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In This Issue

Bipartisan Consensus on Stimulus Package Gathers Momentum

Amid slumping capital markets and real estate values, a jump in unemployment, and a growing chorus of economists forecasting a recession in the U.S., a consensus has rapidly developed in Washington during the first few weeks of the year that a fiscal stimulus package is in order. The watchword in Washington has been "bipartisanship," and President Bush and the congressional Democratic leadership have already made concessions. Some questions remain regarding the optimal structure and size of the package, but indications point to its enactment in a matter of weeks.

Discussion of a fiscal response to the economic slowdown began in earnest when former Treasury Secretary Lawrence Summers wrote in a *Financial Times* op-ed in November 2007, "Three months ago it was reasonable to expect that the sub-prime credit crisis would be a financially significant event but not one that would threaten the overall pattern of economic growth. This is still a possible outcome but no longer the preponderant probability ... the odds

now favor a US recession."

Summers' pessimism — or prescience — was confirmed on Jan. 4 when December 2007 employment figures showed a jump in the jobless rate from 4.7 to 5 percent and net private sector job losses. On Jan. 6, Summers wrote a follow-up op-ed, "Why America must have a fiscal stimulus": "Six weeks ago my judgment in this newspaper that recession was likely seemed extreme; it is now conventional opinion and many fear that there will be a serious recession .... Fiscal stimulus is appropriate as insurance because it is the fastest and most reliable way of encouraging short run economic growth ... to be effective, fiscal stimulus must be *timely*, *targeted*, and *temporary*."

Summers advocated "a program of equal payments to all those paying either income or payroll taxes combined with increases in unemployment insurance benefits for the long-term unemployed and food stamp benefits [in] a $50 - $75 billon package." Ten days later, on Jan. 16, the Joint House-Senate Economic Committee held the first congressional hearing on the issue, "What Should the Federal Government do to Avoid a Recession." At the hearing, a consensus on the committee emerged that a stimulus package along the lines of Summers' recommendations to the committee should be adopted, and that "[a]s long as a fiscal stimulus program is temporary and does not create expectations of future spending or tax cuts it does not make a large economic difference whether or not it is offset by specific future fiscal actions."

The next day, Jan. 17, in testimony before the House Budget Committee, Federal Reserve Chairman Ben Bernanke offered a wholesale endorsement of Summers' suggestions, further remarking that extraneous items, such as an extension of the cuts, would vitiate the effectiveness of a stimulus package. "A fiscal program that increased the structural budget deficit would only make confronting those challenges more difficult," Bernanke said.

On Jan. 18, President Bush weighed in on the issue, saying he favored a package of one percent of gross domestic product, or between $140-150 billion. Bush's proposal reportedly featured $800 rebates for individuals and $1,600 for households, available only to income taxpayers, along with a "bonus depreciation" to allow companies to deduct 50 percent of business investments made in 2008. Surprisingly, the plan eschewed increases in unemployment insurance or food stamp benefits, a commonly cited aspect of a short-term stimulus. At the time, Bush emphasized his desire to reach bipartisan agreement on a package within short order, perhaps in time to announce it during his State of the Union Address on Jan. 28.

The willingness of both Congress and the president to arrive at a compromise on the package quickly is a radical departure from the rancorous debate, veto threats, obstruction, and delay that characterized discourse in Washington on almost every fiscal issue during 2007. One of the keys to this willingness was Bush's commitment to not seek an extension of his 2001 and 2003 tax cuts and Democrats' agreement to waive PAYGO requirements.

Some key issues remain to be resolved. But Treasury Secretary Henry Paulson has retreated from his insistence that the tax rebate go only to citizens who pay income tax, telling the U.S.

Chamber of Commerce on Jan. 22 that "the package must reach a large number of citizens," indicating a willingness to extend the tax rebate to those who pay little to no income taxes. The administration is also considering an increase in the earned-income and child tax credits and is warming up to increasing spending on unemployment insurance and food stamps despite philosophical concerns.

Analysts have been quick to evaluate the efficacy of the various stimulus components under discussion, with the majority supporting widespread rebates and spending measures. According to Mark Zandi, chief economist of Moody's Economy.com, the measures that produced the biggest "bang for the buck" were increases in unemployment benefits, which produced about $1.73 in additional demand for every dollar spent. Tax rebates to all citizens generated about $1.19 for every dollar spent, while reductions in tax rates produced only 59 cents per dollar. Further evidence supporting the need to have rebates extended to all citizens was Congressional Budget Office Director Peter R. Orszag's testimony to the Senate Finance Committee on Jan. 22 that the "most effective types of fiscal stimulus ... are those that direct money to people who are most likely to quickly spend the bulk of any additional funds provided to them."

