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In This Issue

Democrats, Obama Prepare Economic Stimulus Package for January

The passage of an unemployment insurance extension, which occurred at the end of November, is likely the last effort by the 110th Congress to enact legislation to stimulate the economy. With Republicans continuing to block immediate passage of a large economic stimulus package, Democrats are preparing to move legislation as soon as President-elect Barack Obama takes office in January 2009.

Although Senate Republicans and President Bush have vowed to continue to block enactment of broad economic stimulus spending, congressional Democrats mustered sufficient support to pass a seven-week extension to unemployment insurance benefits. The extension gives extra benefits to those who exhaust their 26 weeks of state benefits. In states with unemployment rates higher than six percent, the $6.1 billion bill will provide 13 additional weeks of jobless benefits. Approved by wide majorities in both chambers and promptly signed by President Bush, the bill is the current limit of bipartisan support for economic stimulus policy.

When the House passed a $61 billion economic stimulus package (H.R. 7110) in September, House Minority John Boehner (R-OH) called the measure a "monstrosity," and President Bush issued a veto threat, stating that the bill would "simply increase government spending including self-perpetuating entitlement spending by tens of billions of dollars," ultimately leading to "record tax increases or higher deficits [that] will not advance our economic recovery." On the other side of the Capitol, Senate Republicans blocked (52-42) that chamber's companion legislation (S. 3604), while Ranking Member of the Senate Appropriations Committee Thad Cochran (R-MS) chided Democrats for bringing up a bill that was "designed to fail." Because of these setbacks, congressional Democrats are focusing their efforts on the start of the 111th Congress, when the ability of a shrinking minority of Republicans to block stimulus spending will be considerably weakened.

As the clock winds down on the current Congress and the Bush administration, Democratic congressional leaders and President-elect Obama have signaled that a stimulus measure in the range of hundreds of billions of dollars will be at the top of the legislative agenda in January 2009. Citing a yet-to-be-defined plan to create 2.5 million jobs by 2011 and a stimulus package that would be "significant enough that it really gives a jolt to the economy," Obama has made clear his intention to push for far-reaching and costly stimulus legislation. Although he has resisted attaching a specific dollar amount to his plan, his economic advisors and outside economists have indicated that a two-year spending package totaling $500-700 billion will be necessary to provide the economic jump-start that Obama seeks.

Even some foes of using direct government spending to stimulate the economy are giving their tacit approval. Harvard economics professor Martin Feldstein, a former economic adviser to President Reagan and presidential candidate Sen. John McCain (R-AZ), has said, "I hate to say it, because I'm a guy who doesn't like government spending and doesn't like fiscal deficits, but I don't see any alternative."

While Democratic congressional leaders and Obama have continued to be vague about the specific size and composition of a potential stimulus bill, a proposal will most likely be composed of Food Stamps, Medicaid funding boosts, and infrastructure spending that Obama has called the "long-term investments in our economic future that have been ignored for far too long." These spending priorities have become increasingly pressing as the national economic downturn is straining state and family budgets.

Twenty-seven states are currently facing $26 billion in combined budget shortfalls that will only continue to increase as property tax revenues collapse and as the newly unemployed begin applying for assistance programs like Medicaid. The Kaiser Family Foundation notes that a one percent increase in the unemployment rate increases enrollment in Medicaid and the State Children's Health Insurance Program (SCHIP) by one million. Proposals to boost federal matching funds for Medicaid would reduce pressure on state governments to cut spending on other support programs, raise state college tuition, or increase taxes on working families. In addition, an injection of federal funds into state and local infrastructure projects will allow states to continue funding vital public services by freeing resources and mitigating job losses

that ultimately reduce state revenues.

Critics of infrastructure-spending-as-stimulus, however, say that while such projects may have their own merits, as economic stimulus, they would provide little short-term relief. However, according to the American Association of State Highway and Transportation Officials, there are $32 billion in infrastructure projects that are "ready to go," with more on the way. "Short term" is also relative. Nobel laureate and Princeton University economics professor Paul Krugman predicts that the current economic slump will last a number of months — long enough that spending on infrastructure would prove to be effective economic stimulus.

House members and senators have been instructed to begin crafting legislation in January 2009, an oddity immediately following presidential election years, which usually see Congress returning to work after the inauguration in late January. The move will allow President-elect Obama to sign a stimulus package into law in the first hours of his presidency. If the size and scope of the legislation match the seriousness and urgency with which Obama is approaching the economy, Congress could be poised to pass a spending bill of unprecedented proportion, greatly mitigating the hardships of millions of families while jumpstarting an effort to rebuild the nation's crumbling infrastructure.

