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Nonprofit Issues

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As Elections Near, New Complaints of Partisan Activity Filed Against Religious Groups

New complaints filed with the Internal Revenue Service (IRS) accuse churches in Missouri and Texas of participating in partisan political activities that are prohibited under the tax code. Meanwhile, Focus on Family announced a new voter mobilization drive aimed at evangelical churches which will likely result in IRS complaints before the November elections. Both developments highlight the continued confusion and ambiguity that have plagued IRS policy on voter education and mobilization activities by nonprofits.

Missouri Catholic Conference and Voter Education on Stem Cell Research

On July 25, the *Kansas City Star* reported that a complaint had been filed with the IRS on the previous month against the Missouri Catholic Conference (MCC), alleging it engaged in prohibited partisan electioneering. The complaint claims that MCC sent more than 50 letters to candidates for the state legislature threatening negative publicity as a result of accepting campaign contributions from Supporters of Health Research and Treatments (SHRT), a group that supports medical research including stem cell research. At issue is a state constitutional amendment pending in the legislature, which would ban human cloning but also ban state and local government from discouraging stem cell research allowed under federal law. MCC opposes

the amendment, and obtained information on SHRT contributions from the Missouri Ethics Commission.

One such letter, sent to Rep. Jim Guest (R-King City), copied in the complaint, which was filed by Washington, D.C. attorney Marcus Owens. The letter points out that Guest had received $300 from SHRT, and explains that MCC "is committed to informing Missouri voters about campaign contributions promoting human cloning and embryonic stem cell research, and will report to Missouri voters regarding candidates who choose to associate themselves with this and similar organizations that promote such unethical practices. Therefore, if you have received but returned such a contribution or contributions, the MCC would like to report this fact to Missouri voters." The letter goes on to ask for documentation proving return of the SHRT donation. Guest, who has not returned the money, told *The New York Times*, "I'm not sure if extortion is the right word, but they basically threatened me if I didn't return the money, and that's certainly stepping across the line."

MCC has demonstrated its intention of following through and publicizing information about candidates that take money from SHRT. The complaint includes copies of two MCC publications listing, in a negative context, legislators and candidates that received such contributions. For example, the March 10, 2006 issue of the St. Louis Review Online, the weekly newspaper of the St. Louis Archdiocese, lists the SHRT contribution recipients and reminds readers that, "The Church has condemned embryonic stem-cell research as immoral..."

According to Owens' complaint to the IRS, the MCC's letter "is a crude attempt at intimidation, designed to threaten political candidates into submission by using church resources.". Owens also points out that MCC, as a Catholic organization, has access to information from the General Counsel of the U.S. Conference of Catholic Bishops that provides clear guidelines on what is and is not partisan activity. As a result, Owens maintains MCC's actions are a "knowing and willful attempt by the MCC to manipulate political candidates and engage in prohibited campaign intervention by disseminating favorable and unfavorable statements about candidates." Owens asks the IRS to therefore "take immediate action," including conducting a church tax inquiry under IRS rules and seeking an injunction in federal court that would prevent further violations.

The case deals with both permissible lobbying and advocacy on the state constitutional amendment and apparently impermissible attacks on legislators and candidates in their capacity as candidates not decision makers. It is difficult to predict what the IRS will do with this complaint, and unless MCC releases information about any IRS action privacy laws will keep the results confidential. Catholic Online, a prominent Catholic news site, however, reported on Aug. 21 that the IRS has apparently decided to take no action against the Archdiocese of St. Louis over statements made by Archbishop Raymond Burke's before the 2004 election. The Archbishop told Catholic voters to support pro-life candidates and oppose pro-choice candidates, prompting Catholics for Free Choice to file a complaint. In sharp contrast is the IRS action against All Saints Episcopal Church of Pasadena, California. (See Supplement B: Publicly Disclosed Cases from OMB Watch's recent report on the IRS's Political Activities Compliance Initiative.)

Texas Congregation Seeks Return of Contribution to GOP

Americans United for Separation of Church and State (AU) issued a press release on July 19 announcing it has filed a complaint at the IRS against Calvary Temple Church in Kerrville,

Texas, because of contributions the church made to the Republican Party totaling $1,500 between 2003 and 2005. A few days later Calvary Temple pastor Del Way told the *Kerrville Daily Times* the contribution was for advertising as part of a golf tournament and was not intended to endorse a political party. According to Way, the church has written to the Republican Party asking it to return the funds. AU discovered the payment in records at the Texas Ethics Commission. The Republican Party has not yet announced its decision regarding return of the funds, saying it had used the money for administrative purposes. However, such use would be a violation of IRS rules.

