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The Bush Budget Legacy: Misleading Claims and Misguided Priorities

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

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

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

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

Bush Slashes Key Discretionary Investments

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

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

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

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

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

Massive Impending Spending Once Again Omitted

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

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

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

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

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

Balanced Budget Gimmicks Enable Case for Making Tax Cuts Permanent

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

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

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

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

Effect of Making Permanent 2001 and 2003 Bush Tax Cuts <i>(millions of dollars)</i>							
2008	2009	2010	2011	2012	2013	2009-2013	2009-2018
-422	-2,077	-13,095	-158,453	-236,584	-255,388	-665,597	-2,185,294

Bush Continues Misguided Budget Proposals

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

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

Stimulus Status: The Eye of the Storm

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

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

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

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

also self-employment income, veterans' disability payments, and Social Security benefits — making an additional 250,000 veterans and 20 million seniors eligible for rebates

- An increase in the phase-out points to \$150,000 for individuals and \$300,000 for families

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

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

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

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

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

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

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

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

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

Product Safety Regulator Hobbled by Decades of Negligence

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

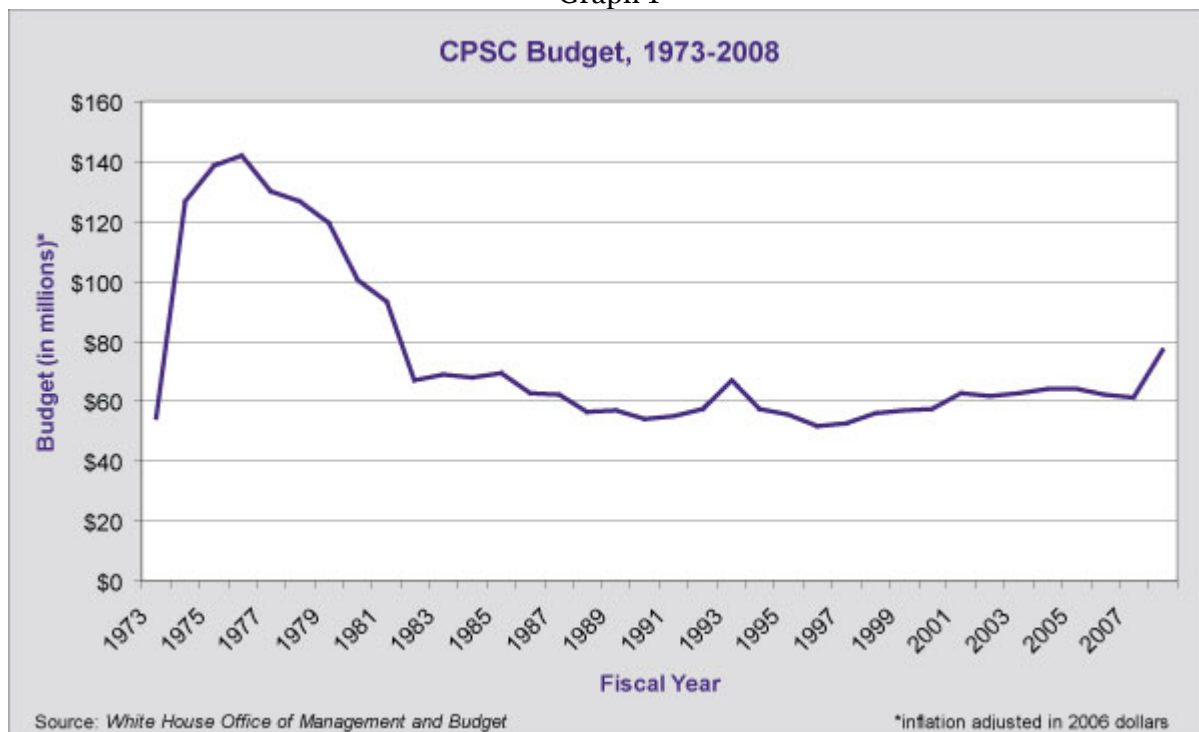
In 1972, Congress passed the Consumer Product Safety Act, which created CPSC. CPSC began operating in 1973 as an independent federal regulatory agency to protect the public from product risks and reduce injuries and fatalities associated with the use of those products. CPSC now regulates more than 15,000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

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

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

congressional appropriators.

