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GSA Administrator Testifies on Misconduct Allegations

On March 28, General Services Administration (GSA) chief Lurita Doan testified before the House Committee on Oversight and Government Reform to account for incidents of alleged mismanagement and politicization of GSA resources. In her testimony, Doan mostly offered unsubstantiated denials and accusations while professing ignorance or a faulty recollection of key actions.

Since assuming the top position at GSA in June 2006, Doan has been accused of being

involved in repeated incidents of misconduct, including an attempt to award a contract to Doan's personal friend, an improper intervention in a contract negotiation with Sun Microsystems, an assault on the independence of the GSA Office of Inspector General (OIG), and the politicization of federal resources. (See this brief background article on the allegations).

The hearing's scope included all of these allegations, and the committee also heard testimony from Sen. Chuck Grassley (R-IA) and the GSA Inspector General.

The Office of the Inspector General

Grassley's testimony strongly criticized Doan's attempts to reduce the budget of the OIG. Inspectors General, by law, remain independent from the agencies they are charged to hold accountable. Grassley asserted that Doan did not have the authority to reduce the OIG's budget and that her intervention undermined its independence and ability to conduct oversight.

Doan defended her actions by denying that her *goal* was to encroach on the OIG's authority. However, she did not address Grassley's concern that the *effect* of her actions would be a less-independent OIG.

Doan instead claimed she changed the OIG budget request because she wanted to root out wasteful spending. Yet the examples of wasteful spending she offered in her testimony — out-of-date information technology and bad management of the human resources department — are not related to the reductions in the OIG's budget she made, which concerned the OIG's authority to conduct preliminary audits of government contractors and a proposed expansion of the OIG's regional offices.

In addition, Doan alleged that the OIG has created a "gotcha atmosphere" at GSA, which makes agency work more difficult. However, Doan did not offer any examples of when this "atmosphere" had made a negative impact on GSA performance, nor did she explain how the OIG could make it harder to effectively administer contracts.

Politicization of Federal Resources

Doan also gave an unsatisfactory explanation of a meeting she attended where a staffer from the White House political office, headed by Karl Rove, briefed GSA staff on the 2008 election. In a striking exchange (for which video is available), Doan said the meeting was a "team-building" exercise and claimed she did not remember a presentation that included a map where certain Democratic congressional districts and Senate seats were highlighted and labeled "targets."

Witnesses of the meeting have told committee staff that at the end of the presentation, Doan asked GSA officials, "How can we use GSA to help our candidates in the next election?" Doan testified at the hearing she does not remember asking that question.

The Congressional Research Service has analyzed whether this meeting constituted a

potential violation of the Hatch Act, which prohibits using federal resources for partisan purposes. The paper came to the conclusion that if Doan did ask the question about "our candidates," she could have violated the Hatch Act.

Preferential Treatment in Contracts

Doan also defended her attempt to direct a contract to a friend and former business associate. Doan denied there was any "intentional wrongdoing," and, refreshingly, admitted to making "a mistake in my eagerness to begin to solve an urgent problem." But she did not dispute that she attempted to improperly award a no-bid contract to a long-time business associate.

In regard to another controversial contract, Doan denied she had any involvement in the resolution of a protracted contract dispute with Sun Microsystems. The OIG had found that Sun was overcharging GSA and that GSA could have secured a more favorable contract with another company. Sen. Grassley's investigation uncovered evidence Doan pressured GSA contract negotiators to agree to unfavorable terms.

Congress Approves War Funding; Pressures Bush to Withdraw Troops

Despite repeated veto threats from President George W. Bush, both the House and Senate have approved enormous war supplemental bills that contain a schedule for eventual withdrawal of American soldiers from Iraq. At approximately $124 billion, these bills are the largest supplemental funding legislation in history.

On March 23, the House approved its version (H.R. 1591) of the supplemental bill in a 218-212 vote, with two Republicans joining all but 14 Democrats to pass the bill. The entire debate in the House hinged on the timetable for withdrawal of U.S. soldiers from Iraq, as House leaders worked for weeks to balance the demands of liberals who were seeking a fast withdrawal with those of conservative Democrats, who were hesitant to set any timetable for commanders in the field. In the end, they were able to find the right balance and likely eased the concerns of many members who supported the bill with an additional $20 billion in funding outside the scope of the wars in Iraq and Afghanistan.

The Senate approved its version of the supplemental bill on March 29 by a vote of 51-47, making a few small changes to the committee mark that was approved the week before. Two Republicans, Sens. Gordon Smith (OR) and Chuck Hagel (NE), joined with Democrats to pass the bill, despite language specifying a "goal" of withdrawing troops from Iraq by March 31, 2008.

The bill approved $123.2 billion, with the vast majority — $96 billion — going to the Defense Department, mostly to continue military operations in Iraq and Afghanistan. It also included a $1 billion increase for the National Guard and Reserve and $1.1 billion for improvements to military housing. The bill also has $5.75 billion for programs overseen

by the State Department, with $3.2 billion of that for Iraq.

Like the House bill, the Senate version includes an additional $20 billion in spending, including an extra $4.3 billion for veterans' health care, $6.7 billion in hurricane relief funds, $745 million for the State Children's Health Insurance Program, $2 billion for homeland security upgrades, and $4.2 billion for agriculture disaster relief.

Despite a number of Republican amendments to strip parts of this additional spending from the bill, mostly offered by Sens. Tom Coburn (R-OK) and Jim DeMint (R-SC), only one was successful — a DeMint amendment to strip payments to spinach growers. It passed 97-0.

The Senate did approve a few amendments that added funding to the bill, including for the Secure Rural Schools And Community Self-Determination Program (approved 74-23), the Adam Walsh Child Safety and Protection Act of 2006 (approved 93-0), and $1.5 billion for additional mine-resistance vehicles in Iraq (approved 98-0). Those amendments were offered by Sens. Ron Wyden (D-OR), John Ensign (R-NV), and Joseph Biden (D-DE), respectively.

During Congress' work on the supplemental, Bush issued numerous firm veto threats against both the House and Senate versions, citing "the excessive and extraneous non-emergency spending."

In addition, the president vowed to veto any bill that sets deadlines or schedules for withdrawal of soldiers from Iraq. Because each chamber's bill refers to specific dates (a "deadline" in the House's version and a "goal" in the Senate), both houses of Congress have now called for complete withdrawal of U.S. troops from a war that has lasted longer than World War II and has been this nation's most expensive ever. The House and Senate versions of the bill have slight variations in the specific dates for withdrawal to begin and end, and in how much pressure they put on the president to withdraw U.S. forces. The Senate language calls for the first withdrawals to begin within 120 days of enactment of the supplemental bill, but does not *force* a complete withdrawal of U.S. forces.

With the standoff between Congress and the president continuing, it is unclear how soon the supplemental bill could be signed into law. This uncertainty has led to very different estimates as to how long current funding for the wars can last. The president has repeatedly stated the supplemental funding bill needs to be approved by mid-April in order to avoid funding shortfalls for the military, but a recently released report by the Congressional Research Service states the military will have sufficient funding through the end of May. With minor accounting changes, CRS believes current funding can last well into the summer.

The Senate has appointed conferees but the House has not, so a conference on the bills will not begin until after the current congressional recess ends in mid-April.