Focus on Family Voter Drive Targets Evangelical Churches

On Aug. 15, Focus on Family issued a statement announcing an eight-state initiative to increase turnout among evangelical voters. Dubbed iVoteValues.org, the project will focus on Maryland, Michigan, Minnesota, Montana, Pennsylvania, Ohio, New Jersey and Tennessee. According to the statement, Focus on Family is "recruiting key evangelical churches" and "church coordinators" to conduct a wide variety of voter registration and mobilization activities. A response from AU Executive Director Rev. Barry Lynn said Focus on Family leader James Dobson has "made it abundantly clear that electing Republicans is an integral part of his agenda, and he doesn't mind risking the tax exemption of churches in the process. Dobson wants to be a major political boss, and this is his way to get there."

With Hearing Possible on Extremist Nominee for Regulatory Czar, Opponents Gear Up for Fight

While a vote on Susan Dudley's nomination to be the new White House regulatory czar has yet to be scheduled, it is rumored that the GOP majority on the Homeland Security and Government Affairs Committee will try to push a vote through in September.

If confirmed, Dudley would oversee and have the ability to curtail the important health, safety and environmental regulations she has spent much of her career opposing.

Susan Dudley's nomination to head the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget will likely face strong opposition from public interest, labor and environmental groups. Dudley has challenged regulation of industry in a number of areas and has publicly presented extremist positions on issues that will come before her as head of OIRA. Environmentalists have already begun to paint a picture of her as a danger to environmental and health concerns.

In response to the controversial nomination, OMB Watch has launched an online information and action center, Dudley Watch, to track the latest developments and provide analysis of Dudley's regulatory record. Visitors can find links to Dudley's scholarly work, analysis of Dudley's opinions on important regulatory developments and background on the Mercatus Center, the industry-funded think tank where Dudley served was head of regulatory policy from 2003 until her nomination this year.

Susan Dudley was nominated by the president in July to head OIRA, an office in the White House with broad power over federal regulatory policy, yet Dudley spent her time at the

Mercatus Center opposing health, safety and environmental regulations. She has opposed lowering the threshold for arsenic in drinking water and closing loopholes in the Davis Bacon Act, which requires employers to pay locally prevailing wages and benefits on public works projects. Dudley has utilized cost-benefit analysis as a weapon to undermine or kill regulations that industry opposes. She even claims that cost-benefit studies demonstrate that OSHA regulations--many of which are widely recognized as protecting the lives and safety of countless - have not had a "substantial impact."

Dudley applies the same logic to the public's right to know about toxic chemicals. According to her public interest comments, while it may be an "intuitively desirable social goal" to provide information to the public, it costs money and may even "confuse, rather than inform" the public. The costs must be outweighed by the social goal, explains Dudley, and even when this is the case it does not suggest that more information available to the public is in order.

Were Dudley to be confirmed as the next regulatory czar, she would likely review an EPA proposal that would undermine the Toxics Release Inventory, the premier right-to-know program about chemical information.

Dudley's championing of industry at times comes across as frighteningly naive. Arguing against regulation requiring air bags in vehicles, which have clearly been shown to save the lives of drivers and passages, she writes that, "if air bags save lives and consumers demand them," then the auto industry would have installed them without federal regulations.

In addition to her pro-industry work at the Mercatus Center, Dudley also once worked for OIRA, reviewing environmental regulations, and was widely criticized by environmental groups for her decisions there.

Dudley Materials Reappear on Mercatus Website

Earlier this month, OMB Watch reported that articles authored by the nominee to replace John Graham as the head of the Office of Information and Regulatory Affairs (OIRA), Susan Dudley, were no longer available on the website of the Mercatus Center, the industry-backed think tank where Dudley was previously employed. Now, all the missing articles have mysteriously returned to the website and several previously unavailable articles by Dudley have also been posted there.