TARP Oversight Helped, Hindered by Senate

A pair of bills designed to improve oversight of the Troubled Asset Relief Program (TARP) has been introduced in the Senate. The first would place restrictions on the use of federal funds and provide greater transparency, and the second would strengthen the role of the Special Inspector General for TARP (SIGTARP). TARP was created by the $700 billion financial bailout bill that Congress passed before the election.

Chances for and timing of passage of the bills remain unclear. However, as several senators are working to improve oversight of TARP, at least one other member of the Senate would prefer that SIGTARP remain a vacant post.

On Nov. 20, Sens. Diane Feinstein (D-CA) and Olympia Snowe (R-ME) introduced The Accountability for Economic Assistance Act (S. 3698). The bill contains four provisions that would place restrictions and reporting requirements on the use of TARP funds. It would prohibit those funds from being used for lobbying; require that firms provide to Treasury detailed, publicly available quarterly reports on the use of those funds; require companies to use corporate governance standards to ensure that TARP funds are not wasted; and provide penalties for firms not complying with those governance standards. The specification of penalties is a big step forward for accountability in TARP, as the original legislation was silent on if and how firms who abuse TARP should be punished.

Sens. Claire McCaskill (D-MO) and Chuck Grassley (R-IA) have also introduced legislation that would slightly improve TARP's thin oversight provisions. Their bill would allow the SIGTARP to quickly ramp up operations by bypassing the normal civil service process for six months.

The bill's other provision would extend SIGTARP's authority to "any and all action conducted as part of the Troubled Asset Relief Program."

In a related matter, a lone Republican senator has placed an anonymous hold on the SIGTARP nominee, which has stalled the Senate confirmation process. *TPMMuckraker* suspects that Sen. Jim Bunning (R-KY) placed the secret hold on the nomination of Neil Barofsky. Bunning has been opposed to the bailout program from the beginning, and during Barofsky's confirmation hearing, the senator expressed serious concerns about Barofsky's nomination.

While Bunning is within his rights to express objections to Barofsky's nomination, his confirmation is already tardy and the TARP program continues to operate without sufficient transparency or disclosure, both in regard to how the money is being spent and who is being given contracts to implement the program.

With almost $300 billion in TARP funds obligated, the SIGTARP already has a steep climb to bring more transparency and accountability to the TARP program. Without expressing his or her particular reservations about Barofsky, the secret holder is compounding the problems created by Barofsky's late nomination and delayed confirmation.

Plastics Chemical Could Remain on Market Despite Ban

Despite a clear directive from Congress, the Consumer Product Safety Commission (CPSC) says it may continue to allow the sale of children's products containing a controversial plastics chemical.

Effective Feb. 10, 2009, the Consumer Product Safety Improvement Act of 2008 bans the sale of children's products containing phthalates, a class of chemicals used to make plastics soft and pliable. Congress passed the bill in July, and President Bush signed it into law on Aug. 14.

Congress banned the substance in response to growing public concern over the health effects of exposure to phthalates. Scientists have linked phthalates to reproductive and developmental abnormalities in fetuses and infants.

However, a legal opinion from CPSC raises new questions on how the agency will implement the ban. CPSC General Counsel Cheryl A. Falvey says that although children's products containing phthalates cannot be manufactured after Feb. 10, 2009, those manufactured before Feb. 10 can continue to be sold indefinitely.

Sen. Barbara Boxer (D-CA), a lead proponent of the phthalate ban, criticized Falvey's legal interpretation in a Nov. 21 letter. Boxer said the law's intent is to ban the sale of children's products containing phthalates regardless of their manufacture date. She called the opinion "a pathetic and transparent attempt to avoid enforcing this law."

Boxer cited the operative provision in the law, which reads, "Beginning on the date that is 180 days after the date of enactment of this Act, it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy or child care article that contains" any of the phthalates identified in the law.

In her legal opinion, Falvey cited a different law, the Consumer Product Safety Act, which sets the framework for consumer product regulation and governs CPSC's regulatory process. "The Consumer Product Safety Act expressly states that consumer product safety standards apply only to product manufactured after the effective date of a new standard," Falvey writes.

