resources Council brought the suit and argued that the rule changes set aside Reagan-era forest management planning processes that included considerations of species diversity and viability and limited logging and resource extraction activities. The 2005 rule, they argued, set aside these considerations and allowed local officials to set logging limits without public participation or amendments to the management plans. The court agreed.

# EPA Issues another Delay in Contaminant Regulation

The U.S. Environmental Protection Agency (EPA) recently called for further study of a substance found in rocket fuel before regulation of the contaminant can occur. A Senate champion of environmental protections criticized the decision, which is the latest delay in a regulatory policy EPA has been developing since 1998.

On April 12, EPA stated the agency will not regulate the drinking water contaminant perchlorate, an ingredient in rocket fuel and fireworks. The National Academies of Science (NAS) found perchlorate commonly present in public drinking water supplies and found ingestion to inhibit human thyroid function. The EPA cited the need for further investigation in its decision not to regulate perchlorate.

Sen. Barbara Boxer ☼ (D-CA) issued a statement chiding EPA for its decision. Boxer is a supporter of perchlorate regulation and has introduced two bills during the current Senate. One bill (S. 150) would mandate EPA to set a standard for perchlorate exposure, and the other (S. 24) would improve drinking water testing. Boxer said, "I am outraged that EPA has yet again refused to do its duty to protect the health of our families and communities from perchlorate pollution."

Much of Boxer's displeasure stems from the amount of time EPA has spent developing perchlorate regulations. EPA first addressed the issue of perchlorate contamination in 1998 but has shown little progress in advancing regulations.

During the Clinton administration, EPA began studying perchlorate with the intent of promulgating regulations to improve public health related to exposure. In 1998, the agency released its first assessment, which was then peer reviewed. In 1999, EPA issued interim guidance on perchlorate. The interim guidance intended to provide information on exposure levels for both EPA and non-EPA researchers.

In 2002, EPA released a revised assessment of perchlorate based on the initial 1998 assessment. The White House then asked NAS to peer review that document and make recommendations. NAS issued its report in January 2005. In 2006, EPA replaced the 1999 interim guidance with new interim guidance, which adopted the recommendations of the NAS report. The new interim guidance, the current framework for assessing perchlorate, suggests a more definitive exposure level for research purposes.

However, the Natural Resources Defense Council (NRDC) found the White House and Pentagon had exerted political influence over the formation of the NAS study group, as well as the study itself. Because of the potential liability for defense contractors, political appointees urged NAS to downplay the danger of perchlorate, according to NRDC. It is unclear to what extent the political pressure altered the study's findings because, according to NRDC, "the White House, DOD and EPA have attempted to cover up their campaign to pressure NAS and to undermine efforts to address perchlorate pollution by

unlawfully withholding or redacting an unprecedented number of documents."

Public skepticism over the commitment of the Bush administration to promulgate perchlorate regulations increased in December 2006 when EPA finalized a rule for monitoring drinking water contaminants. The proposed rule included perchlorate as one of the contaminants, but EPA removed it from the list in the final rule. Critics accused EPA of bowing to industry's wishes.

Now, EPA has missed yet another opportunity to begin regulating drinking water for perchlorate contamination. Under the Safe Drinking Water Act, EPA must propose candidate contaminants every five years and, after a review period, begin regulating those it deems necessary. In 2005, EPA issued a contaminant candidate list of 51 chemicals, of which perchlorate was one. However, EPA's April 12 statement proposes to exclude perchlorate, along with 12 other chemicals, from the final list of regulated contaminants.

In the statement, EPA claims perchlorate "require[s] additional investigation to ascertain total human exposure and health risks." EPA's decision will be open for public comment for 60 days following its publication in the *Federal Register*.

## Congress Urged to Reform USA PATRIOT Act

Congress continues to exercise oversight of the Federal Bureau of Investigation's (FBI) misuse of USA PATRIOT Act powers. The Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights held a hearing on the Department of Justice (DOJ) Inspector General report on the misreporting and abuse of National Security Letter (NSL) powers. A common theme from the four witnesses at the hearing was the need for Congress to reform the USA PATRIOT Act and curtail the FBI's NSL powers.