Aware that Dudley was the likely to receive the OIRA nomination, OMB Watch began researching Dudley's record as head of regulatory policy for the Mercatus Center months before the nomination was announced. In the weeks before Dudley's nomination was announced, Mercatus overhauled its website, and many of the most controversial of Dudley's articles were no longer listed in her bibliography.

On Aug. 8, OMB Watch listed the missing documents in the *The Watcher*, which included comments by Dudley opposing Davis-Bacon and an op-ed claiming that releasing information under the Toxic Release Inventory (TRI) would help terrorists. By Thursday, Aug. 10, the articles were back on Mercatus's website, including some articles never before listed. Recently added articles include an op-ed for the *National Review*, cautioning against increasing regulation after September 11th, and articles criticizing air quality standards for ground-level ozone.

Recently Added Dudley Scholarship | Previously Missing Dudley Scholarship

Recently added Dudley scholarship

(July 1, 2006)

Defining What to Regulate: Silica & the Problem of Regulatory Categorization (June 1, 2006)

Moderating Regulatory Growth: An Analysis of the U.S. Budget for Fiscal years 2006 and 2007 (May 11, 2006)

Mercatus Reports: The Bush Administration Regulatory Record | Wine Wars: Uncorking E-Commerce? (January 1, 2005)

It is Time to Reevaluate the Toxic Release Inventory (January 1, 2005)

Susan Dudley Participates in White House's Conference on the Economy (December 15, 2004)

Mercatus Reports: Mercury | VOIP | Regulatory Budget | Commentary: Modernizing National Equity Markets (September 1, 2004)

Mercatus Reports: Financial Privacy Notices | FTC E-Commerce Studies | A Regulated Day in the Life (July 1, 2004)

Finding Nemo's Worth (August 1, 2003)

Written Testimony on the "TRI Lead Rule: Costs, Compliance, and Science" submitted to the House Subcommittee on Regulatory Reform and Oversight (June 13, 2002)

"I Love Government" - Regulation, Post 9/11 (March 26, 2002)

Mercatus Reports: Ozone Quality Standards | Tanker Vessel Monitoring Devices | Non-Road Vehicle Emissions | Trans-Fatty Acids Labeling | Automated External Defibrillators | Bush's Rejuvenated OIRA (December 1, 2001)

President Expands Oversight of Federal Agency Rulemaking (November 16, 2001)

Mercatus Reports: Arsenic in Drinking Water Systems | Appliance Standards for Air Conditioners and Heat Pumps | Heavy-Duty Truck Emissions | Toxic Release Inventory, Lead and Lead Compounds | Roadless Areas | Clothes Washer Efficiency | Medical Privacy |

Reversing Midnight Regulations (March 1, 2001)

Consumers Reject US Spin Cycle On Washing Machines (January 4, 2001)

WILLY-NILLY REGULATIONS: Climate of haste hurts consumers (January 2, 2001)

OSHA's Ergonomics Program Standard and Musculoskeletal Disorders: An Introduction (January 1, 2001)

The Benefits and Costs of OSHA's Proposed Ergonomics Program Standard (January 1, 2001)

Fuel and Your Money (September 1, 2000)

EPA's Proposed Expansion of Noncompliance Benefit Estimates (January 1, 2000)

EPA Speeds Ahead with Ill-Conceived Vehicle and Gasoline Standards (December 20, 1999)

Proposed Workplace Rules Could Put US Firms In A Cast (November 29, 1999)

Overstressing Business: OSHA and Ergonomics (October 1, 1999)

The EPA Relies on Faulty Market Incentives (September 1, 1998)

EPA's National Ambient Air Quality Standard for Ozone May be Hazardous to Your Health (March 1, 1998)

Economic Impact Analyses (January 1, 1998)

The Human Costs of EPA Standards (June 9, 1997)

Testimony on the Risk Assessment underlying EPA's Proposed Ambient Air Quality Standard for Ozone before the Senate Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety (April 24, 1997)

Previously missing Dudley scholarship

Mercatus Reports: Urban Empowerment Zones | GSE Reform | Regulators' Growing Budget (September 1, 2005)

It's Not Just the Spending (August 29, 2005)

Mercatus Reports: Green Sturgeon | Intercarrier Compensation | Canadian "Smart Regulation" (July 1, 2005)

Mercatus Reports: Regulation Z | Cooling Water Intake | ESA Permit Revocation | Commentary: What's Next for Telecom? (April 15, 2005)