Language in the Consumer Product Safety Act should supersede language in the phthalate ban, according to Falvey. The provision in the Consumer Product Safety Improvement Act of 2008 regarding phthalates says new rules "shall be considered consumer product safety standards under the Consumer Product Safety Act." However, that clause appears in a section of the act concerning "effect on state laws" and is aimed at preventing CPSC from using the phthalate ban to preempt stricter laws and regulations at the state level.

In her letter, Boxer called on Falvey to immediately withdraw her opinion. The views expressed in Falvey's opinion "have not been reviewed or approved" by the CPSC.

If CPSC backs away from Falvey's opinion and enforces the letter of the law, the economic impact will be significant. Making it illegal to "manufacture for sale, offer for sale, distribute in commerce, or import" children's products containing phthalates beginning in February 2009 will likely leave companies at each link in the supply chain with excess inventory.

Industry lobbying groups, such as the U.S. Chamber of Commerce, opposed a ban on phthalates when Congress was debating the Consumer Product Safety Improvement Act. Consumer safety advocates, long concerned with the health effects of phthalates, pushed for the ban.

The European Union and the state of California have already enacted restrictions on phthalates in consumer products. Other states are also considering restrictions.

The federal ban on phthalates was one of the final sticking points for Congress during the debate on the Consumer Product Safety Improvement Act. The provision bans three types of phthalates outright. Three other phthalates will be banned temporarily pending further study.

The new policy on phthalates represents a dramatic shift in the federal government's approach toward regulating toxic substances. Usually, chemicals enter and stay on the market without regulation and are only pulled if scientists prove a definitive health risk. In this case, the banned substances will only be allowed back on the market if their safety is proven.

In an August statement, OMB Watch Executive Director Gary D. Bass said, "The bill turns our usual system of chemical regulation on its head by requiring proof of safety, not proof of harm,

an approach we strongly support."

Gas Drilling Threatens Public with Undisclosed Chemicals

The natural gas drilling industry refuses to disclose what potentially harmful chemicals are used in thousands of hydraulic fracturing gas wells across the country, despite evidence that the chemicals are poisoning drinking water supplies. As concerns mount, several states are considering action to curb use of the process despite the federal government's efforts to encourage it with large subsidies and environmental exemptions.

During hydraulic fracturing, also known as "fracking," large amounts of sand and water are pumped at high pressure into a well. This causes small cracks and fissures to open deep in the layers of rock, releasing previously trapped molecules of natural gas. The mixture pumped deep into the ground usually contains a small proportion of chemicals included to reduce friction, prevent clogging of the fractures, and to prevent corrosion of machinery. These chemicals may end up in underground drinking water supplies, be spilled into surface waters, or evaporate as air pollution.

A recent investigation of hydraulic fracturing by ProPublica revealed documented cases of water contamination and other hazardous events resulting from the drilling process in several states. Drilling companies have consistently maintained that the procedure is safe, referring to a 2004 U.S. Environmental Protection Agency (EPA) study that found no risks to drinking water. However, ProPublica discovered several problems with EPA's conclusions, including statements within the report that fluids migrated unpredictably and to greater distances than previously thought, which were left out of the conclusions. Additionally, ProPublica noted that agency documents appear to indicate that EPA negotiated directly with the gas industry before finalizing its report conclusions.

Among the reports of damage to environmental and public health resulting from hydraulic fracturing are more than 1,000 cases of documented water contamination in Colorado, New Mexico, Alabama, Ohio, and Pennsylvania. In addition to contamination from the below-ground drilling, leaks and spills from trucks and waste pits are also causing problems. Tracking the contamination is especially difficult because drillers refuse to disclose the chemicals being used. Despite the secrecy, some information on the chemical mixture has been pieced together. Among the identified chemicals are volatile organic compounds (VOCs) such as benzene, toluene, ethyl benzene, and xylene.

According to a chemical analysis by the Environmental Working Group and The Endocrine Disruption Exchange (TEDX), a Colorado research organization, of the more than 300 suspected hydraulic fracturing chemicals used in Colorado, at least 65 are federally listed hazardous substances, and little is known about the rest. Despite the risks associated with the 65 hazardous chemicals, the drilling operations are exempt from environmental reporting requirements and use of the chemicals is not controlled. The drilling industries are exempt from numerous environmental regulations — and the accompanying reporting requirements

and public scrutiny — authorized by such laws as the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), and the Safe Drinking Water Act (SDWA). Reps. Diana DeGette (D-CO), John Salazar (D-CO), and Maurice Hinchey (D-NY) introduced legislation, H.R. 7231, on Sept. 29 to remove the SDWA exemption originally created by the 2005 Energy Policy Act. The legislation is expected to be reintroduced in 2009.