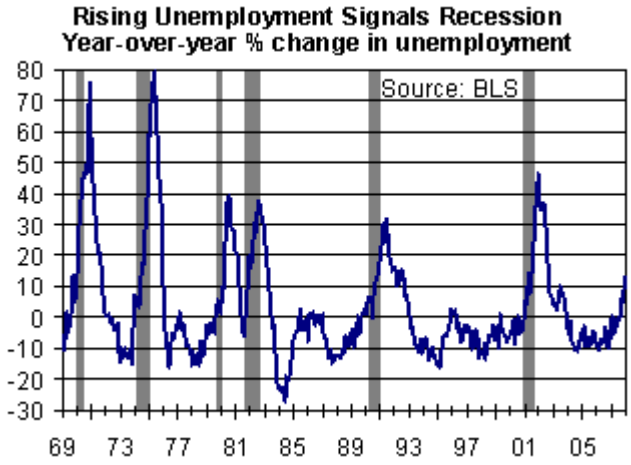
Fiscal Economic Bank for the Buck

One year $ change in real GDP for a given $ reduction in federal tax revenue or increase in spending

Tax Cuts	
Non-refundable lump-sum tax rebate	1.02
Refundable lump-sum tax rebate	1.26
Temporary tax cuts	
Payroll tax holiday	1.29
Across the board tax cut	1.03
Accelerated depreciation	0.27
Permanent tax cuts	
Extend alternative minimum tax patch	0.48
Make Bush Income Tax Cuts Permanent	0.29
Make Dividend and Capital Gains Tax Cuts Permanent	0.37
Cut in Corporate Tax Rate	0.30
Spending Increases	
Extending UI Benefits	1.64
Temporary Increase in Food Stamps	1.73
General Aid to State Governments	1.36
Increased Infrastructure Spending	1.59

Source: Moody's Economy.com

One other concern is the timing of the stimulus. Even if Congress acts quickly on a package that includes some form of tax rebates, it will be difficult for the Treasury Department to swiftly send out checks to citizens. This could have a bearing on how effective the stimulus is in minimizing the economic decline.



While many of the details of the final package have yet to be worked out, it is encouraging that Congress and the president have moved with alacrity toward a consensus that now is the time for stimulus and that it should be targeted and temporary. Now, they need to decide to whom it should be targeted to and how temporary it should be.

Lack of Resources and Poor Policies Hurt IRS Mission

A lack of enforcement resources, misplaced priorities, and inefficient policies at the Internal Revenue Service (IRS) are among the factors perpetuating the federal tax gap, according to a new OMB Watch report released Jan. 15. The report, *Bridging the Tax Gap: The Case for Increasing the IRS Budget*, illustrates why the IRS has had such a difficult time recovering the more than $300 billion in federal taxes that go unpaid every year and offers some practical solutions to the problem.

The most recent data on the gross tax gap comes from the IRS National Research Project, which evaluated tax returns from FY 2000. It put the gross tax gap at between $312 billion and $353 billion annually, or about 16 percent of all taxes owed.

The OMB Watch report argues Congress has given considerable lip service to doing something about the tax gap for years but has done little to actually give the IRS the tools to make significant progress in closing it. According to the report, in FY 1995, IRS had $4.43 billion in its budget for enforcement activities. By FY 2006, this budget had only risen to $4.65 billion — less than a five percent increase. During the same period:

- Inflation had eroded the value of this funding by 36 percent;
- The size of the economy grew 42 percent;
- The number of tax returns the IRS processed increased 11 percent, from 205 million to 228 million; and
- Hundreds of changes to the IRS's authority and tax laws gave the agency more work.

The funding shortage has also impacted the number of staff the IRS can hire. Over the last ten

years, the workforce has shrunk 18 percent, according to IRS statistics. The number of revenue agents and officers — IRS employees who perform audits — has decreased even faster, by 40 and 30 percent, respectively.

Despite these facts, Congress has demanded the IRS close the tax gap without making more resources available for the agency to do so. Thus, the IRS has been forced to make difficult choices as to how to use the limited resources it has been allocated, choices that often end up hurting tax collection and taxpayer rights.