Book Review: States of Fear (April 15, 2005)

Regulator's Budget Continues To Rise: An Analysis of the U.S. Budget For Fiscal years 2004-2005 (July 16, 2004)

Testimony on Small Business Competitiveness before the House Subcommittee on Regulatory Reform and Oversight (May 20, 2004)

Testimony on Regulatory Accounting before the House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs (February 25, 2004)

The Hidden Tax of Regulation (January 5, 2004)

The Price is Right (November 24, 2003)

Figures Full of Air (October 18, 2003)

Regulatory Spending Soars: An Analysis of the U.S. Budget for Fiscal years 2003 and 2004 (July 22, 2003)

EPA Dodges a Rule (June 15, 2003)

Mercatus Reports: Information Disseminated by Federal Agencies | Water Quality Trading Policy | Costs and Benefits of Federal Regulations | Fannie Mac and Freddie Mac Governance | FDA First Amendment Issues | Pollution from Non-Road Diesel Engines | The Coming Shift in Regulation (October 1, 2002)

Testimony on Regulatory Accounting before the House Subommittee on Energy Policy, Natural Resources, and Regulatory Affairs (March 12, 2002)

Terrorist Right-to-Know? (November 1, 2001)

Office of Management and Budget's 2001 Draft Report to Congress on the Costs and Benefits of Federal Regulations (August 14, 2001)

Let OSHA take lead in ergonomics reform: Flexible policy can protect workers, but legislative bickering threatens progress (July 21, 2001)

How Not to Improve Public Health (January 11, 2001)

Testimony on the Effect of the Army Corps of Engineers' Approach to Wetlands Protection on Overall Social Welfare (October 6, 2000)

Something Wicked This Way Comes (July 27, 2000)

DOL's Proposal Governing Helpers on Davis-Bacon Act Projects (June 8, 1999)

Strange Happenings at the IRS Could Affect Enforcement

This fall, the Internal Revenue Service will likely make two changes to its tax enforcement efforts that defy logical explanation. IRS Commissioner Mark Everson will soon go forward with plans to cut nearly half its staff of estate tax auditors and to create a program that would allow private companies to pursue taxpayers who owe back taxes.

"Slashing the number of estate tax auditors and outsourcing collection of outstanding taxes," explains Adam Hughes, OMB Watch budget policy director, "would move the IRS in the opposition direction they should be moving toward a more robust and resourced agency that can provide both customer service to taxpayers and strong enforcement of tax law."

Estate Tax Auditor Layoffs

The IRS is planning to offer voluntary retirement to 157 of its 345 estate tax attorneys. Everson claims that since higher exemption levels in the estate tax will produce fewer filings, fewer auditors are necessary, and the savings generated by the lay-offs could be reallocated to more productive departments. The cuts are in spite of the fact that the IRS itself has said estate tax lawyers are the most productive of its employees, bringing over $2,200 in revenue for every hour worked. What's more, six years ago the IRS found that 85 percent of estate tax returns shortchanged the government.

Everson's claims did little to assuage congressional Democrats, who sent multiple letters to the IRS chief protesting the proposal. A letter from Sen. Chris Dodd (D-CT) asked Everson for a detailed justification of the job cuts, as well as a quantitative description of the impact the proposed cuts will have on enforcement, both before and after 2010. A separate letter from members of the House of Representatives asked that Everson delay the proposed layoffs until Congress has had the opportunity to review them.

Even if the IRS agrees to delay the decision, which is unlikely, Congress may not have enough time this year to thoroughly evaluate Everson's plan. The early retirement proposals will be offered in October, and Congress will be in session a very short time and will have a mountain of work to do prior to the November election.

Privatizing Tax Collection

In addition to weakening the review of estate tax returns, the IRS is set to go forward with plans to privatize some aspects of collection of back taxes. The IRS will let three private agencies collect back taxes from about 12,500 taxpayers who owe less than $25,000 each. The program is projected to raise $1.4 billion over the next 10 years, with $330 million of that going to collection agencies — a whopping *23.5 percent* administrative fee.

For less than that fee, the IRS could hire staff who would bring in about eight times as much revenue as the private collection agencies are projected to, according to former IRS commissioner Charles Rossotti. In testimony before the House of Representatives, Everson freely admitted that hiring more staff is far more efficient than privatization. But inadequate appropriations for the IRS, he claims, have made it impossible to hire new staff.