Congressional leaders, including Senate Majority Leader Harry Reid (D-NV) and House Speaker Nancy Pelosi (D-CA) want to work with President Bush during the conference to avoid a veto of the bill but will need to stay close to the intent of the current language in the bills to maintain support in each chamber.

Budget Resolution Conference Faces Key Choices on PAYGO, Taxes

In the final weeks of March, the House and Senate adopted budget resolutions for Fiscal Year 2008 by narrow margins and will now turn to the task of finding a compromise resolution in conference committee. The two $2.9 trillion budget plans are broadly similar — both seek to reach a budget surplus by the year 2012, establish reserve funds to extend the State Children's Health Insurance Program (SCHIP) to all eligible children, and embrace pay-as-you-go (PAYGO) principles. But their slightly differing spending provisions and definitions of PAYGO, as well as a Senate amendment to extend some of President George W. Bush's middle-income tax cuts, will present some critical choices in conference.

The Senate passed its budget resolution, S. Con. Res. 21, on March 23, by a 52-47 vote, with Maine GOP Sens. Olympia Snowe and Susan Collins joining the 49 Democrats and Independents Bernie Sanders (VT) and Joseph Lieberman (CT) in support. The Senate's nonbinding budget blueprint provides $18 billion more in domestic discretionary spending for next year than Bush's proposed FY 2008 budget, projects a $132 billion surplus by 2012, offers a two-year patch for the Alternative Minimum Tax (AMT), and establishes a strict PAYGO regime.

During floor debate on the resolution, the Senate voted 97-1 to add an amendment by Finance Committee Chair Max Baucus (D-MT) that recommended $195 billion — about $60 billion over and above the projected surplus — be used to extend Bush's 2001 and 2003 middle-class tax cuts, expand SCHIP, and make modest changes to the estate tax. More drastic amendments to cut the estate tax were rejected.

The House adopted its own budget resolution, H. Con. Res. 99, on March 29, by a 216-210 margin, with 12 Democrats and two Republicans crossing party lines. The House resolution calls for a $153 billion surplus by 2012, a nearly $25 billion increase for domestic programs, a one-year AMT patch, and a less rigorous PAYGO rule than the Senate's.

The House voted on, but rejected, alternative budget resolutions proposed by the Progressive Causes (by 81-340), the Congressional Black Caucus (by 115-312), and the GOP conference (by 160-268). The GOP alternative, offered by Budget Committee Ranking Member Paul Ryan (R-WI), would have cut entitlement spending by $270 billion over five years, added $168 billion to the deficit, and violated the House PAYGO rule; it was defeated 160-268. This vote was a wider-than-expected margin, with 40 GOP

members breaking ranks to oppose it. The conservative Democrat Blue Dog coalition did not offer an alternative this year, instead endorsing the House leadership's resolution.

OMB Watch and many of its progressive community partners, including the Emergency Coalition for America's Priorities (ECAP), support both resolutions, with a slight preference for the House version, which provides $5 billion more than the Senate for annually appropriated discretionary domestic programs, including $7.9 billion more for education and social service programs and $3.5 billion more for veterans programs for FY 2008 than Bush's budget. These increases and the commitment to PAYGO principles are seen as a start, a "down payment" on future efforts to redress the last several years' chronic under-funding of social service needs across the country.

Much of the partisan debate surrounding the budget resolutions has focused on the Democrats' assumption that many of the 2001 and 2003 Bush tax cuts would not be extended — yielding nearly $400 billion more revenue than the president's budget over the next five years. The GOP has claimed repeatedly that the Democratic budget resolutions require "the largest tax increase in American history." In fact, however, they assume no tax hikes, only the same increase in revenues assumed under the very same tax cut laws.

The major fiscal difference between the House and Senate resolutions lies in how this increased revenue is handled. The Senate plan, under the Baucus amendment, sets aside about $180 billion after 2010 to renew current middle-class tax cuts such as the expanded child tax credit, marriage penalty relief, and the 10-percent tax bracket, and fixes the estate tax at the current 2009 exemption levels ($3.5 million for individuals, and tax rate, 45 percent). These provisions consume all of the Senate's projected 2012 surplus and then some and call for an additional $15 billion for SCHIP. The Baucus amendment does not propose how that additional funding should be offset, but Senate Democrats would still be free to adhere to PAYGO principles in all their legislation. Their commitment to fiscal responsibility will in some ways be measured by their ability to draft deficit neutral bills even for their most popular priorities like middle-class tax cuts and children's health care.

Implications of the Baucus Amendment on the Estate Tax Debate

The Baucus amendment offered and adopted in the Senate Budget Resolution may have implications for the estate tax debate. The amendment, however, does not change tax law or automatically alter estate tax exemptions and rates — in fact, it never even mentions the estate tax by name. The Baucus amendment is an adjustment to spending and revenue totals in the outline within the budget resolution. It is a non-binding suggestion — a proposal for how federal resources could be spent. The practical effect of the amendment is that it proposes to use the projected surplus for a few specific spending and tax policy changes.

During debate on the amendment, Sen. Baucus ☼ gave details as to his desires for how the surplus revenues, projected in the budget resolution to materialize in 2012, could be spent. He spoke of three specific proposals: extending children's health insurance to all kids in America, extending some middle-class tax cuts, and extending the 2009 levels of the estate tax.

The main motivation for the Baucus amendment was to outline a number of tax and spending policies that could be implemented to spend the projected 2012 surplus during 2011 and 2012, in the process staking a Democratic claim on the additional revenue. It was also likely proposed to deny Republicans their own proposals to use the surplus for additional tax cuts.

In addition, the Baucus amendment's estate tax provision is notable for its recognition that previous proposals on the estate tax were far too irresponsible and expensive to actually implement. Both Baucus and Sen. Kyl ☼ (R-AZ), the main two senators involved in the estate tax debate, have now shifted significantly away from what once were pro-repeal positions on the estate tax toward far more moderate proposals. This is likely due to the Democrats' strong commitment to PAYGO in the current Congress.

While the Baucus amendment does not force implementation of the policies he outlined during the debate on the budget resolution, it does represent an important shift in the Senate away from fiscally reckless estate tax policies and toward more common sense reforms.

Finally, conference treatment of PAYGO itself will be telling. The House's PAYGO rule allows up-front expenses to be offset by future cuts or tax increases, so long as there is no aggregate increase in entitlement spending or decrease in taxes over the five- or ten-year period following the current fiscal year. The Senate plan permits only paid-for entitlement increases or tax cuts in any given fiscal year and extends PAYGO through 2017.

In any event, the budget resolution conference committee report, expected by the end of April, is all but certain to include some version of PAYGO and additional resources for a new farm bill, SCHIP, education, and veterans' health, reflecting a significantly increased congressional commitment to fiscal responsibility and many underserved domestic spending priorities.

Support Mounts to End IRS Privatization Program

Key politicians and advocacy groups are lining up against an IRS program to privatize tax collections, as suspect contracts have raised further concerns about the effectiveness and transparency of the program.

OMB Watch has joined with the American Federation of State, County and Municipal

Employees (AFSCME), Citizens for Tax Justice, and the National Treasury Employees Union (NTEU) to urge Congress to pass H.R. 695 and S. 335, bills that would end the IRS private tax collection program. In conjunction with these groups, OMB Watch sent letters to the House and the Senate making the case that this wasteful and dangerous program should be terminated immediately.