OMB Watch focuses on three areas of policy at the IRS in need of immediate improvement: audits, particularly at the upper end of the income spectrum; tax collections; and tax preparation services for low-income taxpayers eligible for the Earned Income Tax Credit (EITC).

One of the most disturbing trends in enforcement policy over the last ten years has been a sharp decline in audits, which are an essential tool in the fight against unpaid taxes. In the last decade, there has been a general decline in most types of audits. In FY 1996, the audit rate for all individual income tax returns was 1.67 percent. In FY 2006, the rate had dropped to 1.0 percent of all individuals, after reaching a low of 0.5 percent in 2000. Audits of corporations of all sizes have also dropped significantly, and more recent data cited in the report shows the audits that are being done are poorly targeted and inefficient.

For both individuals and corporations, the IRS is increasingly relying on correspondence audits rather than more intensive face-to-face audits. This trend is problematic because correspondence audits are less effective than face-to-face ones, partly because the IRS can only spot problems that are evident from information submitted by the taxpayer during correspondence audits.

Another area in need of improvement and additional funding at the IRS is tax collection. The report cites former IRS Commissioner Charles Rossotti, who in 2002 reported an annual investment of under $400 million in IRS collections could generate over $11 billion each year. Instead of providing these additional resources, Congress has authorized the IRS to outsource the responsibility of collecting small tax debts to private collection agencies (PCAs). This program has so far shown itself to be wasteful and a danger to sensitive taxpayer information. According to the report, initial data on the program for the first year of operation shows PCAs averaged a 4.5:1 return on investment (ROI), collecting $29 million, from which they were paid $6.34 million. These data are far below both the IRS' ROI levels and initial revenue projections for the program.

In addition, numerous experts continue to worry PCAs might violate taxpayer rights. Indeed, anecdotal evidence of this was heard during congressional oversight hearings on the program in 2007, and despite recommendations otherwise, there remain few safeguards in place to prevent these abuses.

Finally, the IRS has taken an approach to enforcing the EITC that relies far too much on audits

and not enough on services. Mostly by congressional mandate, the IRS has taken a punitive approach to EITC error reduction, including disproportionally high audit rates and unique certification requirements. The examination rate for EITC recipients was 2.25 percent, compared to 1.0 percent for all individual income tax returns, and 1.3 percent of all individuals making over $100,000. Yet EITC audits yield only a fraction of the total revenues recovered by IRS examinations. EITC audits identified nearly $1.5 billion in excess payments, resulting in a yield of only $2,895 per audit — the lowest rate of return for any type of audit performed by the IRS.

The report concludes this is the wrong approach to fixing the problems with the EITC. As much as 50 percent of all tax returns with errors are thought to be unintentional and have been linked to the complexity of EITC eligibility requirements. There is also good evidence showing that providing services and assistance to low-income tax filers who claim the EITC sharply reduces error rates.

Unfortunately, the IRS is moving in the opposite direction, deciding to reduce the quantity and quality of services available to low-income filers through cuts to their network of Taxpayer Assistance Centers (TACs). Already understaffed, the IRS further attempted to close almost 20 percent of the TACs in 2005 before Congress intervened.

The tax gap is an eminently solvable problem. The report posits that if Congress were to prioritize funding for IRS examination, collection, and tax preparation services, it would drastically reduce the tax gap. So long as the IRS is underfunded, it will be forced to enforce the tax code unfairly and punitively. However, if the IRS is properly funded and administered correctly, the federal government will have the opportunity to make substantial progress in reducing the tax gap and to ensure the tax system is as progressive in practice as it is in law.

2008 Regulatory Policy Agenda: Congress Debates, States Act

In the current political climate, it is unlikely that Congress will succeed in passing legislation that protects the public from the range of regulatory failures we experienced in 2007. The barriers to substantially improving public health, worker safety, and environmental quality seem too high in this election year, especially given President Bush's willingness to use his veto power. What Congress can accomplish in 2008 is establishing legislative and oversight priorities over numerous health, safety, and environmental issues. In many instances, however, we will see states move ahead with a variety of actions designed to improve public protections. The executive branch will also play an increasingly important role as the Bush administration comes to a close.

Regulatory improvements or delay will come from federal agencies, and states will have to react to federal actions or inactions as they push their individual programs. In the next issue of *The Watcher*, we will provide an assessment of executive branch actions to watch out for. So what are some items on the consumer, health, and safety agenda for Congress?