The privatization program also raises concerns about abuse and fraud. Private companies may be subject to less federal regulation and will seek to maximize profits rather than deliver quality customer service, increasing the chance that they may extort taxpayers or misuse funds. It's also

possible fraudulent schemes involving people posing as collection agencies will emerge threatening to cheat and steal from taxpayers. The IRS has taken some precautionary measures to prevent unauthorized people from posing as private collection agencies, but whether those measures are sufficient remains to be seen.

Efforts are already underway to end the privatization program. Rep. Steve Rothman (D-NJ) successfully lead the charge against this policy in the House, attaching an amendment to block the IRS from spending money implementing the outsourcing program to the FY 2007 Treasury-Transportation appropriations bill. While the Senate has not passed its version of the appropriations bill, if the Rothman amendment makes it into the final version, the IRS will find it very difficult, if not impossible, to run the program.

Regardless of whether the private collection program is put in place, the total revenues expected will make only a small dent in the "tax gap," the difference between what is owed in taxes and what is paid. The "tax gap" is currently estimated at $345 billion annually, which is $90 billion more than this year's current deficit projection.

While outsourcing tax collection to private companies is inefficient, the IRS has certainly not helped, and likely exacerbated, the tax gap in recent years by decreasing its audit rates . The "face-to-face" IRS audit rate has declined 80 percent over the past 20 years - from 1.19 percent in 1984 to 0.15 percent in 2004 - and IRS examinations of business income-tax returns have dropped 66 percent since 1997.

Despite Short-Term Gains, CBO Forecasts Grim Long-Term Fiscal Outlook

On Aug. 17, The Congressional Budget Office (CBO) released the annual summer update to its Budget and Economic Outlook report. In it, CBO lowers its estimate of the Fiscal Year 2006 budget deficit by 30 percent from its March analysis and now projects the year-end deficit at $260 billion. The rosy news, however, did little to assuage analysts' concerns over fiscal challenges looming on the horizon.

CBO's Deficit Projections *(in billions)*	
March 2006 Estimate	$372
August 2006 Adjustments	
Higher Than Expected Revenues	($99)
Lower Than Expected Spending	($13)
New Adjusted Deficit Projection	$260

CBO's lowered deficit projection is not a result of changes in policy or legislation controlled by Congress but instead reflects a re-calculation of deficits under improved economic conditions. As a result, CBO still warns the long-term outlook for the federal government, unchanged from earlier this year, is still disturbingly bleak and will require changes in current and expected future policy in order to improve.

The projected deficit of $260 billion would be $58 billion lower than the deficit the government had in FY2005 ($318 billion) and is approximately $30 billion lower than last month's Office of Management and Budget (OMB) figures.

The CBO update cites unexpected gains in tax receipts from individual and corporate income taxes as the main reason the projections improved. Most of these new revenues come from corporate and capital gains taxes, which are generally income sources for the well-off. The CBO analysis shows non-withheld individual income tax revenues are projected to rise 20 percent and corporate income tax receipts by 22 percent in 2006. Tax receipts from the middle and working class, though, will rise far less - just 7 percent — in 2006. These latest data projections continue to underscore the widening income and wealth gap in America.

Overall government spending was $13 billion lower than CBO projected earlier this year.

Also helping the short-term improvement was lower than anticipated spending on Medicare and Medicaid.

The estimates of spending on the nation's health care programs and future defense spending projections are the two main reasons for the discrepancy in deficits for FY 2006 between the CBO report and the OMB estimates from July. CBO projects about $10 billion less in Medicare and Medicaid spending, and $10 billion less in defense spending this fiscal year.

Despite the lower deficits expected at year's end, a dark long-term outlook continues to loom, with extending President Bush's tax cuts beyond 2010 and accounting for war and other hidden costs costing an additional $1.75 trillion in debt over the next 10 years and causing an expansion of annual deficits by about $250 billion from 2011 through 2016.

In addition, the CBO baseline projections do not include widely anticipated changes to the Alternative Minimum Tax (AMT), expected to cost the government an additional $1 trillion over the next 10 years. The AMT was originally intended to prevent rich individuals from using excessive deductions to avoid paying income taxes, but increasingly is pinching upper-middle class families because the tax was not indexed for inflation.