The IRS private debt collection program, authorized in 2004 and initiated in September 2006, contracts out the collection of tax debts that the IRS has identified but claims it does not have the resources to obtain. Contractors are allowed to keep 21 to 24 percent of all the money they collect, even though IRS employees could do the same work for one-eighth the cost.

Representatives controlling key committees have also made public their opposition to the private debt collection program. Rep. Jose Serrano ☼ (D-NY), chairman of the House appropriations subcommittee on financial services and general government, repeated his intention to end the program at a March 28 hearing. At that hearing, Treasury Secretary Henry Paulson gave a muted defense of the program, acknowledging concerns about cost and taxpayer rights that Bush administration officials had previously denied. Paulson did not recommend repealing the program, but signaled he would not strongly oppose repealing it. "It's a hard one for me to feel strongly about," Paulson said in a recent TaxAnalysts article.

In addition, Chairman of the House Ways and Means Committee Charles Rangel (D-NY) has stated his intention to repeal the IRS privatization program and asked that the IRS not issue any more contracts to private debt collectors. Rangel's interest is most likely in moving forward with H.R. 695, which is co-sponsored by Reps. Chris Van Hollen (D-MD) and Steve Rothman (D-NJ) with bipartisan support.

Rangel said his immediate concerns over the program stem from a suspicious denial by the IRS to renew one of the current debt collector's contracts. The contractor — Linebarger Goggan Blair & Sampson — is a debt collector based in Texas.

Neither the IRS nor Linebarger have explained why the contract was not renewed. A tax expert in San Antonio, where Linebarger has offices, speculated that Linebarger may have had trouble recovering the tax debts, making the contract less profitable. Private contractors do not have the legal authority to compel tax payment if a debtor refuses to cooperate.

IRS Taxpayer Advocate Nina Olson has found data suggesting private collectors have only successfully obtained payments from 20 percent of the cases IRS gave them. The IRS has not released information explaining what has happened to the vast majority of cases given to private collectors. Olson said that given the lack of data, it is impossible for the public to evaluate the program. On the other hand, a report by the Treasury Inspector General for Tax Administration has found that IRS has taken enough steps to protect taxpayer rights and ensure that the debt collection program is monitored for

effectiveness. The report urged further action in computer security and how the IRS tracks data on taxpayers who request to deal with IRS agents instead of private contractors, among other concerns.

Correction: The original version of this article contained errors about Linebarger Goggan Blair & Sampson, LLP, a Texas-based firm. The article incorrectly stated that the firm was "currently being sued" in a case in Texas; Linebarger was never a party to the suit in question, Municipal Services Bureau v. City of Brownsville, *and the suit was dismissed in February. The article also incorrectly stated that "some" of the firm's employees were convicted of bribery; only one employee of the firm was indicted and convicted of bribery, and he was fired upon his indictment. --Ed., April 6, 2007.*

OMB Manipulated Climate Science, Report Says

Political officials throughout the Bush administration have edited and manipulated climate science communications, according to a recent report by a nonprofit watchdog group. Evidence shows the White House Office of Management and Budget (OMB) to be involved in the manipulation.

On March 27, the Government Accountability Project (GAP), a public interest advocacy and watchdog organization, released a report detailing political interference in federal offices performing scientific research related to global climate change. The report, *Redacting the Science of Climate Change*, focuses on the manipulation of agency scientific communications to Congress and the media. The report is the product of a year-long investigation which included interviews and examinations of internal executive branch documents.

Examples in the report indicate OMB has been involved in political interference. OMB exerted political influence in responses to questions from Congress. OMB also plays an oversight role in a federal climate science clearinghouse.

For example, after an April 26, 2006, Senate committee hearing on the effects of climate change, two senators submitted questions for the record to the National Oceanic and Atmospheric Administration. A number of federal offices, including OMB, took the opportunity to comment on and edit the responses.

In one of its edits, OMB inserted text which "attributed global warming to increasing water vapor, in reliance on a quote taken out of context from a scientific paper," according to the GAP report. Before finalizing the response, one of the paper's authors intervened to correct OMB's assertion.

In another edit, OMB recommended removing the phrase "healthy coral reef ecosystems are important to both the fisheries and tourism industries and negative impacts on these ecosystems could affect these industries." OMB felt the phrase unnecessary, according to

documents obtained by GAP.

The report indicates OMB has also been involved in interference as an overseer of the Climate Change Science Program (CCSP). CCSP was formed to coordinate climate change science across a number of federal agencies and serve as a clearinghouse for information. CCSP is governed by members of those agencies as well as other executive offices, including OMB. Two OMB officials also sit on a CCSP working group in charge of publicly disseminating climate science information.

However, CCSP has underwhelmed observers in its releases of public information, according to the report. Since 2004, CCSP has released only 12 substantive written products, none of which exceed four pages in length. Since January 2006, the only new materials to emerge from CCSP have been three press releases. CCSP currently employs a staff of 14. Though OMB's exact involvement cannot be quantified, Tarek Maassarani, the author of the GAP report, says, "OMB has a presence in a lot of the decision making processes" in CCSP.

GAP released the report in conjunction with a hearing held by an oversight subcommittee of the House Science and Technology Committee. Like the report, the hearing focused on political interference in climate science communications.

The testimony of James McCarthy, a Harvard professor of biological oceanography, underscored the importance of sound science in the global climate change dialogue and the danger of scientific manipulation. Speaking of recent consensus on rising global temperatures and the anthropogenic causes thereof, McCarthy said, "Despite this strong scientific understanding, media coverage and political debate on global warming science often give undue credence to the views of little known organizations and statements by individuals purporting to be experts on climate science."

Both the report and the hearing point to other offices within the Executive Office of the President as involved in climate science manipulation. Most notably, internal documents have identified the White House Council on Environmental Quality (CEQ) and the Office of Science and Technology Policy (OSTP) as perpetrators.

CEQ and OSTP have been more involved in political interference than OMB, according to the report. However, OMB's role in the political manipulation of climate science communication is not to be understated. According to Maassarani, "OMB is very hostile to the policy implications of this science."

Miners Detail MSHA's Failings in Emotional Testimony

On March 28, the House Committee on Education and Labor heard emotional testimony from miners and miners' families about the dangerous conditions that currently exist in the coal industry, despite recent federal legislation that addresses mine safety. The main

focus of the hearing was to provide a forum for the families and miners to argue for legislative and regulatory action similar to laws recently passed in West Virginia and Kentucky and to describe conditions in the mines.

Committee Chair George Miller (D-CA) asked the witnesses to discuss what role the states have in determining the extent of mine safety and what Congress can learn from the states' efforts. In his opening remarks, Miller addressed failures to collect fines from companies violating laws and stacking the federal Mine Safety and Health Administration (MSHA) with industry insiders. "Under the Bush administration, MSHA has rolled back safety and health rules, and has shifted its focus away from enforcing the law and toward so-called 'voluntary compliance assistance'," Miller said.

Three witnesses from Kentucky — a miner who was fired for raising safety concerns, the wife of a deceased miner, and an attorney who has represented miners — called for expanded federal legislation similar to Kentucky's HB 207, which was passed in 2006. The legislation requires increased numbers of mine inspections, more multi-gas detectors, investigative subpoena powers and more mine emergency technicians at mining sites.