Job Safety

On Jan. 16, the House passed coal mine safety legislation, H.R. 2768, that immediately received a veto threat. (See the accompanying article "Miner Safety Bill Clears House, Bush Veto Looms") It would, among other things, enhance the federal Mine Safety and Health Administration's (MSHA) regulations.

MSHA, however, does not support the legislation, according to a Jan.11 BNA article (subscription required) quoting the acting director of MSHA, Richard Stickler. Instead, MSHA is going back to basics. The agency has increased its enforcement efforts in the last year, and it hired 273 inspectors between July 2006 and September 2007. Because it takes 18 months to train the new inspectors, 49 percent of the inspection staff is still in training.

The Occupational Safety and Health Administration (OSHA) has come under fire for its lack of attention to workplace issues and enforcement during the Bush administration. Two high profile actions occurred in late 2007 that will be part of OSHA's 2008 agenda: 1) issuing a new standard for the food additive diacetyl, which can cause a fatal lung disease in factory workers exposed to it, and 2) implementing rules issued in November 2007 regarding employers' obligations to pay for personal protective equipment (PPE) for workers. There is a good chance that industry will challenge the PPE rule, resulting in significant delays in its implementation.

Two other workplace issues have the attention of the House Education and Labor Committee, according to BNA. The Committee may hold hearings regarding OSHA's lack of citations of ergonomics violations and questionable reporting of workplace injuries and illnesses. Labor proponents think there is considerable underreporting by employers, in part because workers fear retaliation for reporting accidents and illnesses.

Meanwhile, many states that administer OSHA-approved plans are addressing these same issues through their health and safety programs. For example, California is implementing its own diacetyl exposure rule for workers, and it is considering proposals to regulate other food additives, according to a Jan. 11 BNA article on states' plans. Michigan, Minnesota, and Washington State have initiatives regarding certification of construction crane operators. In some instances, these initiatives are prompted by accidents that highlighted the need for improved safety.

Consumer Product Safety

In the Jan. 8 issue of *The Watcher*, OMB Watch described how Congress was limping toward enhancing the regulatory authority of the Consumer Product Safety Commission (CPSC). The bills before Congress now will vastly increase resources in future years for the agency, and the omnibus appropriations bill for FY 2008, passed in December 2007, includes an increase of $17 million in the agency's budget. The latter is being used by CPSC to station more staff at ports of entry for imports, increase inspections of retailers, and target higher-risk products, especially children's products.

Environmental Quality

Congress is likely to spend considerable time on a variety of greenhouse gas (GHG) emissions bills, although the chances for passage seem remote in 2008. Sens. Joseph Lieberman (I-CT) and John Warner (R-VA) have introduced cap-and-trade legislation, S. 2191. This bill will probably be debated, and senators are staking out their positions, according to a Jan. 18 BNA article. The prospects for getting 60 votes to pass the bill are slim, but the outlines of legislation could be decided during this process. Democrats failed to introduce a similar measure in the House, although Rep. John Dingell☼ (D-MI), chair of the House Energy and Commerce Committee, is expected to do so later this year.

Most GHG activity is taking place through regional coalitions of states. The initiatives, such as the Regional Greenhouse Gas Initiative in the Northeast, are proposing cap-and-trade and emissions tracking programs coupled with setting emissions limits.

Climate change issues are driving drinking water concerns as well, according to BNA. For example, carbon sequestration — injecting carbon dioxide from power plants deep underground — has the potential to affect drinking water sources. The U.S. Environmental Protection Agency (EPA) is likely to propose a rule this year regulating this practice, but the impacts of sequestration are not well known.

Other drinking water issues scheduled for EPA action in 2008 include upgrading the nation's infrastructure and a decision on whether to regulate perchlorate, a chemical found in rocket fuel and linked to thyroid problems in children. EPA estimates that $277 billion will be needed to upgrade the infrastructure between 2003 and 2022, BNA reported in a Jan. 18 article. States and local water utilities argue that Congress has not appropriated enough money to help rebuild an infrastructure not quite at a crisis stage.

EPA has been debating a perchlorate standard since 1998 and is expected to make a decision early in 2008. Legislation has been introduced in both chambers of Congress to require a perchlorate standard. It is unlikely any bill will get through Congress and past a presidential veto.