Graph 1



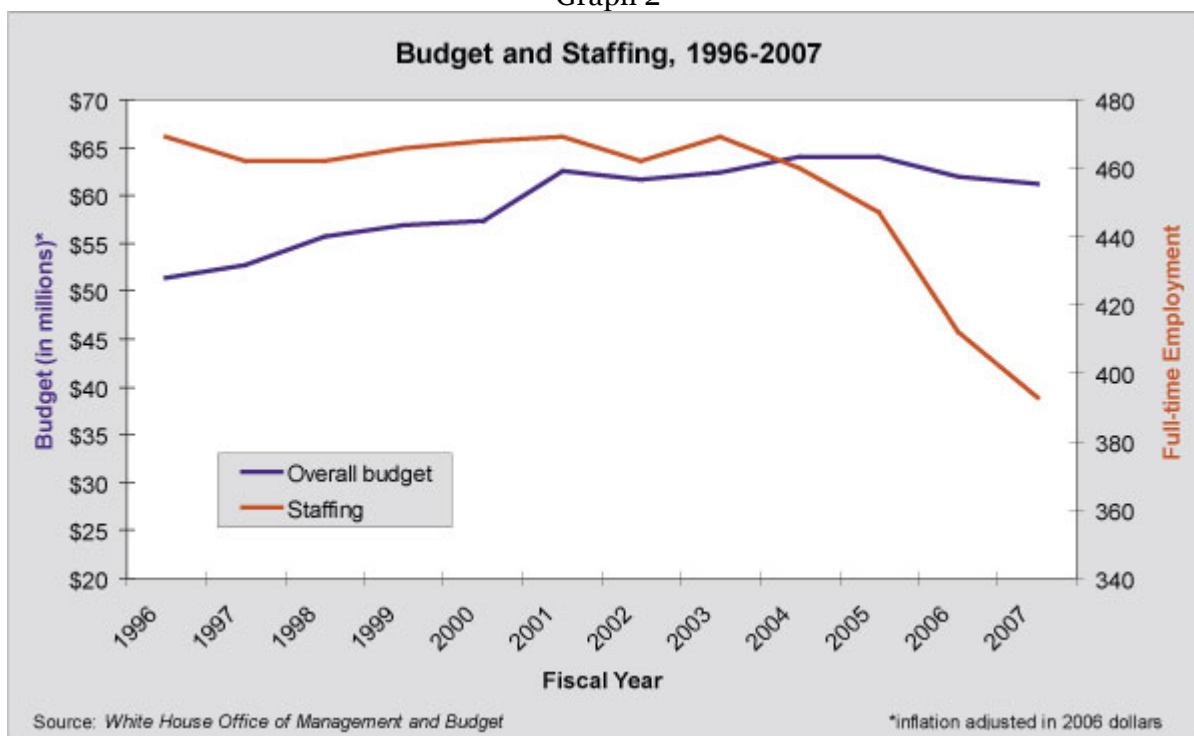
CPSC's budget and staffing levels reached their peak in 1976, only the agency's fourth year in existence. During the final years of the Ford administration, throughout the Carter administration, and into the Reagan administration, CPSC faced budget cuts every fiscal year. The trend reversed in the final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

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

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

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

Graph 2



As CPSC Shrinks, Industries Grow

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

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

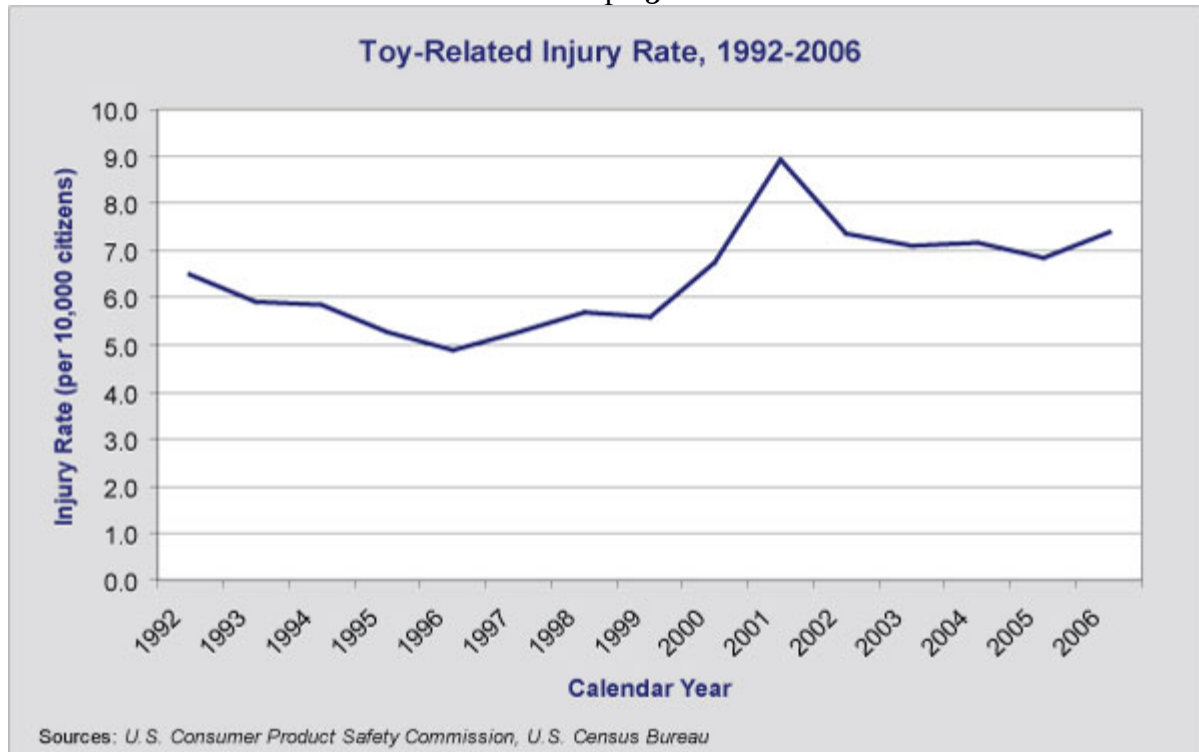
CPSC has recently been announcing more toy recalls than at any other time in its history. In FY 2007, CPSC announced 58 toy recalls — the most ever. In FY 2008 (beginning Oct. 1, 2007), CPSC has already announced 40 recalls. The number of toy recalls in FY 2008 is the second-highest in agency history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