The health risks from fracking chemicals was made clear in the summer of 2008 when a Colorado nurse almost died from exposure while treating a gas field worker whose clothing had been doused with the chemicals. Despite the nurse suffering from heart, lung, and liver failure, plus kidney damage and blurred vision, the drilling company refused to reveal to her doctors the "proprietary" chemicals used in hydraulic fracturing. While the nurse eventually recovered, she was never told to what she had been exposed.

For Colorado health officials, the chemical exemptions, regulatory loopholes, and missing data are a cause for concern. "We are just working in the dark," says Dr. Martha Rudolph, director of environmental programs for the Colorado Department of Public Health and Environment in a report for *Newsweek*. "We don't know the impact on the potential health on humans might be. We need to."

Claiming that the specific chemicals used in the drilling process are confidential business information and that disclosure would threaten their "competitive advantage" over competing firms, drilling companies have managed to operate wells nationwide without revealing what chemicals they are using. Halliburton, the oil and gas services firm and a pioneer of hydraulic fracturing, has threatened to pull its affected operations out of Colorado if it is forced by the state to disclose the chemicals it is using.

A major expansion of natural gas drilling is being planned for upstate New York within the region supplying New York City's water. However, New York City and state officials have asked the state Department of Environmental Conservation (DEC) to ban all gas drilling in the city's watershed, which overlaps the Marcellus Shale, a geologic region of high natural gas potential underneath New York, Pennsylvania, and West Virginia, until further studies on its impact can be done. The Marcellus Shale is estimated to contain enough natural gas to fuel the country's gas needs for fourteen years.

There has been a dramatic expansion of gas and oil drilling across the United States during the last eight years. The Bush administration has allowed more oil and gas drilling on western public lands than any administration in at least 25 years, and fracking is used in nine out of ten of these natural gas wells. Not only has the government allowed fracking to occur with lax oversight and regulatory exemptions, the government has also actively encouraged oil and gas companies with significant federal subsidies for exploration and drilling, including fracking. An analysis by Friends of the Earth released in July found that oil and gas companies would receive more than $32.9 billion in different subsidies over the next five years, including seven new provisions that were included in the Energy Policy Act of 2005 (PL 109-58). A report released by Taxpayers for Common Sense (TCS) on Nov. 14 details those seven new provisions,

calculating they will cost taxpayers $2.3 billion through 2015.

Five Change.gov Clues to Obama's Approach to Governing

As the Obama transition team gathers policy information and vets potential appointees, many outsiders are eager to know what the new administration will do and how it will govern. The transition website, change.gov, may hold clues to some of these questions.

It is important to note that the purpose of change.gov, as a transition website, differs greatly from administrative websites such as those of the White House or an executive agency. As such, it is difficult to directly connect aspects of the transition site to specific tasks or policies the incoming administration may pursue. However, there are aspects of the site that offer clues about Obama's likely approach to governing.

Transparent

Despite the incredibly daunting task of needing to prepare to take over management of the entire federal executive branch in just a couple of months, the transition team is demonstrating a strong commitment to transparency just in the efforts to launch and maintain a robust public website. Many of the traditional activities of a transition team are behind-the-scenes-type work — collecting input from experts, considering candidates for key government positions, and researching problems the country is facing. Despite the insider nature of this work, one of the transition team's first activities was the public website launch. With each passing day, change.gov contains more useful information and features for users.

The commitment of time and resources to transparency during this hectic planning phase bodes very well for the importance of transparency during Obama's time in office. Exact transparency policies are impossible to determine at this stage, but that the administration will attempt to be transparent seems a near certainty.

Interactive

There are many aspects of the transition website that would lead a visitor to conclude the Obama administration will be placing great emphasis on interactivity with the public. First, the site has numerous requests for input from the public, with standing requests for visitors to share their stories and their vision for an Obama administration. The transition blog then uses excerpts from public input on stories about community service and climate change. These efforts convey a new attitude that attempts to make government and politics more participatory.

The site also ties into outreach on other popular sites with an Obama transition channel on YouTube and a photo account on Flickr. Using these services indicates an aggressive effort by the transition team to engage the public by going to where the masses are, rather than requiring the public to come directly to change.gov. The YouTube video and Flickr photo

postings also create opportunities for dialog with the public through the comments and feedback interested people can leave.