Scientific Integrity

Congress held several hearings in 2007 focused on the contentious strategy of the Bush administration 1) to declare science uncertain on some policy questions ranging from global warming to drug safety and 2) to suppress government scientists' speech. According to the Union of Concerned Scientists' (UCS) Scientific Integrity Program, Congress addressed the erosion of the appropriate use of science in several bills. For example, Congress passed and the president signed the Food and Drug Administration Revitalization Act, which will help ensure that the best available science is used in decisions by the Food and Drug Administration. Legislation moving through Congress to enhance the authority of CPSC, as mentioned above, would extend whistleblower protections for CPSC scientists.

In addition, the House passed The Improving Government Accountability Act, which would provide more independence to inspectors general (IGs) at federal government agencies. IGs investigate waste, fraud, and corruption, which can include the misuse of science. The bill would allow agency scientists to challenge scientific misconduct in a confidential manner. According to UCS, the bill has bipartisan support in the Senate.

Workers Threatened by Decline in OSHA Budget, Enforcement Activity

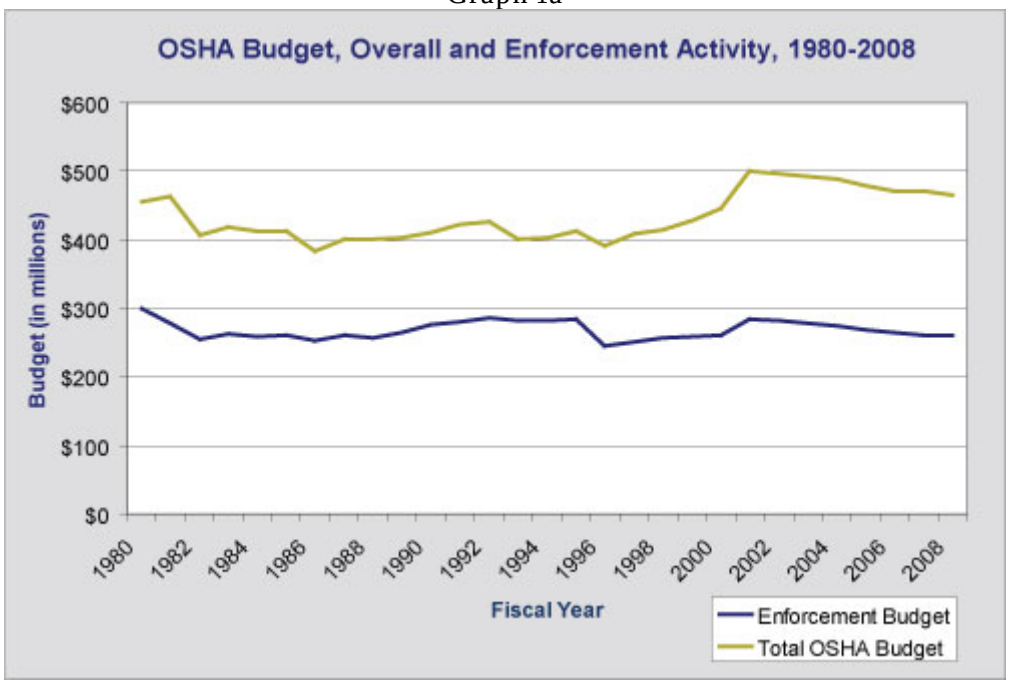
The consolidated appropriations bill passed by Congress and signed by President Bush in December 2007 cuts the budget of the U.S. Occupational Safety and Health Administration (OSHA) for Fiscal Year 2008. OSHA, like many other federal agencies, already faces budget constraints that make it more difficult for the agency to achieve its mission. Over the past three decades, OSHA's budget, staffing levels, and inspection activity have dropped while the American workforce has grown and new hazards have emerged.

In 1970, Congress passed the Occupational Safety and Health Act (OSH Act), creating OSHA. OSHA is responsible for assuring the safety and health of America's workforce, primarily by setting workplace safety standards through regulation and enforcing those standards.