The DOJ Inspector General reported on March 9 that the FBI has been systematically underreporting to Congress the number of NSL requests and has repeatedly violated federal law and agency policies in collecting personal information. Without court approval, the FBI can issue NSL requests that require Internet service providers, telephone companies, credit reporting agencies, and banks to disclose information relating to individuals':

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

The witnesses before the Senate subcommittee criticized the expansions made to the FBI's NSL powers under the USA PATRIOT Act. The USA PATRIOT Act significantly broadened the NSL provisions — previously restricted to suspected terrorists or spies — to cover any information that is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." The USA PATRIOT Act also expanded approval authority of NSLs beyond senior FBI Headquarters officials to all special agents in charge of the FBI's 56 field offices. There is no policy regarding how long information collected through NSLs can be maintained or under what circumstances information must be disposed.

Suzanne E. Spaulding, former Deputy General Counsel of the Central Intelligence Agency, stated in her testimony, "Clear rules and careful oversight provide essential protections for those on the front lines of our domestic counterterrorism efforts. Unfortunately, it appears both were lacking in the implementation of national security letter authorities."

Former Rep. Bob Barr (R-GA) testified, "For over five years, those of us who fight to defend the Constitution from government overreach have pleaded with Congress to put reasonable checks and balances on intrusive powers created by the PATRIOT Act. Those pleas have largely fallen on deaf ears; and until a few weeks ago, the FBI operated in the dark, hiding its abuse of power from Congress and the public."

The DOJ Inspector General report found:

- Reporting Errors: 22 percent of the NSL requests investigated by the Inspector General were not reported
- Violations of Law and Policy: One-fifth of the investigated NSL files contained unreported violations of federal law and policy
- Abuse of Exigent Letters: 700 exigent letters (letters to request information in emergency situations) were used illegally in non-emergency situations to collect information from three telecommunications companies on over 3,000 telephone numbers

All of the witnesses, including Peter Swire, former Chief Counselor for Privacy in the Clinton administration, called for reform of the NSL powers of the USA PATRIOT Act. Swire stated that Congress should require judicial approval of NSL requests and narrow the showing of a connection to a terrorist or a foreign power. Additionally, Swire recommended mandating that information that is no longer pertinent be destroyed, reforming the gag rule for NSL recipients, and requiring the issuance of a "Statement of Rights and Responsibilities" to accompany NSL requests.

"We should update our law enforcement and intelligence tools to respond to new technology and new threats," said Swire. "We should similarly update checks and balances to draw on the traditions and capabilities of all three branches of government."

According to the Congressional Research Service, two federal courts have found the "NSL statutes could not withstand constitutional scrutiny unless more explicit provisions were made for judicial review and permissible disclosure by recipients." The ruling in *Doe v. Ashcroft* found that the USA PATRIOT Act provisions are in violation of the Fourth Amendment's protection against unreasonable searches and seizures and of the First Amendment's protection of free speech. The decision in *Doe v. Gonzales* also found the NSL powers to be in violation of the First Amendment.

George Christian, a party in the *Doe v. Gonzales* case, testified before the subcommittee, "Though our gag order was lifted, several hundred thousand other recipients of national security letters must carry the secret of their experiences to the grave."

Several bills have been introduced to reform the NSL powers of the FBI. Rep. Jane Harman ☼ (D-CA) introduced the National Security Letter Judicial and Congressional Oversight Act (H.R. 1739) on March 28. The bill would accomplish many of the reforms suggested by witnesses at the subcommittee hearing. The Congressional Research Service reports that other NSL reform bills were introduced in the 109th Congress. These bills may be reintroduced in the 110th as the controversy over the FBI's abuse of NSL powers continues to develop.

## California Moves to Reinstate Reporting Standards Weakened by Federal EPA

California, a leader in strong environmental policy, has introduced a bill that would restore reporting requirements for toxic chemicals to pre-U.S. EPA rollback threshold levels. As the federal government weakens toxic waste regulation, states are taking charge of the Toxics Release Inventory (TRI) and prioritizing the protection of their residents. The California Toxic Release Inventory Program Act of 2007 (Assembly Bill 833) maintains the previous level of reporting and prevents the federal changes from impacting the state program.