Another example of the emphasis on interaction and participation is the discussion thread recently launched on change.gov to gather input from the public on health care priorities. The thread discussion was initiated by a short video of comments and specific questions from Dora Hughes and Lauren Aronson of the Health Policy Transition Group. The site allows users to log in, leave comments, and vote for or against comments left by others. More than 3,600 comments have already been made on the health care question.

Missteps

Whenever new approaches are explored, there are bound to be initial missteps, and the Obama transition team's mistakes, though so far relatively few and minor, remind everyone to prepare for similar glitches from the administration as it seeks to establish new techniques and functions.

With high expectations for the Obama administration and intense scrutiny, these missteps have been immediately announced and discussed by dissatisfied experts. For example immediately on the heels of President-elect Obama's first "fireside chat" on YouTube, Ellen Miller, Executive Director of the Sunlight Foundation, noted the missed opportunity of the transition team's initial decision to disable the comments feature. Miller, whose organization explores innovative online tools for government transparency, wanted the interactivity that she knew the tool possessed.

Other missteps and concerns have been raised. Jim Jacobs of Free Government Information voiced concerns about the transition team's decision to exert copyright claims over materials contained on change.gov. Jacobs and other librarians argued that the copyright claims unnecessarily restricted use of the online materials and significantly reduced the potential benefits of the transition team's website efforts. Similarly, after the policy section of change.gov disappeared for a few days without explanation and was then reposted with much of the partisan campaign rhetoric removed, Tim O'Reilly, technology expert and advocate for open source and open standards, proposed that revision control be implemented for the website. Revision control, similar to the method used on Wikipedia, would only allow the public to see what changed and when.

Reactive

Change.gov also indicates that the Obama administration will utilize reactivity in governing. The transition team has demonstrated that the interactivity and information collection is being put to use. For instance, one of the videos posted on the President-elect's YouTube channel features a policy team member responding to questions on energy and environment issues, which were received from users via e-mail. Even more impressive has been the transition's responsiveness to complaints of missteps, as mentioned above. Within a few days of complaints about the inability to post comments on the transition videos, the feature had been

turned on for both the YouTube videos and the Flickr photos. Similarly, on Dec. 1, the transition team announced a new copyright policy using a creative commons license, which gives visitors more freedom to reuse content from the site. These activities indicate that the Obama administration may do more than just listen — it may actually respond to what it hears from the public.

Innovation

The final, overarching characteristic about the incoming Obama administration that can be gleaned from exploring change.gov is the willingness to try new technologies and innovative approaches to traditional tasks. The website's use of videos, blog posts, and message threads conveys a commitment to getting the most out of the available online tools better than any policy statement. The previously mentioned YouTube videos with comments from the public are a good example of such innovation. This modernizes the functional dialogues that allow the government to learn as much, or even more, about the public's thoughts on a given issue. The online tools transform the traditional "fireside chat" radio addresses into national talk radio call-in programs that can be played at any time.

As the transition process continues, additional insights into the coming Obama administration will likely be available. However, it is unlikely we will be able to determine to what extent these new approaches will be implemented in the administration — at least until after inauguration on Jan. 20, 2009.

Outdated Virginia Laws Lack E-mail Transparency

County supervisors in Loudoun County, VA, recently discussed a proposal to change the state's freedom of information laws in light of a court case that seeks personal e-mails from the county board. The controversy in Virginia reflects the broader problem of distinguishing between official and personal electronic records that plagues federal and state governments.

During their Nov. 18 business meeting, the Board of Supervisors in Loudoun County discussed a proposed legislative request to the Virginia General Assembly concerning the Virginia Freedom of Information Act (Virginia FOIA). The measure is part of a larger set of draft legislative proposals the board passed in September, which must be formalized before they are sent to the state legislature. The portion of the draft addressing the state FOIA asks that state information requests for private records be considered finalized upon initial denial.

Unless reworded, the legislation proposed by the county would give board members final authority in denying material from their private e-mail accounts that may include official business. At the November meeting, an attorney hired by the county, Roger Wiley, pressed the board to limit its formal request to seeking greater legislative distinction between public records and personal or campaign records. No final decision was made on what the board's specific recommendation to the legislature would be.

The Board of Supervisors' effort comes in response to a late 2007 Virginia FOIA lawsuit, in which the Loudoun County District Court ruled that local officials must disclose material from their personal e-mail accounts in response to a Virginia FOIA request. In October 2007, Judge Dean Worcester wrote, "It does not meet the purpose for FOIA that the official can decide what is public or private." In Loudoun County, supervisors review their own materials for disclosure. There is no process in state law designating who should review official material in personal e-mail accounts.