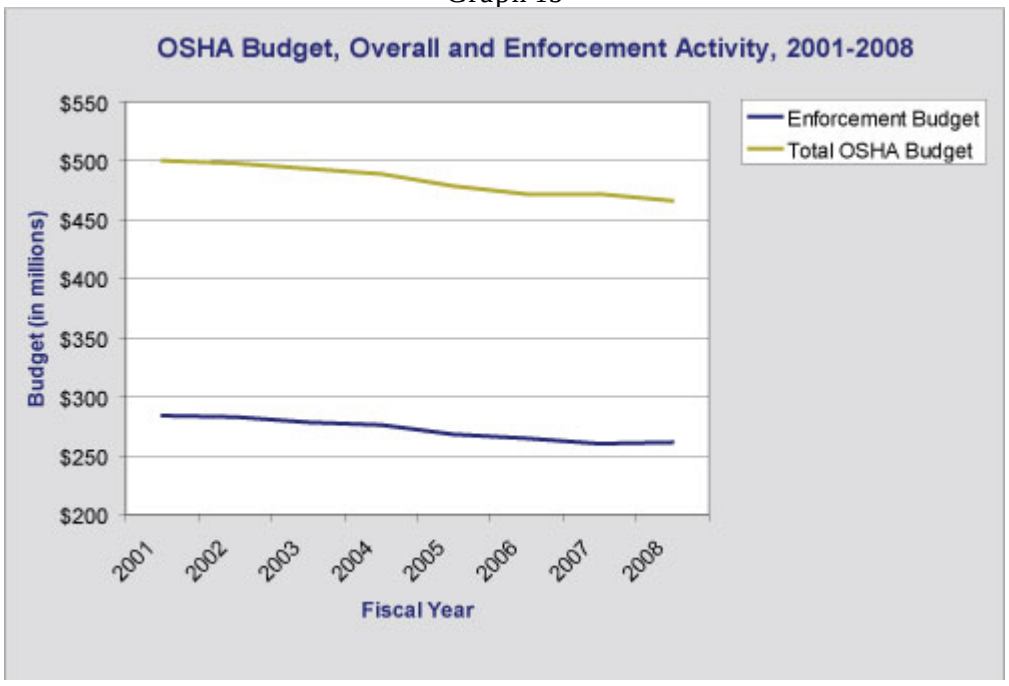
Long-term trends

By the end of the Carter administration, OSHA was up and running and operating at resource levels that would turn out to be 20-year highs. In 1982, OSHA's budget was cut sharply and remained near those levels throughout the Reagan administration. OSHA's budget rebounded slightly during the George H.W. Bush administration but fell again in FY 1993. The budget grew during the last years of the Clinton administration and, by FY 2001, reached an all-time high. (See Graph 1a.) Since then, OSHA's budget has been cut every year when adjusted for inflation. (See Graph 1b.)

Graph 1a



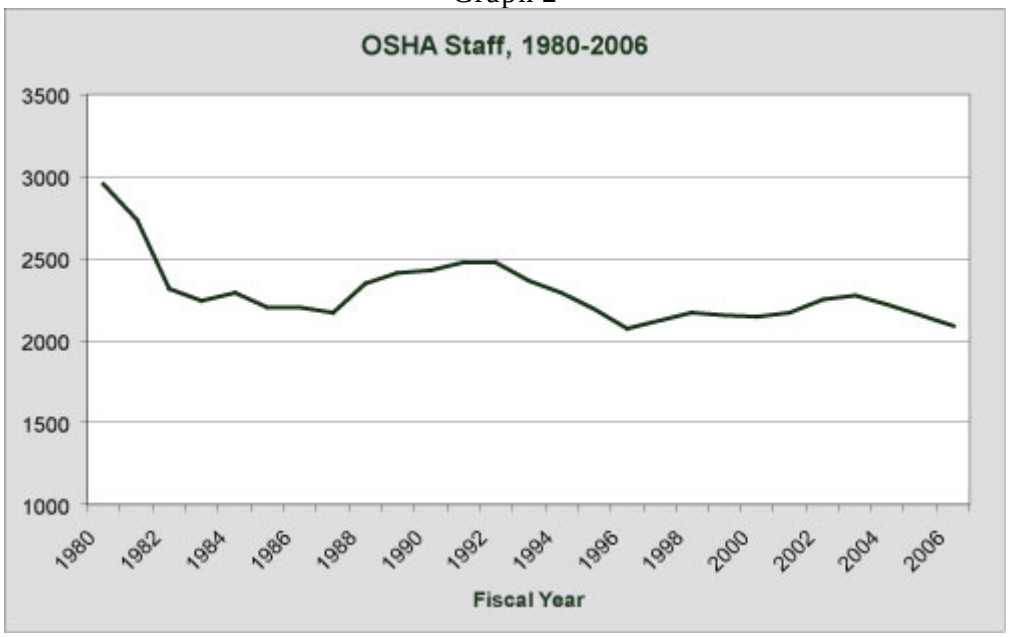
Graph 1b



As OSHA's budget has ebbed and flowed, so too has its staffing level. In FY 1980, OSHA's staffing level hit its peak — 2,950. For FY 2006, OSHA had a staff of only 2,092, the second-lowest level in 30 years. (See Graph 2.) In 1980, OSHA had approximately three staff members

for every 100,000 American workers. For FY 2006, staffing levels had been cut in half for every 100,000 American workers — to only 1.5 staff members.