West Virginia also passed legislation in 2006 after fourteen miners were killed in two different incidents. Senate Bill 247 "mandates immediate and crucial upgrades in West Virginia's rescue technology and provides for better communication among local and state officials and mine operators when an accident occurs." Nearly all the witnesses testified that state actions are not enough, however, and that MSHA hasn't met its obligations under the law despite specific deadlines for action.

According to witnesses, many of whom sat with pictures of family members killed in mine incidents, serious dangers still exist in mines despite passage in 2006 of the federal Mine Improvement and New Emergency Response Act (MINER). Congress passed the MINER Act after seventeen deaths at the Sago and Darby mines. There were more coal miner deaths in 2006 than in any year since 1991, according to written testimony from the United Mine Workers of America (UMWA). The UMWA, and many members who attended the hearing from West Virginia, agreed with several other witnesses who argued that MSHA has failed to protect miners since Congress created the agency in 1977.

The dangers described by the witnesses include insufficient stores of oxygen, mandatory ventilation systems and explosion-proof seals. MSHA has allowed coal companies to institute many of these safety requirements on a voluntary basis while the agency studies the restraints and, in some cases, relaxes the standards.

Several witnesses urged Congress not to allow coal industry officials to hold positions in MSHA. They also asked the Committee to have MSHA officials appear at hearings and ask questions about why the agency hasn't put regulations in place when the states have been able to move quickly in implementing new safety standards. MSHA withdrew

seventeen proposed health and safety rules in 2001. Miller vowed to have both MSHA and coal company representatives appear before the Committee in subsequent hearings.

Coal companies joined MSHA as targets of the witnesses' complaints. Without adequate inspections and enforcement, companies cut corners. A Kentucky miner fired for complaining about safety violations was blacklisted in his region and said that mine safety is not any better now than when he started mining 28 years ago. Witnesses spoke of intimidation and threats for raising safety complaints, including threats to the children of a deceased miner.

The Alma mine fire in West Virginia was one of the 2006 incidents addressed at the hearing and provides an example of industry neglecting safety. Two miners were killed in the fire, after which MSHA began an investigation. MSHA has just imposed the largest fine in its history against the Alma mine owners, Aracoma Coal Company. According to a March 30 BNA story, the $1.5 million fine was levied for 25 violations of mandatory safety requirements, 21 of which were judged "reckless disregard" by MSHA. Among the violations,

Miners were not immediately notified or withdrawn when the initial carbon monoxide alarm signaled, MSHA said. Also, a required fire suppression system was not installed and there was no water available in the area to fight the fire. Airflow carried smoke from the fire into the primary escapeway because required ventilation walls had been removed.

A state investigation found 168 violations by the owners. During the investigation, the state issued 90 subpoenas. The MSHA and West Virginia investigations of the Alma fire provide examples of some of the differences between the state and federal powers and responsibilities in regulating the second most dangerous occupation in the nation.

FDA Issues New Conflict of Interest Guidelines

The U.S. Food and Drug Administration (FDA) issued a proposal that revised its criteria for determining whether scientific advisory committee members have financial conflicts of interest. The guidance, which would be nonbinding if adopted, is in its draft form and will be open for comment upon publication in the *Federal Register*. The guidance simplifies FDA's process for determining financial conflicts of interest. It also details exceptions agency personnel can make to allow scientists with conflicts of interest to serve on panels. The proposal comes as FDA faces increasing scrutiny over its ties to the pharmaceutical industry.

FDA advisory committees are standing panels comprised of individuals considered experts in a particular field. Members are generally non-governmental employees but may also include government employees outside of the office to which the panel is making recommendations. Committees are comprised primarily of members with

scientific interests, but may also include members representing consumer, industry and patient interests. Advisory committees vote to provide nonbinding recommendations to FDA.

Federal law requires agencies to screen advisory committees for financial conflicts of interest. The guidance points out, because FDA advisory committees are integral in the agency's regulatory decision making, "the public has a particular interest in and high expectations for FDA's process." FDA recently identified assessment of potential conflicts of interest as an area in need of improvement.

On March 21, FDA released a proposal which would "streamline" the agencies process for assessing financial conflicts of interest. The guidance includes detailed instructions agency personnel should use when considering advisory committee members. Agency personnel should determine whether the candidate has a disqualifying financial interest. The proposal defines a financial interest as "the potential for gain or loss to the employee as a result of governmental action on the particular matter." A member's family, partners, employer, prospective employers, and organizational ties should be considered.

The guidance sets a threshold of $50,000 for determining the severity of a conflict of interest. The guidance suggests potential members with a financial interest of more than $50,000 should not serve on panels. Those with a financial interest less than $50,000 may participate but only as non-voting members.

The guidance also instructs personnel to consider financial interests the candidate may have had in the preceding year, regardless of whether those interests still apply. This provision exceeds statutory criteria for determining conflicts of interest.

However, the proposal also includes criteria for granting exemptions to potential committee members with financial conflicts of interest. This is in accordance with federal statute, which requires certain provisions for exemption.

One of these exemptions applies to non-governmental employees. Upon determining an individual has a financial interest greater than $50,000, the guidance instructs agency personnel to ask: "Does the need for the individual's services outweigh the potential for a conflict of interest?" If the answer is "yes," the member could serve on the panel but could not vote.

The guidance suggests ways to determine whether the need for an individual supersedes financial interest. One factor is the determination of the uniqueness of the individual's expertise. The guidance states, "Need will be most persuasively shown when a reasonably thorough search for a similarly or better qualified candidate with fewer conflicts can be documented."

Other suggestions for determining need involve qualifying in some way the conflicts that led to the determination of financial interest. For example, personnel are to consider "the

extent to which the disqualifying financial interest could be affected by the actions of the advisory committee." The guidance does not indicate who in the agency should make these determinations.

OMB Watch is concerned about the factors the guidance identifies in determining the "need for the individual's services." In comments the organization plans to submit, OMB Watch states, "Allowing agency personnel to qualify conflicts undermines the original criteria for determining financial interests. Conflicts either exist or they do not. Mitigating the severity of a conflict of interest should not be an option." OMB Watch also critiques the proposal for setting a seemingly arbitrary level of $50,000 for exclusion from committees, and encourages FDA to include its rationale in the final guidance.

"Currently, the proposal includes several loopholes which could allow agency personnel to advance a political agenda and sacrifice scientific integrity in the process," OMB Watch says in its comments. "If FDA closes these loopholes, this conflict of interest guidance will provide a fine framework for agency personnel and set a course for other agencies to follow."

FDA's decision to address ties between advisory committee members and industry comes in the wake of two House hearings which addressed the agency's drug approval process. At the second hearing on March 22, FDA Commissioner Andrew von Eschenbach defended the agency in front of the House Energy and Commerce subcommittee on Oversight and Investigations. Commenting on high-profile drug safety failures such as the Vioxx incident, subcommittee Chairman Bart Stupak (D-MI) said, "FDA officials responsible for protecting Americans overruled their own scientists and chose instead to listen to the self-interested pleadings of the drug companies."