Assembly member Ira Ruskin introduced the bill. "It is unfortunate that California must once again defend itself from a Bush Administration action that harms the health of people and turns its back on scientific knowledge," said Ruskin in a press release. "In this case, the affected industry did not even clamor for the reporting rollbacks granted by Bush's EPA. My legislation ensures that the people of California maintain the same rights to know despite the efforts of the Bush Administration to curtail that right." The bill passed in the Environmental Safety & Toxic Materials Committee on April 11 and will now be considered by the Appropriations Committee.

In December 2006, the U.S. Environmental Protection Agency (EPA) finalized a rule that increased the annual amount of toxins facilities can emit before substantive reporting is required. Previously, all toxic releases and disposals over 500 pounds required detailed reports on management of the toxin. Effective January 2007, the threshold increased to

5,000 pounds, provided less than 2,000 pounds are released directly to the environment. This tenfold increase will essentially allow releases below the threshold to go unreported. For releases under the threshold, facilities need only file a short form affirming the chemical name and that its quantity is below the reporting requirement — no specific information on the quantity or where the chemical went (air, water, or land) is included.

According to an analysis by the Environmental Working Group (EWG), in California alone, 600,000 pounds of hazardous waste would essentially vanish from the record books. The EWG report, *Stolen Inventory*, explains that data on several dangerous carcinogens would be among the missing information, including: 41,000 pounds of ethylbenzene, 10,000 pounds of styrene, 12,000 pounds of benzene and 16,000 pounds of chromium-related compounds. The report estimates that 274 facilities would switch to the relaxed reporting system, with certain areas disproportionately losing data. Los Angeles County alone would account for 107 missing facilities. Passage of AB 833 would ensure that these toxins and facilities remain on the California books.

EPA declared that its December rule change would decrease unnecessary reporting burdens for companies. However, California's actions indicate that the opposite is happening. State governments were vocal in their opposition to the TRI rollback; agencies and officials from 23 states submitted comments in the effort to stop the rule change. Many states have built their toxics programs around the TRI data, sometimes adding to information tracked, but avoiding senseless duplication of federal reporting requirements. Some states, such as Massachusetts and New Jersey, have strong additional toxic reporting programs of their own. Others, such as Minnesota, are concerned about potential health impacts and revenue loss from toxic reporting fees. In the absence of acceptable federal reporting thresholds, such concerned states may choose to follow California's lead and create new toxics reporting standards to compensate for EPA's rollback. Companies operating in multiple states will be compelled to comply with numerous different state programs instead of the singular system that had been in practice for the past twenty years.

Federal legislative efforts are also underway in both the House and Senate to undo much of the damage from EPA's rule change. Similar to California's introduced legislation, these bills simply restore the original TRI reporting thresholds and prevent facilities from avoiding the requirement to report their toxic pollution. On Feb. 14, Sen. Frank R. Lautenberg (D-NJ) and Reps. Frank Pallone (D-NJ) and Hilda Solis (D-CA) announced companion versions of the Toxic Right-to-Know Protection Act, S. 595 and H.R. 1055, respectively. Both bills are currently being considered in committee.

## Polar Bears: Don't Ask, Don't Tell

New accusations of manipulating scientific information and gagging government scientists have arisen amidst the government's consideration of listing polar bears as an

endangered species. Memos that censored scientists traveling to countries around the Arctic region and draft reports that were significantly altered in their final form have fueled these concerns.

A leaked memo from Richard Hannon, a regional director of the U.S. Department of the Interior, instructs U.S. Fish and Wildlife Service officials in the Alaska Division to limit their discussions on polar bears and climate change when in Arctic region countries. The memo, reported by the *New York Times*, specifically states that the officials "will not be speaking on or responding to these issues."

Existence of the memo met with outrage and suspicion in Congress as two senior Democratic members demanded more information on the matter. Reps. Bart Gordon (D-TN) and Brad Miller (D-NC) demanded in a letter to Interior Secretary Dirk Kempthorne that all records on this matter be released to Congress. Gordon is chairman of the House Committee on Science and Technology, and Miller is chairman of the investigations and oversight subcommittee. The letter expressed concern that the memo "appears to be the latest effort by the Bush Administration to block a full and free discussion of issues relating to climate change by the scientific community."