The CBO report underscored the enormous price associated with carrying such huge deficits year after year in its section describing interest on the national debt. Interest payments on the debt jumped by 19.7 percent, to $220 billion, in 2006, making it the fastest growing section of federal government spending. That total is more than what is being spent on the entire Medicaid program ($181 billion) or on the "combined total for all federal income-support programs: unemployment compensation, food stamps, child nutrition programs and the earned-income tax credit," according to analysis by *The New York Times*. The interest on the debt will accelerate over the next decade, rising to $333 billion in 2016, according to CBO projections, thereby putting increased pressure on the discretionary budget and likely crowding out key budget items.

Table 1-4.

CBO's Baseline Projections of Mandatory Spending

(Outlays, in billions of dollars)

	Actual 2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Tot 200 20
Social Security	519	549	582	612	643	679	716	759	806	856	911	970	3,:
Medicare[a]	333	372	446	475	512	549	605	613	682	742	808	909	2,!
Medicaid	182	181	195	213	232	249	269	290	312	337	363	392	1,:
Income Support													
Supplemental Security Income	38	37	36	41	43	44	50	44	49	51	53	59	:
Earned income and child tax credits	49	52	53	54	55	54	54	37	37	37	38	38	:
Unemployment compensation	33	31	32	35	39	42	44	46	48	50	52	55	:
Food Stamps	33	35	35	35	36	37	37	38	39	40	41	42	:
Family support[b]	24	24	24	24	24	24	24	24	24	24	25	25	:
Child nutrition	13	14	14	15	16	16	17	18	18	19	20	21	
Foster care	6	7	7	7	7	8	8	8	8	9	9	9	
Subtotal	196	200	202	212	219	225	234	215	225	231	237	248	1,!

Excerpt from Table 1-4 of CBO's Budget and Economic Outlook: An Update. Pg. 12.

Acting CBO Director Donald B. Marron, who is serving out the unfinished term of former CBO chief Douglas Holtz-Eakin, focused on the more positive short-term news following the report's release, noting that the 2006 deficit would come in at around 2 percent of the American economy, comparing favorably with deficits over the last 40 years that have averaged about 2.3 percent:

> "[T]he message I would send is that we've gone from a period in which the fiscal deficits we were running in this country were large and not sustainable if they had persisted, to a situation in which, at least now and for next year, for several years going forward, deficits appear to be in a range that they're sustainable."

Marron's comments did not sit well with the ranking members of the House and Senate Budget Committee: Rep. Spratt (R-SC) and Sen. Kent Conrad (D-ND). Conrad and Spratt fired back immediately, saying the comments were "completely and totally irresponsible," and could disqualify him from being considered for the job.

While Marron is technically correct in his statements, he glosses over long-term projections in which deficits rise above the 2 percent of GDP level again and rapidly-rising interest on the debt crowds out other important spending priorities.

New Official Secrets Law?: Case Threatens Open Government and Freedom of Press

On Aug. 9, a federal district court ruled that use of the Espionage Act to prosecute private citizens for receiving and transmitting national security information is constitutional. The

decision to extend the Espionage Act to non-governmental employees has sweeping implications for open government and freedom of speech and the press, and raises the prospect of the U.S. adopting an Official Secrets Act similar to that of the UK.

The case involves Steven Rosen and Keith Weissman of the American Israel Public Affairs Committee (AIPAC) who received classified information from Lawrence Franklin, a Department of Defense (DOD) employee. According to the indictment, Rosen and Weissman received what they knew was classified information and relayed that information to a *Washington Post* employee, a foreign policy analyst at a think tank, and an official of the Israeli government.

Franklin received a 10-year sentence for violating the Espionage Act and "willfully" communicating national defense information "to any person not entitled to receive it." Federal prosecutors recently indicted Rosen and Weissman for receiving and transmitting national defense information which they were not authorized to receive. This is the first time the Espionage Act has been used to prosecute non-government employees, who did not intent to harming the government, and could open the door to the prosecution of journalists and others who at times may receive and transmit sensitive information.

Rosen and Weissman sought a dismissal, arguing that the case violated the Fifth Amendment's due process clause and the First Amendment's protection of free speech. Judge T.S. Ellis dismissed the request and allowed the case the go forward. Ellis rejected the defense's claim that the Espionage Act violated the due process requirement because it is unconstitutionally vague, and, in his ruling, specified requirements that must be met for a non-government employee to be guilty of disclosing sensitive national security information.