Graph 2



However, looking at overall appropriations and staffing does not provide adequate insight into whether OSHA is fulfilling its mission to protect American workers. The bulk of OSHA's work is in enforcement. The federal budget for federal and state enforcement activity has declined more sharply over time than the overall OSHA budget. Subsequently, the number of workplace inspections conducted by both OSHA and state agencies has fallen dramatically.

The federal government funds inspections conducted by both OSHA inspectors and state workplace safety inspectors. Under the OSH Act, the federal government provides grants of up to 50 percent of the total costs of state enforcement programs. Currently, 21 states have their own workplace safety programs, which have been approved by OSHA and receive federal grants. The enforcement budget referenced here includes both federal inspection funding and state grants from the federal government.

OSHA's budget for enforcement activity is currently 12 percent lower than it was in FY 1980. (See Graph 1a.) OSHA was appropriated $264 million for enforcement activity for FY 2006, compared to $301 million in FY 1980 when adjusted for inflation.

Inspection activity has suffered at least in part due to budget constraints. The number of workplace inspections conducted by federal and state regulators has rebounded since falling to all-time lows during the Clinton administration. However, regulators are still conducting far

fewer inspections than they did throughout the 1980s and early 1990s. In FY 1980, federal and state inspectors made more than 174,000 visits to American workplaces. In FY 2006, fewer than 97,000 inspections were conducted. (See Graph 3.)

Graph 3

When adjusted for the growing size of the American workforce, the drop in inspection activity is even greater. In 1980, OSHA and state regulators conducted 1.77 inspections per 100,000 workers. By 2005, OSHA and the states conducted only 0.668 inspections per 100,000 workers — a 62 percent drop.

Although the data indicate a correlation — and not necessarily a cause-effect relationship — between inspection rates and fatalities, as inspection activity has dropped, progress in reducing workplace fatalities has slowed. Since the passage of the OSH Act and the creation of OSHA, workplace fatality rates have plummeted. In 1970, the year Congress passed the OSH Act, the fatality rate was 18 deaths per 100,000 workers, according to the best available data. By 2006, that rate had fallen to 4.[1] (See Graph 4.)

Graph 4

Still, 5,703 workers died on the job in 2006 — an average of more than 15 every day. In recent years, the once-consistent rate of reduction in the fatality rate has slowed. From 1996 to 2005, the fatality rate dropped by 0.8. For the period 20 years earlier, 1976-1985, the fatality rate dropped by 3. Perhaps most disturbingly, in 2004, the fatality rate rose for only the second time since OSHA's creation.

Recent trends

OSHA's budget has been cut each year President Bush has been in office, when adjusting for inflation. Since reaching an all-time high in FY 2001, OSHA's overall budget has fallen more than five percent under Bush.

Funds appropriated for enforcement activity fell almost 8 percent from FY 2001 to FY 2008. (See Graph 1b.) Although money appropriated for enforcement activity has fallen during the Bush administration, the number of inspections conducted by OSHA and state regulators has remained consistent.

While the overall budget and enforcement budget at OSHA have declined, the budget for compliance assistance has risen. OSHA compliance assistance programs allow federal regulators to work with businesses to promote voluntary compliance and assist in understanding federal regulations.

Peg Seminario, director of safety and health for the AFL-CIO, said in testimony before a Senate worker safety panel that the budget shifts are reflective of the Bush administration's attitude toward workplace regulation. She said the Bush administration has "[r]epeatedly favored voluntary compliance over enforcement and programs directed at employers over those for workers."

Although Seminario recognizes the problems associated with resource constraints, the real

problem, she says, has been in OSHA's management. In the area of enforcement, Seminario points out Bush's OSHA, unlike previous administrations, "hasn't had high-profile focused initiatives on major hazards." As a result, "There is no sense of overall presence," she adds.

Outlook

Even if a new administration chooses to make worker safety a priority and revitalize OSHA management, resource constraints will still present a challenge. Considering nearly three decades of budget and staffing cuts and sharp declines in the number of workplace inspections, future administrators, however well intentioned, will have difficulty jump-starting progress in improving workplace safety.