The hearing revisited the 2006 controversy over the antibiotic Ketek, which was rushed to market despite warnings from agency scientists about the drug's potential side effects. Von Eschenbach claimed FDA did not rely on false safety studies despite contrary claims posted on the agency's website. On March 28, Stupak and Committee Chairman John Dingell (D-MI) sent a strongly worded letter to Michael O. Leavitt, the Secretary of Health and Human Services. The letter announced the lawmakers intent to investigate possible efforts by Von Eschenbach to "intentionally mislead the Subcommittee" and requesed documents to that effect.

Lawmakers are likely to continue to examine industry's influence at FDA as Congress prepares to reauthorize the Prescription Drug User Fee Act (PDUFA). PDUFA authorizes FDA to collect fees from pharmaceutical companies which are then used to conduct safety studies on specific drugs. The fees are tied to "performance goals" that prompt FDA to expedite the approval process. PDUFA is set to expire on Sept. 30, the end of the fiscal year.

Department of Homeland Security Finalizes Chemical Security Program

On April 2, the Department of Homeland Security (DHS) finalized interim chemical security regulations. The final regulations are an improvement over the proposed regulations issued in December 2006, but many weaknesses remain. In particular, DHS modified its broad interpretation of a provision regarding state preemption but did not adequately establish that states can develop rules stronger than the federal ones. The final rules do little to allay concerns regarding the lack of public accountability and access to information or the failure to require consideration of inherently safer technologies by facilities reporting to DHS.

Section 550 of the Department of Homeland Security Appropriations Act of 2007 required DHS to develop a temporary program for instituting security performance standards for high-risk chemical facilities.

According to the final rules, DHS will assess the risk level of every chemical facility based on the amount and type of dangerous chemicals. The only facilities subject to the chemical security rules will by "high risk facilities," estimated by DHS to be approximately six to seven thousand facilities across the country. DHS will then categorize the high-risk facilities into four tiers of escalating risk. Facilities in all four tiers are required to submit site security plans for approval, but the strength of the standards increase in proportion to the risk of the facility.

In an April 2 conference call, DHS stated that the final rules addressed three primary concerns raised by the public interest and environmental community — state preemption, excessive secrecy, and use of inherently safer technologies. However, the public interest and environmental community believes the final rules do not address these concerns sufficiently. It appears Democrats in Congress are reacting in a similar fashion.

State Preemption

The proposed chemical security rules included a broad preemption provision which, according to DHS's interpretation at the time, would have nullified all stronger state chemical security programs. In the final rules, this approach was recognized by DHS as an expansive interpretation of the agency's authority under Section 550. In the preamble to the final rules, DHS states, "the Department [of Homeland Security] has modified certain of its prior statements on preemption as potentially too broad." DHS noted in Monday's conference call that no state laws "currently on the books" are believed to conflict with the final regulations, and federal law has no impact on existing state chemical security programs. The final rule contains the same preemption clause as present in the proposed rule, though DHS has modified its interpretation and is no longer claiming preemption of all stronger state chemical security programs.

The state preemption clause was regarded as one of the more controversial subjects of

the proposed regulations. Many public interest groups opposed the provision, as did many members of Congress. The preemption issue was so important to Congress that it attached a rider to the supplemental appropriations bill that would explicitly resolve the problem that DHS's federal chemical security rules do not preempt any state or local programs. The president is expected to veto the supplemental appropriations bill.

According to the *Washington Post*, New Jersey Gov. Jon Corzine's (D) spokesperson said the rules "appear to undermine states' ability to tailor important policies unique to their own situation and vulnerability." The *Post* adds that Sens. Frank Lautenberg (D-NJ), Susan Collins (R-ME), and Robert Menendez (D-NJ) have already expressed concerns about the DHS final rules.

Excessive Secrecy

The final regulations maintain the plan to create a new sensitive but unclassified category of information called Chemical-terrorism Security and Vulnerability Information (CVI). Access to information marked as CVI will be limited to "covered persons who have a need to know."

In comments to DHS, OMB Watch and Public Citizen strongly objected to this paradigm for information sharing. The groups recommended that the regulations specify how the collected information will be combined and shared with ongoing counterterrorism and security programs at other departments and agencies. OMB Watch and Public Citizen also encouraged DHS to create the infrastructure to increase information sharing, not by limiting information to those who "need to know," but by creating an environment and culture at DHS which understands the need to share information with state, local and private actors and with the public.

Most of these recommendations went unheeded in the final regulations. In the final rules' preamble, DHS recognizes that, "the Department does not take the creation of a new information protection regime lightly," and notes that all people with a "need to know, including appropriate State and local officials, will have access to the necessary CVI." Unfortunately, DHS is still operating under a framework that has been repeatedly criticized as largely responsible for the mistakes leading-up to 9/11. The final regulations limit information sharing for "activities approved, accepted, funded, recommended, or directed by the Department [of Homeland Security]." Despite the good intentions of the federal government, DHS cannot predetermine every potential use of the information being collected and should, therefore, try to maximize access to CVI at the local and state levels. Anything short of such access is a dangerous impediment to homeland security efforts. Also troubling is that DHS regards CVI information as automatically exempt from the Freedom of Information Act.

The final regulations make an improvement in access to information, though, by clearly stating that no other federal regulations are intended to be displaced. The existing programs at the U.S. Environmental Protection Agency and the Occupational Safety and Health Administration will not be affected. DHS officials on the April 2 conference call

also stated that the identities of facilities covered by the chemical security program would generally be publicly available but not information on the risk tier the facility was placed within. The officials also stated that communities would be informed about facilities that flagrantly violate the security requirements of the program, although it was implied that such information would only be available after some delay.

Inherently Safer Technologies

The authorizing legislation passed by Congress last year prevented DHS from instituting chemical security standards, which would approve or disapprove a site security plan "based on the presence or absence of a particular security measure." OMB Watch and Public Citizen, along with other environmental and public interest groups and members of Congress, urged DHS to add provisions encouraging chemical facilities to consider implementing safer processes and using safer chemicals as a method to improve site security through the reduction of risk. Such provisions would not force companies to implement inherently safer technologies, nor would they establish a litmus test to reject site security plans simply based on the absence of inherently safer technologies from the plan. In the final rules, DHS, nonetheless, stated it did not have the authority to implement such a section.

DHS's decision to exclude any provisions encouraging installation of safer technologies is especially difficult to understand as it comes on the heels of a Chemical Safety Board report laying blame for the BP Texas City refinery accident on the company's failure to invest in safer equipment. The tragic March 2005 accident that killed 15 and injured 170 clearly demonstrates a common vulnerability at chemical plants — cost cutting and bottom line thinking that delays installation of life saving equipment.

Chemical facilities pose one of the greatest threats to our nation's security. The U.S. Army's Surgeon General states that 2.4 million people are at risk of death or injury as a result of an attack on a chemical plant in the United States, and the U.S. Public Interest Research Group estimates that 41 million Americans live in "within range of a toxic cloud that could result from a chemical accident at a facility located in their home zip codes." Those estimates, and the DHS chemical security rules, fail to address the significant threat posed by the transportation of deadly chemicals to and from the thousands of facilities DHS plans to include in its program. A new report, "Toxic Trains and the Terrorist Threat," by the Center for American Progress highlights this currently overlooked aspect of the chemical security issue.

Needs and Methods for Congressional Oversight the Focus of Hearing

In the context of the ongoing controversy surrounding the firing of eight U.S. attorneys, the House Judiciary Subcommittee on Commercial and Administrative Law held a hearing on March 29 that explored the oversight powers of Congress. "Ensuring Executive Branch Accountability" included testimony from several experts on executive

privilege and congressional oversight powers.