This matter bears striking resemblances to 2006 claims from NASA climatologist James Hansen that a political appointee, ironically in the position of Public Information Officer, attempted to prevent Hansen from being interview by National Public Radio. The matter drew significant public attention, and eventually, the Bush administration had to respond with new disclosure policies.

The Government Accountability Project cites the Interior memo in a new report, *Redacting the Science of Climate Change*, as demonstrative of Interior's attitude toward climate change. The investigative report did not find evidence of any direct interference in climate change research but uncovered "unduly restrictive policies and practices" with respect to communicating information to the media, public and Congress — specifically information that did not support existing administration policy positions. The report stated, "Interference with media communications includes delaying, monitoring, screening, and denying interviews, as well as delay, denial, and inappropriate editing of press releases. Interference with the public and Congress includes inappropriate editing, delay, and suppression of reports and other printed and online material."

New concerns have been raised that such communication interference may have occurred in editing a Department of Interior report on the status of polar bears. In December 2006, Interior proposed listing polar bears as endangered because the sea ice they depend on is disappearing. But officials left out of the listing proposal any discussion of the connection between human activity and rising Arctic temperatures that are eliminating the sea ice and stated that the agency had not examined such factors. Yet another agency study, "Range-Wide Status Review of the Polar Bear," published in December 2006 cites several studies on the effects of climate change on sea ice and how reducing greenhouse gas emissions could slow Arctic warming. None of this material

made it into the proposal to list polar bears. Instead, the proposal states, "there are few, if any, processes that are capable of altering this trajectory."

A decision on listing the polar bear as an endangered species is expected by January 2008.

## New Complaints of Partisan Electioneering Go to IRS, FEC

November 2008 may seem to be a long way off, but in the current reality of political campaigns, the presidential election is right around the corner, and the campaigns are not the only entities actively involved. Recent complaints filed with the Internal Revenue Service (IRS) and the Federal Election Commission (FEC) challenge the activities of two nonprofits, Priests for Life and Americans for Job Security.

### Priests for Life

Catholics for a Free Choice (CFFC) has filed a complaint with the IRS against the group Priests for Life, claiming that Priests for Life has engaged in prohibited campaign intervention in violation of its 501(c)(3) tax-exempt status. CFFC's complaint focuses on two videos on the Priests for Life website that implicitly support the presidential campaign of Sen. Sam Brownback ☼ (R-KS). The videos show Brownback giving a speech and display supporters holding up signs that say "Brownback For President." This is the third complaint CFFC has filed against Priests for Life. In October 2004, CFFC cited Priests for Life's heavy involvement in electoral activities supporting Republican candidates.

### Americans for Job Security

On April 11, Public Citizen, a national advocacy organization, filed a complaint with both the IRS and the FEC against the business trade association Americans for Job Security (AJS). Public Citizen charged that AJS violated federal election law and its tax-exempt status as a 501(c)(6) trade association. Trade associations are barred from conducting activities that seek to influence elections as their primary purpose. After analyzing television and radio broadcasts, Public Citizen determined that the primary purpose of AJS is to influence elections. "The fact that AJS's advocacy communications were intended to influence elections combined with the organization's representation that it invested the vast majority of its resources on advertisements leads to the inescapable conclusion that the group was primarily engaged in influencing elections in the years covered in this complaint."

Public Citizen used the IRS 11-point test from IRS Rev. Rule 2004-6 to determine whether ads should be considered either electioneering or issue-advocacy messages. They also analyzed 32 transcripts of AJS messages, finding that each satisfied the criteria for "electioneering." The complaint said, "Every single one — 32 out of 32 — of AJS's

communications analyzed in this complaint satisfied a clear majority of the factors in favor of a communication being deemed an exempt function under Section 527(e)(2) and each satisfied only a slim minority, if any, of the factors pointing against a communication being deemed an exempt function under the section."

As a result, Public Citizen said the group is not eligible for 501(c) nonprofit tax status and should instead be required to register as a political committee under federal campaign finance law and be subject to its disclosure requirements and contribution limits. In addition, Public Citizen also asks the IRS to collect back taxes for AJS's undeclared electioneering activities and require it to pay penalties for violating its tax-exempt status.