The case is currently on appeal, and arguments have been made before state Circuit Court Judge Thomas Horne. In January, Horne indicated that Worcester's decision was too broad and that not every record in possession of a public official is a public record subject to the Virginia FOIA. County attorneys argue that the state FOIA law is too vague because it does not define personal records. Horne has not yet issued a ruling on the larger question of which records fall under the state's freedom of information law. The court is waiting on the complainant to take an action before a ruling can be made.

E-mail Accounts are a Nationwide Recordkeeping Issue

While Loudoun County argues that the public should trust the word of their elected officials, extensive accounts of related issues, arising at every level of government throughout the country, suggest otherwise. Officials in both federal and state governments have been found using private accounts to conduct official business.

Most notably, the federal government lost e-mails between March 2003 and October 2005 when at least 88 White House officials relied on their Republican National Committee accounts rather than official government systems. The time period of the lost e-mails covered the beginning of the Iraq War. The White House responded by stating, "We screwed up." However, some White House aides proceeded to use private e-mail accounts through their cell phone providers to further circumvent public recordkeeping requirements.

The e-mail question also arose during the recent election season, when Alaska Governor Sarah Palin, the Republican nominee for Vice President, was asked to release over 1,000 e-mails in a state FOIA request. According to documents obtained by *The Washington Post* and *The New York Times*, Palin used a personal Yahoo e-mail account to conduct official state business.

The Right-to-Know Community, a broad group of more than 320 organizations and individuals, included several recommendations to the incoming Obama administration related to e-mails and other electronic records management in *Moving Toward a 21st Century Right-to-Know Agenda*. The report notes, "As our society continues to shift to a more electronic age, the proper management of electronic records becomes an increasingly important function of the government." While e-mail retention and review is a complex issue with significant challenges, the public deserves a process that ensures accountability. New technologies elicit the necessity of new record keeping methods and regulations, whether through legislation or greater definition by the courts.

Legal Battles Continue on What Constitutes Issue Advocacy

Although the election is over, the ongoing battle about the difference between issue advocacy and electioneering is headed to the U.S. Supreme Court in *Citizens United vs. Federal Election Commission*. Meanwhile, a new Advisory Opinion from the Federal Election Commission (FEC) also wrestles with this issue.

The Bipartisan Campaign Reform Act (BCRA) of 2002 prohibits corporations, including nonprofits, from airing broadcasts that refer to a federal candidate 30 days before a primary election and 60 days before a general election. This electioneering communications rule was modified by the Supreme Court in the case *Wisconsin Right to Life v. FEC* (WRTL) in 2007 to limit the prohibition to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."

The WRTL case did not resolve the debate over what constitutes issue advocacy and what constitutes an appeal to vote for or against federal candidates. As a result, the Supreme Court has agreed to hear arguments in the *Citizens United* case at the end of February 2009. Citizens United is a nonprofit organization which is tax-exempt under section 501(c)(4) of the Internal Revenue Code.

Citizens United's lawsuit, which was initially filed in December 2007 in the U.S. District Court for the District of Columbia, claims that television ads for its film, *Hillary: The Movie*, should not be subject to donor disclosure and disclaimer requirements under FEC rules because they are unconstitutional as applied to the group's three advertisements for the movie. The suit also contends that its ads for the film about Sen. Hillary Clinton (D-NY) are purely commercial, that the film itself is no different from documentaries seen on television, and that the film and the ads should be exempt from any type of regulation, including the prohibition on electioneering communications.

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

Second, the court determined that the film was not a constitutionally protected discussion of issues, under the test the Supreme Court established in the WRTL case, because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." Thus, the film and its ads were deemed "electioneering communications."

Even though the elections are over, the case is still ripe because Citizens United says it plans to release similar ads in the future. According to a blog that follows the Supreme Court, the "FEC

did not contend that the Court lacked jurisdiction to hear the appeal, and on [Nov. 14] the Court simply 'noted probable jurisdiction,' indicating that it agreed it had authority to decide the case."

Separately, the National Right to Life Committee, Inc. (NRLC) recently sought an Advisory Opinion from the FEC to determine the legal rules that apply to two radio advertisements they wanted to air before the 2008 election. Both were critical of then-Democratic presidential nominee Barack Obama's position on abortion. The first ad asks Obama to apologize to the NRLC for calling them liars. The second ad is the same, with the addition of the phrase "Barack Obama: a candidate whose word you can't believe in."