First, the prosecutor has to show that the information is related to national defense by proving that:

1. "the information relates to the national defense, intelligence gathering or foreign policy;"
2. "the information is closely held by the government, in that it does not exist in the public domain"; and
3. "the information is such that its disclosure could cause injury to the nation's security."

Second, the prosecutor has to show that the information was transmitted to someone not entitled to receive it by proving that:

1. "a validly promulgated executive branch regulation or order restricted the disclosure of information to a certain set of identifiable people,"; and
2. "the defendant delivered the information to a person outside this set."

Third, the government has prove that "the person alleged to have violated these provisions knew the nature of the information, knew that the person with whom they were communicating was not entitled to the information, and knew that such communication was illegal."

Lastly, the government must prove that "the defendant had reason to believe that the disclosure of the information could harm the United States or aid a foreign nation."

In response to the claim that the Espionage Act violates freedom of speech, Ellis commented that the case, "exposes the tension between government transparency so essential to a

democratic society and the government's equally compelling need to protect from disclosure information that could be used by those who wish this nation harm."

The court found that the statute's narrowly crafted protection against the disclosure of national security information which can harm the United States, ". . . is [a] reasonable, and therefore constitutional exercise of its power."

The ruling has potentially severe implications for the freedom of the press and national security whistleblowers. As noted by Stephen Aftergood of the Federation of American Scientists, the reporting of the Abu Ghraib prisons would likely be found to fit the above requirements. The Abu Ghraib reports were based on classified national security information and the short-term consequences of the transmittal of such information to those not authorized to receive it harmed the interests of the United States. "And yet the disclosure also served an important national purpose in prompting a public debate over U.S. policy on prisoner detention and interrogation," states Aftergood.

The Espionage Act has roundly been criticized as poorly drafted, and Ellis, near the end of his opinion, makes the rare remark "that the time is ripe for Congress to engage in a thorough review and revision of [the Espionage Act] to ensure that [it] reflect[s] . . . contemporary views about the appropriate balance between our nation's security and our citizens' ability to engage in public debate about the United States' conduct in the society of nations."

In the meantime, the Justice Department may exploit the current imbalance to prosecute journalists who disclose national security programs, like the National Security Agency's domestic spying efforts and interrogation tactics of the U.S. military and Central Intelligence Agency. The threat of prosecution may chill the exercise of free speech and thereby harm the national dialogue on vital national security issues.

In the recent past, covert efforts have been undertaken to impose an Official Secrets Act to protect national security information. For example, in 2000, Congress quietly attached such a provision to an intelligence authorization bill that was never the subject of public hearings. President Bill Clinton felt the provision was too extreme and vetoed the bill in order to kill the secrecy provision. Congress is now considering legislation to achieve the same objective.

As Justice Potter Stewart noted in the Pentagon papers case (and Judge Ellis quoted), "In the absence of the government checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government."

Open Government Rising Issue for 2006 Elections

With November--and its many state, local and midterm Congressional elections--just around the corner, candidates are promising citizens a more open government in exchange for their vote. Access advocates believe that recently revelations about government secrecy (such the National Security Administration's covert warrantless spying program) and Washington corruption scandals have boosted public support for more democratic and less secretive

government at the national, state and local levels, and campaigns are picking up on it.

At the federal level, the Democratic National Party (DNC) included open government among its recently released principles, Democratic Vision. First among six broad platforms in the DNC vision statement was "honest leadership and open government." By raising the prominence of the issue, the DNC appears to be counting on open government to appeal to voters across the country and help candidates win elections. This hard stance allows the Democrats to build off of several recent political scandals involving Republicans, including Jack Abramoff's funneling of dirty money to countless campaign coffers, the conviction of Rep. Randall "Duke" Cunningham (R-CA), and accusations that Rep. Tom DeLay (R-TX) took advantage of inadequate fundraising laws.

Open government has also risen to a platform issue for candidates running for state offices. Typical of this trend, South Dakota House candidate Pam Hemmingsen (D-Dist. 32) spent several days earlier this month knocking on doors in her district promising citizens more access to government information. Hemmingsen told the *Rapid City Journal*, "What I want to do is just connect with voters of all parties on the common-ground issues of education, healthcare and open government."