According to a recent report issued by the Campaign Finance Institute (CFI), "Soft Money in the 2006 Election and the Outlook for 2008 The Changing Nonprofits Landscape," in 2006, AJS spent about $1.5 million for ads favoring former Sen. Rick Santorum (R-PA).

This is not the first time AJS has seen such scrutiny. In October 2004, Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint with the IRS against the group with the same charges. And according to a March 2005 *New York Times* article, AJS "ran more than 5,000 television advertisements in at least five states last year [2004], all without having to disclose the source of its money." As a 501(c)(6), AJS is not required to reveal its donors, assuming it is engaged in public policy advocacy activity.

The electioneering activity of 501(c) groups such as AJS showed others an opportunity to avoid campaign finance disclosure. The Public Citizen press release highlights a recent announcement that Club for Growth intends to establish a 501(c)(4) organization in light of recent scrutiny on its 527. According to an article in *Roll Call*, (subscription required) Club for Growth president, former Rep. Pat Toomey (R-PA), told its members that a "reorganized tax status will alter little of the group's focus on 'promoting economic freedom,' but also will allow unlimited anonymous donations from individuals and allow the group to take part in a variety of new lobbying activities. Club directors also reconfigured its political action committee, which it can use to channel hard-dollar donations to candidates." However, 501(c)(4) tax status does not eliminate all chances of running into trouble with the FEC. For example, if a group engages in prohibited political activities such as running an ad that "expressly advocates" the election or defeat of a candidate, it would run afoul of FEC rules.

## Government Manipulates Research Again, This Time on Voter Fraud

Documents released as a result of oversight hearings in the House have revealed that the Election Assistance Commission (EAC), the bipartisan body charged with implementing the Help America Vote Act, has rejected or altered research on voter fraud and

intimidation and the impact of voter identification laws. This marks another instance in which the government has been accused of manipulating information.

The details of the EAC controversy, described in an April 11 *New York Times* article, sparked prompt responses in the House and Senate, with several members writing to the EAC demanding an explanation and questioning whether partisan considerations have affected their decisions. On April 16, the EAC announced that it has asked its Inspector General to conduct an independent investigation into its research contracting procedures.

In May and September of 2005, the EAC commissioned two reports, one on voter fraud and intimidation and one on voter identification requirements. In November 2006, when the reports had not been published, People for the American Way (PFAW) submitted a petition signed by 13,000 people seeking release of the report on voter fraud and intimidation. In December 2006, the EAC released the report, titled *Election Crimes: An Initial Review and Recommendations for Further Study*. It was promptly criticized in a PFAW analysis, which called the report a whitewash for ignoring key facts.

In March, the EAC voted not to adopt the study on voter identification requirements, which was conducted by the Rutgers University's Eagleton Institute. The Eagleton report found that voter identification requirements and other laws intended to address fraud can reduce voter turnout, particularly among minorities. However, an EAC statement said since the report focused on one election year, it "was not sufficient to draw any conclusions."

Also in March, the House Appropriations Subcommittee on Financial Services and General Government held a hearing at which Rep. Maurice Hinchey ☼ (D-NY) asked the EAC for a copy of the draft voter fraud report submitted by the researchers, Tova Wang of the Century Foundation and Job Serebrov, an election law expert. In April, the subcommittee released the original draft report. In an April 11 press release, Hinchey and Subcommittee chair Rep. Jose Serrano ☼ (D-NY) said, "Significant changes were made to the findings of outside experts before the final report was released....In hiding a draft report from the public that is significantly different from the final version, the EAC has created a lot more questions than it has answered while stunting debate on the issue."

The *New York Times* article also was published on April 11. It noted several alterations from the original draft report to the final version released by the EAC. These include:

- the original report found little evidence of polling place fraud, while the final report said there is "a great deal of debate on the pervasiveness of fraud."
- the original report found "evidence of some continued outright intimidation and suppression" of voters, but the final report said voter suppression is also a topic of debate.
- the original report found "false registration forms have not resulted in polling

> place fraud", but the final version blamed nonprofit organizations, claiming "registration drives by nongovernmental organizations as a source of fraud."