The FEC initially released a draft Advisory Opinion that concluded that the first ad does not constitute express advocacy and, thus, it "would not constitute an expenditure" and it "would be a permissible corporate-funded electioneering communication." The FEC draft opinion concluded that the second ad contains express advocacy and "the funds used to finance its broadcast would constitute an expenditure" because the second ad identified Obama as a candidate, and it re-worded his campaign slogan of "Change You Can Believe In."

However, in late November, the FEC issued Advisory Opinion 2008-15, a final opinion on the NRLC ads, which said, "The Commission concludes that the NRLC may use its general treasury funds to finance the broadcast of the first advertisement. The Commission could not approve a response by the required four affirmative votes regarding the NRLC's second advertisement." Thus, it is unclear if the second ad constitutes express advocacy or if its financing would constitute an expenditure subject to FEC rules.

Funds that advocate for or against a federal candidate are considered electioneering expenditures. Corporations, including nonprofit organizations, are prohibited from making expenditures related to a federal election but may use their general treasury funds to finance the broadcast of an advertisement that is genuine issue advocacy.

The ambiguity surrounding issue advocacy and electioneering for candidates is not new. During the election, a 527 group called The Real Truth About Obama, Inc. (RTAO) filed a lawsuit in the U.S. District Court in Richmond, VA, against the FEC and the U.S. Department of Justice (DOJ). RTAO planned to run issue ads examining then-Democratic presidential nominee Barack Obama's position on abortion and other policy issues. RTAO argued that is not a political action committee (PAC) because it did not plan to advocate for Obama's defeat or election.

The lawsuit challenges the FEC's definition of express advocacy for or against candidates. In WRTL, the Court sought to protect messages put out by political groups that engage in issue advocacy. However, according to RTAO, the regulation put in place after the WRTL decision is unconstitutionally vague and overbroad. RTAO is challenging this new regulation, which the group charges could restrict messages if they contain "indicia of express advocacy," such as references to political parties, and could exclude some "express advocacy."

Until the courts clarify the definitions, the current ambiguity will continue to create confusion among those who genuinely want to engage in issue advocacy, as well as a loophole for those who desire to exploit the lack of clarity to evade campaign finance restrictions.

Conviction of Holy Land Foundation Raises Questions, Concerns for Nonprofits

On Nov. 24, the two-month retrial against the Holy Land Foundation for Relief and Development (HLF) and five of its leaders ended with guilty verdicts on charges of supporting Hamas, which was designated as a terrorist organization in 1995. The convictions came even though the prosecution admitted that all funds went to local charities, called zakat committees, that are not on government watchlists. Attorneys for the defendants said they would appeal.

HLF was shut down in 2001 by the Department of the Treasury (Treasury), which accused the group of supporting Hamas, and the organization's assets were frozen. In 2004, the group and five leaders were indicted, and the first trial ended in a hung jury in October 2007. In the retrial, prosecutors dropped charges from 197 counts to 108 counts of supporting terrorism, money laundering, conspiracy, and tax fraud. There was a different judge, U.S. District Court Judge Jorge Solis, and some new witnesses and evidence at the retrial. Otherwise, the basic arguments were the same on both sides:

- The prosecution, using over 500 documents, videos, bank records, and wiretap records, said HLF wired $12.4 million to Hamas-controlled zakat committees after the 1995 designation. It did not allege that HLF supported violent acts and admitted the funds were used for hospitals, schools, and charitable programs. However, the prosecutor told jurors not to be distracted by this fact, since it is illegal to support Hamas with any kind of resources.
- The defense argued that the zakat committees were not on the government's list of illegal groups and that HLF made every effort to ensure funds were spent only for charity, on a "need, not creed" basis.

The jury deliberated for eight days. After the verdicts were announced, the defendants were taken into custody. They could receive up to 15-20 years imprisonment for each count.

HLF's Assets: Forfeited to the Government or Used for Charity?

The judge asked the jury to decide whether HLF's assets should be forfeited to the government, since money laundering charges are involved. The jury found both HLF and the five defendants liable for the $12.4 million they determined was illegally funneled to Hamas. The defense will be moving to stay forfeiture pending appeal. It is unclear what HLF funds remain in the accounts blocked by Treasury, but estimates are in the $5 million range. There is also real property located in California.