The *Rapid City Journal* recently editorialized that "[t]oo often in South Dakota, politicians and government employees close the door to public access to information and participation in meetings. The state Legislature continues to operate as if public scrutiny spells death for democracy instead of the opposite." In apparent response to such concerns, Hemmingsen has promised if elected to introduce legislation that "opens governmental meetings and records to the public." Improved access to government information even finds fervent support from candidates running for local offices. Berkeley, California, mayoral candidate *Zelda Bronstein*, one of three challengers of current mayor, Tom Bates, is stressing her concerns about public information access. In campaign material, Bronstein criticizes the Bates administration for making too many important decisions in secret, including those involving lawsuits and major transportation and development projects. Bronstein's campaign promises include an open government agenda to "[p]ass a Strong Sunshine Ordinance that gives citizens legal access to information about local government and how decisions are made in City Hall, and the right to sue the city if they think the law has been violated by city officials."

These are just a handful of the thousands of campaigns that are gearing up for election season this fall. How important an issue government openness will be in November's elections remains to be seen. But, with high profile cases of government secrecy and official corruption continuing to make headlines, it is likely that more and more campaigns will take on open government as a campaign platform.

Federal Court Finds NSA Eavesdropping Program Unconstitutional

In a ruling last week, the U.S. Court for the Eastern District of Michigan found the National Security Agency's (NSA) warrantless domestic spying program to be in violation of the First and Fourth Amendments and the separation of powers. The decision came on a case filed by the American Civil Liberties Union (ACLU) challenging the legality of the NSA program by arguing

that the rights of several journalists and academics had been violated.

Judge Anna Diggs Taylor ruled that the NSA program violates the First Amendment, because of its restricting effect on communications between U.S. citizens and people in Middle Eastern countries. Many of the communications of those represented by the ACLU were with individuals from the Middle East, and they have reason to believe that they were subject to the NSA program. The represented journalists and academics reported the inability to continue these communications due to the chilling effect of the program.

Taylor also found the program to be in violation of the Fourth Amendment, because Internet and telephone communications were seized without a warrant or court approval, violating the protection against unreasonable searches and seizures. Finally, Taylor found that the program exceeds the powers of Article II of the Constitution, which spells out presidential powers, and violates the separation of powers between the executive and legislative branches.

Much of the ruling focuses on dismissing the Department of Justice's (DOJ) claims of state secrets privilege and lack of standing. DOJ argued that the state secrets privilege applied because information necessary for debating the program's legality cannot be disclosed, lest the nation's security be at risk. The court accepted this state secrets argument in dismissing the plaintiff's challenge of the NSA's data-mining program, which reportedly collects thousands of domestic calling numbers but not the contents of calls. However, Taylor found the state secrets claim in respect to the Terrorist Surveillance program (TSP), which monitors the content of communications, to be "disingenuous and without merit."

The decision was a huge blow to the administration's argument that the president has inherent constitutional authority to conduct a domestic surveillance program in the name of fighting terrorism. The opinion directly contradicts such claims by arguing that, "There are no hereditary Kings in America and no powers not created by the Constitution. So all 'inherent powers' must derive from the Constitution."

Taylor's opinion quickly received strong criticism by not only the President and the Republican National Committee but also from many legal scholars and newspapers. President Bush predicted that an appeals court would overturn the decision, stating that "[t]hose who herald this decision simply do not understand the nature of the world in which we live."

Many legal scholars agreed with the court's eventual findings on the illegality of the program, but disagreed with Taylor's reasoning. Yale Law School professor Jack Balkin stated, "Although the court reaches the right result--that the program is illegal, much of the opinion is disappointing." Balkin goes on to note that, "because the court's opinion, quite frankly, has so many holes in it, it is . . . clear to me that the plaintiffs will have to relitigate the entire matter before the circuit court, and possibly the Supreme Court."

The *Washington Post* stated that the NSA program "exists on ever-more uncertain legal grounds," but that "as a piece of judicial work--that is, a guide to what the law requires and how it either restrains or permits the NSA's program--her opinion will not be helpful."

The decision was immediately appealed by DOJ and that appeal will likely soon be heard by the Sixth Circuit. Meanwhile, over 30 cases challenging various aspects of NSA's TSP and data-mining program continue to make their way through the judicial system.