An EAC statement released on April 11 responded to the news by saying the agency would examine its contracting and decision-making process on research and reports.

On April 12, another *New York Times* article found that "Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew elections, according to court records and interviews."

The publicity prompted Sens. Dianne Feinstein (D-CA) and Richard Durbin (D-IL) to write the EAC seeking answers to 20 questions on the process and decisions relating to the two reports. One question directly asked, "Did the commissioners or commission senior staff receive any outside communication or pressure to change or not release the entire draft report or portions of the draft language on the voter identification report?" A letter from Rep. Zoe Lofgren ☼ (D-CA) expressed alarm at "what appears to be an emerging pattern by the EAC to hold off on publicly releasing reports as well as modifying reports that are released." Citing the problems with the voter fraud and identification reports, she asked the EAC for copies of all versions of the pending, overdue report on absentee ballots and military and overseas voting.

On April 16, the EAC asked its Inspector General to conduct an investigation. The announcement asked that the voter fraud and identification reports be specifically reviewed, and included copies of the letters from members of Congress.

The EAC's problems appear not to be isolated incidents. Former EAC Commissioner Ray Martinez told the *New York Times* that while he was on the commission, he argued unsuccessfully that all reports, both drafts and final versions, should be made public.

Unfortunately, this is not the first time the Bush administration has come under fire for manipulating information to make reports more consistent with current policy positions. Such manipulations have occurred in terrorism statistics, economic reports, and reports on polar bears. Rep. Henry Waxman ☼ (D-CA) compiled a report, *Politics And Science in the Bush Administration*, documenting dozens of cases where the Bush administration altered scientific information to make it fit policy positions. For instance, in 2005, it was uncovered that a Council on Environmental Quality official, Philip Cooney, heavily edited several government climate change reports to downplay the reliability of the science and magnitude of the problem. In a recent House Oversight and Government Reform Committee hearing, Cooney acknowledged that some of his edits on the climate reports were made "to align these communications with the administration's stated policy."

# Treasury Posts Risk Matrix for Charities

In March, without public announcement or comment, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) published a Risk Matrix for the Charitable Sector on its website. The Introduction of the publication says the matrix is meant help charities comply with U.S. sanctions programs that prohibit transactions with designated terrorists or certain countries. In 2006, Treasury said it was working on a draft of the matrix, and in June 2006, a group of nonprofits wrote Treasury asking for a public comment period. Treasury did not respond. Despite the unannounced posting, representatives of the nonprofit sector are likely to comment on the matrix and suggest improvements.

The Introduction to the matrix says the publication is needed because of "reports by international organizations and in the media have revealed the vulnerability of the charitable sector to abuse by terrorists." In the past, Treasury has urged charities and grantmakers to take a risk-based approach to avoiding violations of sanctions laws through its Voluntary Anti-Terrorist Financing Guidelines. The Introduction to the matrix also says it will be "particularly useful to charities that conduct overseas charitable activity due to the increased risks associated with international activities."

The Introduction notes that the matrix is not a comprehensive list, and in a footnote, says it is not mandatory. Instead, another footnote recognizes that "charities and their grantees differ from one another in size, products, and services, sources of funding, the geographic locations that they serve, and numerous other variables." However, the burden is on charities to determine the best approach, since Treasury has no safe harbors or specific measures that protect against sanctions, which include asset seizure. Instead, the footnote says Treasury "addresses every violation in context, taking into account the nature of a charity's business, the history of the group's enforcement record with OFAC, the sanctions harm that may have resulted from the transaction, and the charity's compliance procedures."

The matrix lists 11 factors according to whether they constitute a low, medium or high risk of diversion of funds to terrorists. The factors are:

- specificity of stated purpose and expenditures
- written grant agreement with safeguards
- references
- history of legitimate activities
- due diligence by grantor, including on-site review and audits
- documentation
- size of fund disbursements
- availability and use of a reliable banking system
- suspension procedures, and

- location of charity's work (U.S. only, international, conflict areas)

In footnote 4, Treasury notes that the matrix should be applied to sub-grantees "to the extent reasonably practicable."