Frederick Schwarz, Jr., senior counsel at the Brennan Center for Justice at New York University Law School, testified before the subcommittee. Schwarz imparted his findings on congressional powers based on his experiences as chief counsel of the Church Committee, the 1970s investigative committee that uncovered widespread FBI abuse spying on political opponents, civil rights leaders and war protestors. Schwarz called for a "broader investigation into the politicization and the credibility of the Justice Department." The U.S. attorney firings are in need of investigation, stated Schwarz, but congressional oversight should expand to include areas of national security and the interpretation and execution of legislation and policy, which impacts the entire executive branch. Schwarz asserted that without oversight, the executive branch tends toward abuse of powers; "History demonstrates that the absence of oversight allows the awesome law enforcement and national security powers of the executive branch to be turned to harmful ends."

The subcommittee also heard from John Podesta, former chief of staff for President Clinton and current president of the Center for American Progress. Podesta stressed that there are limits to executive privilege. President Clinton exercised executive privilege but also, stated Podesta, "understood that the privilege is not unqualified: that the public interests by the claim of privilege must be weighed against those that would be served by disclosure. He appreciated that even where the privilege applies, it is not absolute." Congressional oversight is necessary, because there are no formal mechanisms for oversight of the White House. Podesta stated that, "the White House has no inspector general to investigate abuses and it is not subject to the Freedom of Information Act. Only Congress can provide appropriate oversight and accountability."

For the effective exercise of congressional oversight powers, Schwarz recommended that Congress respect the following:

- Oversight need not be a partisan matter: "sensible men and women will converge on sensible courses of action."
- Contemporaneous documents and live testimony are essential in determining the facts.
- Testimony must be transcribed: "a 'hearing' without a transcript is simply a waste of time."
- Access to privileged or classified information can be obtained with appropriate procedures.
- Congress and the White House must mind the distinction between legitimate secrets and excessive use of national security powers.
- Executive privilege should not be taken at face value.

The witnesses served as advisors to a Congress in the midst of several ongoing investigations of potential abuses of executive power. The articulation of the powers and methods necessary for vigorous oversight will hopefully be put to good use by the 110th

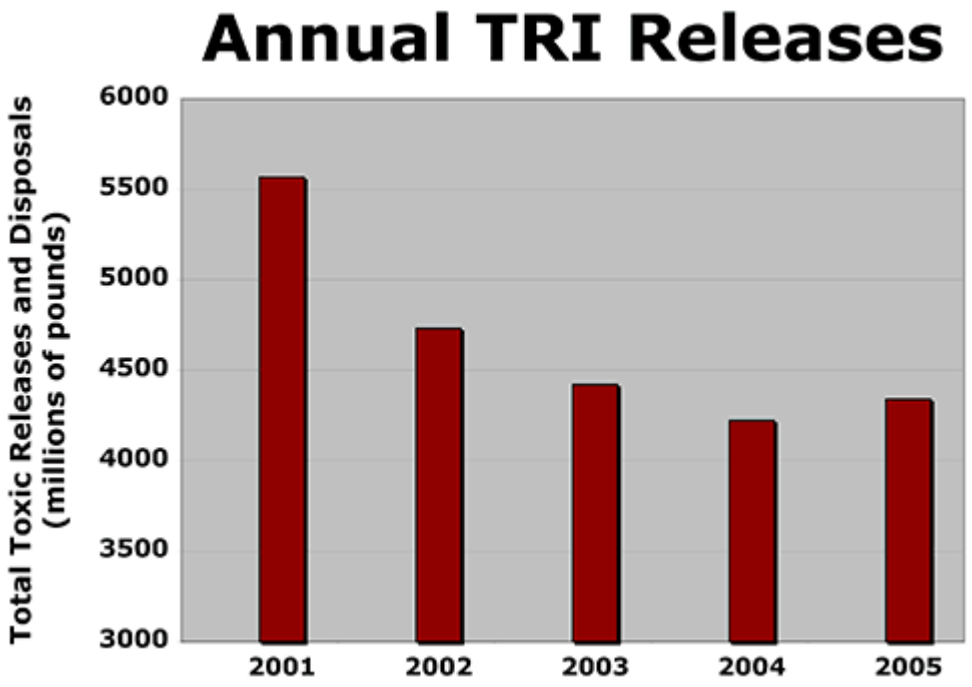
Congress.

RTK NET Publishes 2005 Toxics Release Inventory Data

The Right-to-Know Network (RTK NET) published the 2005 Toxics Release Inventory (TRI) data on March 23, providing public access to important U.S. Environmental Protection Agency (EPA) data on the release and transfer of toxic chemicals in the United States. This is EPA's earliest release of the annual TRI data in the history of the program.

Individual facilities report TRI data by sending reports to EPA every year. RTK NET allows the public to search the data, enabling users to learn about the toxic chemicals in their local communities, states, regions, and the entire nation. Users can search by location, individual facility, parent company, industry type, and offsite waste transfer data tailored to fit their specific requirements. Updates over this past year include more comprehensive search results and additional cross-referencing options that allow for simultaneous sewage plant and offsite transfer searches. RTK NET is also using a new indexing protocol, called sitemaps, which will allow key results to be found via popular Internet search engines such as Google, Yahoo and MSN.

For 2005, over 23,000 facilities reported 4.34 billion pounds of releases and disposal of toxic chemicals, covering approximately 650 chemicals and chemical categories. This is an increase of three percent (117 million pounds) from 2004, driven by increases in releases from the metal mining, electric utilities and primary metals industry sectors. The longer term trend for TRI continues to demonstrate significant reductions, with 2005 totals down 22 percent (1.23 billion pounds) from the releases in 2001. The 2005 data show a troubling nine percent increase (72 million pounds) in the release of carcinogens, including a 54 percent increase (65 million pounds) in the release of arsenic. The new TRI data also indicated a five percent (25 million pounds) increase in releases of Persistent Bioaccumulative Toxins (PBTs), which occurred because releases of lead rose by six percent (26 million pounds) from 2004, while releases of other PBTs, such as mercury, dioxin, and PCBs, decreased modestly.



Unfortunately, in December 2006, EPA changed the TRI rules to drastically reduce the amount of data collected on toxic pollution throughout the country, severely diminishing the usefulness of the TRI program for users. Amid huge opposition, the agency raised the threshold for detailed reporting for most of the 650 TRI chemicals, from 500 pounds to 5,000 pounds, up to 2,000 pounds of which can be released directly to the environment. The reporting changes will also allow facilities to withhold details on low-level waste generation of persistent bioaccumulative toxins (PBTs) such as mercury and lead.

"We are pleased that EPA got the data out faster this year, but their efforts to chip away the amount of toxic pollution tracked in TRI raises doubts about the usefulness of the program to individuals and communities," said Sean Moulton, Director of Federal Information Policy at OMB Watch. "EPA has insisted on viewing TRI as a tool for national totals and trends, which means the details that are disclosed at the local level that are so important to health and safety may be abandoned."

OMB Watch urges RTK NET users to weigh in so we can continue to provide useful environmental information on chemical releases. See http://www.crtk.org/subscribe.cfm to sign up for updates. Citizens concerned about the TRI rollbacks can contact Congress by visiting http://ga6.org/campaign/TRI.