Forfeiture of charitable assets raises unique issues and problems, since under traditional charity law principles, these assets can only be used for charitable purposes. The forfeiture provisions in money laundering laws were passed to prevent convicted criminals such as drug kingpins and organized crime from enjoying the financial benefits of their crimes. In this case, forfeiture prevents refugees and others in need from receiving aid intended by donors.

The Zakat Committees: Not on Government Watchlists

The defense argued that it was not illegal for HLF to deliver aid through zakat committees because they have never been designated as supporters of terrorism by the U.S. The question of whether or not it was legal for HLF to work with the zakat committees is central to the case. Robert McBrien from Treasury's Office of Foreign Assets Control, a new witness, told the jury that designation is not necessary and that keeping up with front groups "is a task beyond the wise use of resources." Instead, he said Treasury targets umbrella groups. However, since Treasury has known about these particular groups since at least 2004 when it indicted HLF, that rationale does not explain Treasury's continuing failure to designate the groups. According to AlterNet, the same zakat committees have received aid from the International Red Cross and the U.S. Agency for International Development.

Treasury's legal theory makes it impossible for U.S. charities operating abroad to protect themselves by checking local charity partners against the list of designated supporters of terrorism. The threat of being shut down by Treasury has already discouraged international programs from operating in conflict zones, and now the potential for severe criminal sanctions could further exacerbate this situation.

After Hamas was designated in 1995, HLF hired a former member of Congress from Texas, John Bryant, to help the group communicate with Treasury about what groups were off-limits. Bryant testified that Treasury rejected their attempt to obtain guidance. The lack of known evidence about zakat committee ties to Hamas was described by another defense witness, Edward Abington, former U.S. consul general in Israel between 1993 and 1997. In the first trial, he testified that while in Israel, he got daily intelligence briefings on security threats and was never told Hamas controlled charities. In this trial, the CIA barred him from referring to his past affiliation with it. As a result, Abington was only able to refer to "government" briefings that did not include references to the zakat committees. The defense called this "a blatant attempt to interfere with the defendant's Fifth and Sixth Amendment rights to present a defense."

The prosecution alleged that the zakat committees were staffed and controlled by Hamas, using detailed charts to show Hamas affiliations with zakat committee leaders. In an unusual and controversial move, the government had two Israeli intelligence officials testify anonymously about documents and items seized in their raids on the zakat offices between 2002 and 2004. These items included key chains and other memorabilia memorializing suicide bombers. The judge overruled defense objections, and use of the anonymous witnesses is expected to be a major issue in the appeal.

More on the Evidence

To counter the defendants' argument that there is no criminal violation when all funds are used to support charitable programs, hospitals, and schools, the prosecution presented a new witness, Georgetown University professor Bruce Hoffman, as an expert on terrorism. He told the jury that throughout history, terrorist groups have used charities as fronts to raise money and build good will "almost without exception."

The prosecution spent the first four of its five weeks presenting witnesses and evidence that focused on the defendants' political views about the conflict in the Middle East and their ties to suspected militants. It also showed videos of violent attacks, although the defendants were not accused of violent acts. Much of this evidence centered on events that took place before Hamas was designated as a terrorist organization. For example, FBI agent Lara Burns testified about a 1993 meeting in Philadelphia attended by HLF representatives, which Hamas sympathizers are also alleged to have attended. Another FBI agent, Robert Miranda, testified about HLF-sponsored fundraising events and Palestinian festivals that included Hamas leaders and speakers. Other evidence focused on the defendants' political views and the "jihadist" content of songs and skits at these events.

Evidence about HLF communications with Hamas after the 1995 designation included a 1997 fundraising conference call with two alleged Hamas speakers, including one who praised a Hamas bomb maker. An ex-HLF employee, Mohamed Shorbagi, also testified that HLF raised money for Hamas at Palestinian festivals and by sending money via the zakat committees after 1995. The defense said Shorbagi lied in order to get a potential life sentence reduced to seven years in a deal that required him to plead guilty to using HLF to support Hamas.

The defendants presented two expert witnesses, Dr. John Esposito, a Georgetown professor and expert on Islam, and Dr. David McDonald, a professor at Indiana University and an expert on Palestinian culture and folklore. Their testimony sought to set the evidence about the content of songs and statements in context. For example, Esposito said the traditional meaning of the word "jihad" relates to spiritual struggle, not violence, and "economic jihad" refers to giving to the poor.

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