Treasury cites the American Bar Association's (ABA) 2003 comments in IRS Announcement 1003-29 Regarding International Grant-Making and International Activities by Domestic 501(c)(3) Organizations as a resource in development of the matrix. However, the passage of time and subsequent experience may well have changed the ABA's views. In addition, nonprofits participating in the Treasury Guidelines working group, which published Principles of International Charity in 2005, are also likely to make suggestions.

Unlike Treasury, the European Union (EU) released a discussion draft of risk indicators for comment in July 2005. It lists six areas of governance that pose potential risks. However, the Introduction of the draft says, "An indicator should not in any case be regarded in isolation, but should be evaluated in the context of other indicators and the organizational and legislative environment in which the NPO operates."

## Supplemental Debate: War of Words

In the weeks since the House and Senate each narrowly passed emergency supplemental appropriations bills, the president and congressional Democrats have engaged in a rhetorical battle over additional items above the president's record request, as well as language calling for a withdrawal of troops from Iraq. Bush has issued almost daily attacks against the bills since they passed, calling them attempts to "micromanage" the war and fund unnecessary projects. The two sides are scheduled to meet at the White House April 18, but the war of words is not expected to abate anytime soon.

Despite similarities, the House and Senate versions differ significantly in terms of the troop withdrawal schedules and minimum wage tax packages added to the president's request, differences that will need to be worked out in conference.

The House bill includes a timetable requiring final troop withdrawal to begin by March 1, 2008, with the process to be completed by August 31, 2008. The Senate bill calls for the beginning of U.S. troop redeployment within 120 days of enactment, with a non-binding "goal" of withdrawing all combat forces by March 31, 2008.

In addition, both bills raise the federal minimum wage to $7.25 an hour over two years but have different tax cut provisions that accompany the wage increases. The House provides $1.3 billion in small business tax breaks, with a roughly equal amount of offsets, while the Senate has now increased the total cost of its tax provisions from $8.3 billion to

$12.6 billion, with $13.8 billion in offsets.

The president has promised to veto both the House and Senate versions, despite the fact that the final product from the conference committee is unknown, and the panel may yet emerge with the Senate's non-binding troop withdrawal language.

Democrats in Congress might be inclined to accommodate the administration's demands for a "clean" bill — one without the withdrawal provisions and the $20 billion in additional funding. But there is very little room for maneuver within their own caucuses. Given close votes in both the House (218-212) and Senate (51-47), any significant changes in the conference report could reduce vital Democratic support that would likely be needed to pass a final version of the bill. Moreover, a *Washington Post*-ABC News poll reported in the *Post* on April 17 shows that 51 percent of Americans support a deadline for withdrawing from Iraq, and 65 percent oppose the president's surge plan. Further, 58 percent trust the Democrats to do a better job of handling situation in Iraq as opposed to 33 percent who trust Bush more. The polling provides strong support for withdrawal of troops from Iraq, encouraging Democrats who are pressuring the president for a plan to get out of the war. Senate Majority Leader Harry Reid (D-NV) has expressed clear confidence in his party's confrontational approach, saying that Democrats are "going to pick up Senate seats as a result of this war."

Congressional Democrats may have trouble altering the domestic spending provisions added to the bill for similar reasons — because eliminating them may imperil Democratic support for the supplemental.

House and Senate conferees may meet as early as April 17, with the White House-Congress supplemental summit meeting scheduled for the following day. Few expect either side to back away at that meeting from what could become a constitutional conflict. For now, both the president and Majority Leader Reid both seem intent on a first legislative round that ends in veto.

## Economic Policy Institute Panel Looks beyond Balanced Budget

A balanced budget can and does have a place in a responsible fiscal policy, but it is not the only element. That was the message presented April 12, when the Economic Policy Institute (EPI) hosted a panel discussion entitled "Beyond Balanced Budget Mania." Indeed, a strict concentration on balancing the budget could have deleterious effects on the economy, continue to leave health care out the reach of millions, and contribute to the ongoing decay of national infrastructure.