OMB Watch created RTK NET in 1989 in support of the Emergency Planning and Community Right to Know Act (EPCRA), which mandated public access to TRI information.

CEQ Guidance Adds Needed Details to Bush Executive Order

On March 29, President George W. Bush's Council on Environmental Quality (CEQ) released guidance to agencies that explains in greater detail how to implement the president's recent environmental order. On Jan. 24, Bush issued Executive Order (E.O.) 13423, Strengthening Federal Environmental, Energy and Transportation Management. The order replaced five detailed environmental orders, issued by President Bill Clinton, with vaguer, less aggressive provisions that broaden agency exemptions and consolidate power in executive offices.

Bush's E.O. did establish some specific goals, including that by 2015, "energy intensity" should decrease by 30 percent, water consumption should shrink 16 percent, and the federal fleet's gas consumption should be down 16 percent. However, the new executive order lacked much of the specificity and detail from the previous orders it replaced. The five earlier E.O.s utilized more than thirty-seven pages to detail requirements and activities associated with the stated environmental and energy goals. The new E.O. covered the same issues in just five pages, consisting of instructions that were more generic and vague then those contained in the previous orders. Now the CEQ has released a 50-page guidance document to help fill in some of the blanks.

The CEQ's Instructions for Implementing Executive Order 13423 cover organization and oversight as well as details for energy and water management, building materials, greener products, toxic materials, fleet management, and more. However, many of these goals merely replicated ones established by Clinton's orders, differing primarily in their target dates. For instance, the gas consumption goal is no different from the one established under Clinton's E.O. 13149 issued in 2000, but the new order allows almost twice as much time and uses a much older baseline. While the instructions provide greater detail and context to the executive order, it is clear that additional guidance and goals will be developed in future years by the Steering Committee and Workgroups outlined in the instructions.

A change evident in E.O. 13423 and reinforced by the CEQ instructions is the shift of authority and control for these environmental and energy goals to executive offices such CEQ and the White House Office of Management and Budget (OMB). Previously, agencies such as the U.S. Environmental Protection Agency (EPA) and Department of Energy (DoE) oversaw such programs. While the instructions reserve an elevated position for these agencies, that role is advisor to the executive offices. The problem with such a shift of authority is that executive offices are more politically controlled and have much less accountability and transparency than the more public agencies.

There was also great concern that the new executive order would eliminate the requirement that federal facilities report toxic pollution under the Toxics Release Inventory (TRI), because it revoked a Clinton executive order establishing the requirement without explicitly restating the provision. However, the CEQ guidance

clarifies that the TRI reporting requirement remains in place.

Another troubling change implemented through E.O. 13423 is new loopholes for compliance that designate entire projects exempt from the E.O. due to security reasons. The National Intelligence Director and an agency head with "law enforcement activities" have the discretion to exempt projects from complying with this E.O. when they determine there is danger of "unauthorized disclosure." Previously, waiver and exemptions could be applied for, but the process required justifications and approval.

Though it maintains some energy efficiency reduction goals, the new executive order does not improve upon them and, in some instances, lowers obligations. Additionally, the order shifts responsibility for these goals away from objective agencies with expertise in energy and the environment to political executive offices with more limited accountability.

The following E.O.s were revoked:

- E.O. 13101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition (9/14/98-Clinton)
- E.O. 13123, Greening the Government Through Energy Efficient Energy Management (6/3/99-Clinton)
- E.O. 13134, Developing and Promoting Biobased Products and Bioenergy (8/12/99-Clinton)
- E.O. 13149, Greening the Government Through Federal Fleet and Transportation Efficiency (4/21/00-Clinton)
- E.O. 13148, Greening the Government Through Leadership in Environmental Management (4/21/00-Clinton)

Senate Committee Advances Electronic Filing Legislation

Legislation that would require senators to file their Federal Election Commission information electronically was passed out of the Senate Rules Committee on Feb. 28. The issue has been raised in the last two sessions of Congress but has never been passed by the Senate.

The bill, the Senate Campaign Disclosure Parity Act (S. 223), introduced by Sens. Russell Feingold (D-WI) and Thad Cochran (R-MS), would require Senate candidates to file their campaign finance reports electronically rather than on paper, starting next January. House and presidential candidates, as well as federal political action committees, have all had to file electronically since 2001.

Ironically, the Senate offices already use software to electronically fill out the campaign disclosure forms, but the data is then printed out and delivered to the Federal Election Committee (FEC), which then re-enters all of the information in a computer database.

Eliminating this wasteful and unnecessary step should speed up the process, allowing the public review the information sooner, and should increase accuracy while decreasing costs. Entering all of the data filed on paper from the Senate's campaign finance reports takes the FEC weeks and is estimated to cost $250,000 each year.

Proponents of the legislation plan to bring it up for a unanimous consent vote on the Senate floor. While similar legislation has yet to be introduced in the House, given that House members are already required to electronically file this information, it is unlikely that the members will hesitate to hold the Senate to a similar standard.

New York Police Watched Nonprofits before 2004 GOP Convention

A March 25 story in the *New York Times* revealed that the New York City Police Department (NYPD) conducted a covert surveillance program in 14 states, Canada and Europe that collected information on groups planning lawful protests or events at the 2004 Republican National Convention. The information became public as a result of two lawsuits brought against the city by seven of the 1,806 people arrested during the convention. However, the city has asked a federal court to keep detailed records of this surveillance secret, fearing they will be "misinterpreted." The vast scope of the surveillance has become public knowledge at the same time that Congress is investigating Federal Bureau of Investigation (FBI) abuse of Patriot Act powers to collect information.

The *Times* investigation found that during the year leading up to the Republican convention, NYPD sent agents to cities such as Albuquerque, Montreal and Miami. They attended meetings and filed detailed reports. In some cases, they contacted the police departments in other cities about peaceful anti-war events, such as concerts billed as Bands Against Bush that included political speeches between sets. Anti-war groups were not the only targets. According to the *Times*, church groups, environmentalists, anti-death penalty groups and street theatre groups were also watched. In all, the *Times* said NYPD "chronicled the views and plans of people who had no apparent intention of breaking the law."

The New York Civil Liberties Union (NYCLU) filed the lawsuits in October 2004, challenging use of mass arrests, improper detention and fingerprinting as violations of the First, Fourth and Fourteenth Amendments to the U.S. Constitution. NYCLU was successful in convincing the city to destroy fingerprint records of people arrested for minor offenses. However, the group's effort to have the mass arrest procedures barred from future use is proceeding to trial.

The NYCLU obtained the NYPD documents through the pre-trial discovery process, and the court granted permission to make the information public in January 2007. Judge James C. Francis of the Federal District Court in Manhattan said, "The questions posed

by these cases have great public significance. At issue is the proper relationship between the free speech rights of protesters and the means used by law enforcement officials to maintain public order." The documents were posted on the NYCLU website in late February. In addition, the *Times* reviewed still-secret records on the surveillance program and joined the NYCLU's request to the court to unseal them. The city opposes the motion, saying the news media will sensationalize the information.