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

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

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

Graph 3

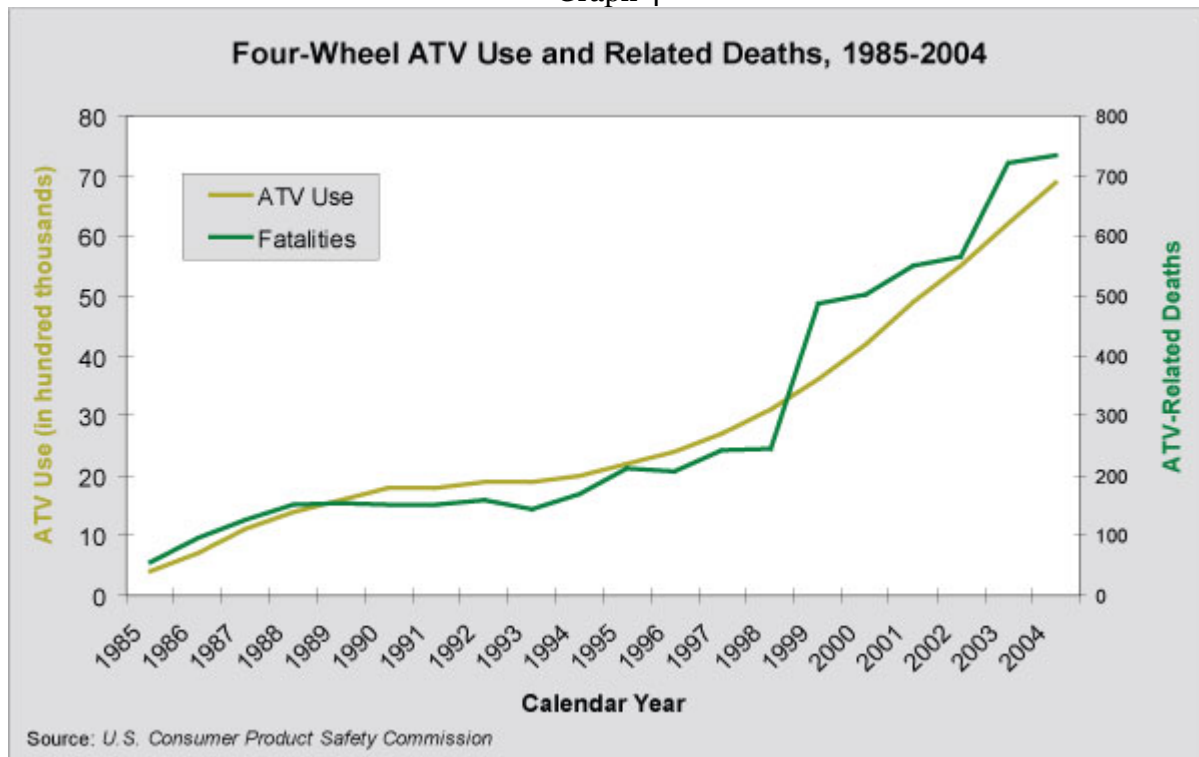


While the popularity of ATVs has grown in recent decades, CPSC has actually rolled back regulations on the recreational vehicles. In December 2007, a former CPSC staff statistician, Robin Ingle, [wrote in *The Washington Post*](#), "In the 1990s, the industry had been bound by strict regulatory agreements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

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

proliferation. (See Graph 4.)

Graph 4



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

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

Outlook

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

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

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

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

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

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

Endnotes:

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

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

2008 Executive Branch Regulatory Agenda: Building an Administrative Legacy

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

Suppressing Science

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

2008, there is evidence that this practice will continue.

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

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

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

Institutionalizing Management Practices

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

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

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

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

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

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

Circumventing the Law

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

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

been issued for forests in Idaho and Colorado.

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

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

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

New FOIA Law Already in Trouble

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

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

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

The budget proposes:

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

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

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

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

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

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

FISA Fight Heats Up in Senate

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

On Aug. 6, 2007, Bush signed the [Protect America Act of 2007 \(PAA\)](#), granting the government the authority to wiretap anyone, including U.S. citizens, without any court approval as long as the "target" of the surveillance is located outside the U.S.

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

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

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

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

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

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

Government Offers Refunds for Katrina Trailers

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

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

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

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

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

Polar Bears Get Their Day in Congress

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Charity Charged with Violating Economic Sanctions in Grants to Orphanage

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

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

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

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

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

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

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