Bucking the trend in recent policy discussions, EPI presented a series of speakers who challenged the notion that a balanced budget deserves the undivided attention of fiscal policy planners. Nobel laureate Joseph E. Stiglitz, who served as chair of President Bill

Clinton's Council of Economic Advisers and Chief Economist at the World Bank, delivered the keynote speech. Following Stiglitz was a three-person panel composed of: Henry J. Aaron, Brookings Institution Economic Studies Program Senior Fellow and former Assistant Secretary for Planning and Evaluation at the Department of Health, Education, and Welfare; EPI economist Max Sawicky; and Joan Lombardi, Director of The Children's Project and former Deputy Assistant Secretary for External Affairs in the Administration for Children and Families at the U.S. Department of Health and Human Services.

To be sure, a balanced budget can have significant benefits for the nation. Expenditures on the national debt are becoming a larger part of the federal budget every year. For Fiscal Year 2006, interest payments on the national debt totaled $227 billion. This amount was 46 percent of non-defense discretionary spending and nine percent of all federal spending last year. Additionally, procedures and rules that give rise to a balanced budget force Congress to carefully consider the ramifications of their spending decisions, so there is an increased likelihood that national priorities receive funding. But, as the panel's speakers reminded the audience, focusing solely on the deficit does not guarantee this outcome, and it perniciously excludes other important fiscal policy objectives.

**Deficits and the Economy: Context Matters**

Stiglitz opened the event by speaking to the macroeconomic impacts of fiscal policy. A budget deficit, while not inconsequential, is not always undesirable. Running a deficit can be used to jump-start an ailing economy, but closing a deficit during a downturn can hasten the onset of a prolonged recession. Responding to a question about the fiscal restraint enacted during the sour economic climate of the early 1990s, Stiglitz offered that it was a combination of good luck and poor banking regulatory policy that produced a fortunate outcome. This explanation challenges the idea that the balanced-budget policies implemented by Clinton Treasury Secretary Robert Rubin were directly responsible for the economic boom of the 1990s.

**Rising Cost of Health Care, not Deficits, Responsible for Long-Term Imbalances**

The concern among many deficit hawks is that entitlement spending increases in the next twenty years will push budget deficits to an "unsustainable" level, so the hawks agitate for "entitlement reform." Are deficit hawks appropriately addressing the future financial obligations of the federal government by imposing tight budget controls today and "reforming" entitlement programs? Aaron of the Brookings Institution says "not necessarily."

The cost of health care, not an increase in entitlement spending, is the long-term fiscal challenge, and balancing the federal budget does little to address this fact. Government Accountability Office chief David Walker recently told Congress that only by tightening budget controls and "restructuring existing entitlement programs" will we avoid unsustainable deficits. Aaron provided a stark contrast to these remedies, stating the driving force behind the "entitlement crisis" is solely the rapidly rising costs of both

public and private health care. Reforming entitlement programs will not change this, he believes.

**Responsible Fiscal Policy More Than Just Deficit Reduction**

The message of the EPI briefing is that reducing spending on public investments in favor of balancing the budget is a short-sighted approach to fiscal policy. It ignores the financial returns in years to come as the result of the government making solid, long-term investments. Lombardi's and Sawicky's presentations focused on public investment expenditure as a tool to increase not only economic growth, but also the general welfare of the nation. Lombardi highlighted empirical studies that demonstrate early childhood development programs generate significant financial returns, not only to the individual, but to the nation as a whole. Sawicky illustrated the extent to which spending on other forms of public infrastructure has declined over the past thirty years. Like early childhood development, federal spending on research and development, bridges and roads, physical plants, and education will result in returns on investment and serve to increase economic growth. Restraining government spending on public investments with the singular purpose of balancing the budget could ultimately weaken the fiscal position of the nation.

EPI's attempt to move the fiscal policy discourse "beyond balanced budget mania" is an attempt to address aspects of fiscal policy that are too often ignored. Congress should address deficit reduction in the context of competing national priorities. Given the state of the economy and the level of public investment, a too-narrowly focused policy of reducing the budget deficit could negatively impact the short- and long-term economic and fiscal state of the nation. The pursuit of a balanced budget is laudable, but only insofar as it is part of a fiscal policy that seeks to fully fund national priorities.





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