A spokesman for the city said the surveillance program was necessary to prepare for the large crowds expected during the Republican convention. However, the courts have required some indication of unlawful activity to justify an investigation of an organization. New York has treated protest as adequate justification. The deputy police commissioner for intelligence, David Cohen, is a former CIA official who has made public statements linking investigations of political activity to terrorism investigations. One demonstrator who was arrested said he had been questioned by detectives with the terrorism task force. In all, the *Times* said, "In its preparations, the department applied the intelligence resources that had just been strengthened for fighting terrorism to an entirely different task: collecting information on people participating in political protests."

The broad scope of the NYPD surveillance and the use of anti-terrorism laws to crack down on protesters fit the pattern of overreaching investigation of lawful political activity. A March 9 report from the U.S. Department of Justice Inspector General (DOJ IG) found that the FBI has made heavy use of national security letters, which do not require judicial review, to justify surveillance and investigations. In Congress, both the House and Senate Judiciary Committees have held oversight hearings, where the DOJ IG said he found "widespread and serious abuse." As a result, some members of Congress, including Sen. Russell Feingold ☼ (D-WI), have said the Patriot Act needs to be reviewed to prevent future problems. Feingold was the only member of the Senate to vote against the Patriot Act in 2001.

NYPD is not alone in seeking to keep evidence of their political investigations secret. In civil lawsuits challenging domestic surveillance by the National Security Agency, DOJ has taken extraordinary steps to keep information secret, including requirements that judges use DOJ computers to write their opinions and limiting their access to case documents. One of these suits involves the Oregon charity Al-Haramain Islamic Foundation, which was shut down by the Treasury Department in 2004. The organization's attorneys learned from a document released in pre-trial discovery that the government had eavesdropped on conversations between the attorneys and Al-Haramain officials. DOJ has forced the attorneys to return the document, but the group has sued for damages as a result of the eavesdropping. The court denied DOJ's motion to bar the attorneys from referring to the document or the organization's knowledge of the wiretap.

Double Standard: Chiquita Banana Fined, Not Shut Down, for Transactions with Designated Terrorists

In a plea agreement with the U.S. Department of Justice (DOJ), on March 14 Chiquita Brands International agreed to pay a $25 million fine after admitting it paid terrorists for protection in a dangerous region of Colombia. The payments, made between 1997 and 2004, continued despite the company's knowledge that they were illegal. The company was allowed to continue profitable production during the investigation. The U.S. government's action is inconsistent with standards and procedure used against charities, which have had their assets seized and frozen while investigations are pending. Six U.S. charities have been shut down on the basis of much less evidence than the direct payments to which Chiquita admitted. The Chiquita fine is unlikely to affect its operations, as the company has annual revenues of approximately $4.5 billion.

The Cincinnati-based company paid approximately $1.7 million to the United Self-Defense Forces of Colombia (AUC) and also made payments to the leftist Revolutionary Armed Forces of Colombia (FARC), both U.S. designated terrorist organizations. The government's designation of AUC as a terrorist organization made it illegal for anyone in the U.S. "to knowingly provide material support, including currency and monetary instruments" to such organizations. According to a *Wall Street Journal* report in 2003, outside attorneys for Chiquita notified the company that the payments violated U.S. anti-terrorism laws and should not continue. However, payments to the groups continued until Chiquita sold its subsidiary, Banadex, in June 2004.

The company reported the $25 million plea agreement to the Securities and Exchange Commission (SEC). The SEC filing stated, "In 2003, Chiquita voluntarily disclosed to the Department of Justice that its former banana-producing subsidiary had been forced to make payments to right- and left-wing paramilitary groups in Colombia to protect the lives of its employees. The company made this disclosure shortly after senior management became aware that these groups had been designated as foreign terrorist organizations under a U.S. statute that makes it a crime to make payments to such organizations."

DOJ's "slap on the wrist" approach exhibits clearly unequal enforcement of anti-terrorist financing laws. In contrast to the direct funding Chiquita paid AUC, no significant evidence of terror financing by U.S.-based charities has been found. Instead, questionable evidence was used to shut down the largest U.S.-based Muslim charities, including the Holy Land Foundation.

Charities File Friend of Court Brief Supporting Grassroots Lobbying Rights

A group of 17 charities filed an amicus brief in the U.S. Supreme Court case *Wisconsin*

Right to Life v. Federal Election Commission on March 23, urging the Court to protect the right of charities to broadcast grassroots educational and lobbying communications. Multiple amicus briefs have been filed on both sides of the case, which challenges the constitutionality of the "electioneering communications" rule in the Bipartisan Campaign Reform Act of 2002 (BCRA). The rule bans broadcasts that refer to federal candidates and are funded by corporations, including charities, 60 days before a general election and 30 days before a primary. The Court will hold oral argument on April 25, and a decision is expected in the summer or early fall, in time to clarify the law before the 2008 elections.

The charities' amicus brief argues charities and religious organizations do not pose a threat of corruption to the electoral system when they air grassroots lobbying broadcasts, since tax law requires them to remain nonpartisan in elections. As a result, they do not broadcast the type of "sham issue ads" that the McCain-Feingold law was meant to stop. It also argues that the "electioneering communications" rule is overbroad, since there are no exceptions for unpaid or nonpartisan broadcasts.

The case, which is reaching the Supreme Court for the second time, was brought by Wisconsin Right to Life (WRTL), a 501(c)(4) social action organization. In 2004, WRTL wanted to conduct a grassroots lobbying campaign urging Sens. Russ Feingold (D-WI) and Herb Kohl (D-WI) to oppose upcoming Senate filibusters of President Bush's judicial nominees. Because Feingold was up for re-election, the ads could not air 60 days before the election, which was when Congress was considering judicial nominations. WRTL filed suit challenging the constitutionality of the law, and the Federal Election Commission argued that, because the Supreme Court had upheld McCain-Feingold generally, WRTL could not challenge application of the rule to its grassroots lobbying effort. The Supreme Court ruled that WRTL could bring the challenge and sent the case back to the lower courts to consider the merits. WRTL won a favorable judgment in December 2006, and the FEC appealed.

Congressional supporters of grassroots lobbying rights are ready to push H.R. 71, the First Amendment Restoration Act. It would repeal the electioneering communications rule if the Supreme Court does not strike it down. It is sponsored by Rep. Roscoe Bartlett ☼ (R-MD), who spoke against the rule on the House floor on March 29, the fifth anniversary of passage of BCRA. He said it "limits a citizen's freedom of speech and freedom of association." Rep. Virginia Foxx ☼ (R-NC) also spoke out against the provision on March 27, saying the rule sends the wrong message to organizations, since it "communicates to them that they have no right to voice their views during elections."

The charities' amicus brief was written by attorneys Robert F. Bauer, Karl J. Sandstrom and Ezra W. Reese of the firm Perkins Coie. It is available online here. Charities that signed the brief are:

National organizations:

- Alliance for Healthy Homes
- American Conservative Union Foundation
- Center for Lobbying in the Public Interest
- Independence Institute
- Independent Sector
- NARAL Pro-Choice America Foundation
- National Council of Jewish Women
- National Council of Nonprofit Associations
- National Legal and Policy Center
- National Low Income Housing Coalition
- OMB Watch
- Violence Policy Center

State organizations:

- California Association of Nonprofits
- The Housing Alliance of Pennsylvania
- Nonprofit Coordinating Committee of New York, Inc.
- The North Carolina Center for Nonprofits
- Pennsylvania Association of Nonprofit Organizations

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