Moreover, federal funding is an important signal of our priorities as a nation. The inability of multiple presidents and congresses to consistently fund OSHA at the levels necessary to keep up with emerging hazards and a growing workforce sends the wrong message to the American people — that their safety at work is not a priority.

Endnotes:

All data for fiscal years 1980-2006 are from the Budget of the U.S. Government appendices, fiscal years 1982-2008. 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 years 2007-2008 comes from final versions of appropriations bills passed by Congress and signed by the president (H.J. Res. 20 and H.R. 2764, respectively).

[1] Fatality data and workforce size data are taken from *Death on the Job: The Toll of Neglect*, AFL-CIO, April 2007. Available at: aflcio.org/issues/safety/memorial/doj_2007.cfm

Miner Safety Bill Clears House, Bush Veto Looms

The House passed the Supplemental Mine Improvement and New Emergency Response Act (S-MINER) on Jan. 16. The bill aims to improve mine safety and the responsiveness of the federal government's chief mine regulator, the U.S. Mine Safety and Health Administration (MSHA), in response to the Crandall Canyon mine collapse and other recent disasters. White House officials have indicated President Bush will veto the bill.

The S-MINER bill (H.R. 2768) passed the House in a 214-199 vote, largely along party lines. The bill creates additional federal protections for miners and clarifies provisions of the Mine Improvement and New Emergency Response Act of 2006 (MINER Act), which Congress passed in the wake of the Sago, Aracoma, and Darby mine disasters of 2006.

Rep. George Miller (D-CA), the S-MINER bill's primary sponsor and the chairman of the House Education and Labor Committee, said further improvements to mine safety are needed and blamed the Bush administration for not being more responsive: "Even after these recent tragedies, even after the MINER Act of 2006 was enacted, we continue to see neglect from this Administration."

The bill requires MSHA to tighten federal standards for retreat mining — the controversial technique in which miners remove support pillars in order to intentionally collapse areas of the mine no longer in use. Currently, MSHA must approve retreat mining plans before a mine can engage in the technique. The bill would require MSHA to perform a more thorough review of those plans and perform on-site monitoring of retreat mining to ensure compliance.

Retreat mining was used in Utah's Crandall Canyon mine. In August 2007, the Crandall Canyon mine collapsed, trapping and killing six miners. Days later, three workers were killed during a rescue attempt. Prior to the collapse, MSHA had approved a plan for the use of retreat mining at Crandall Canyon.

The bill would also expand MSHA's ability to deal with mine owners and operators who are in violation of federal regulations. One provision allows the Secretary of Labor to halt production at mines if operators refuse to pay civil penalties. The bill also provides MSHA with the power of subpoena.

The bill also requires MSHA to take interim steps to improve emergency response technologies while permanent regulations, required by the MINER Act, are being finalized. MSHA would have to enhance communications technology that could be used in the event of a collapse while wireless technology is being developed. The S-MINER Act also requires mines to provide miners with breathable air sources (such as air cylinders) while MSHA finalizes regulations on refuge chambers.

The bill aims to reduce the prevalence of black lung, a severe lung disease caused by exposure to coal dust. In the 1960s, growing concern over the disease caused the federal government to act to limit exposure. Progress was made in combating the disease, but recent studies show the reverse is now happening. The S-MINER bill requires mine operators to use better technology for measuring coal dust exposure and cuts in half the federal exposure limit for coal dust.

The bill also calls for a National Academy of Sciences (NAS) report examining the effect that various analytical requirements impose on MSHA regulators. The bill explicitly asks NAS to review the impact of the Regulatory Flexibility Act, the Data Quality Act, White House memos on cost-benefit analysis and risk management, and Executive Order 12866 as amended by Executive Order 13422. The bill asks NAS to "[q]uantify to the extent possible the costs to miners of the aforementioned requirements."

The White House Office of Management and Budget (OMB) announced Jan. 15 that President Bush would likely veto the S-MINER bill if Congress approves it in its current form. OMB states the bill would jeopardize progress currently being made in the implementation of the MINER Act, arguing, "Several of the regulatory mandates in the S-MINER bill would weaken several existing regulations and overturn regulatory processes that were required by the MINER Act and are ongoing."

The United Mine Workers of America (UMWA) called the vote, "A tremendous victory for coal miners throughout America." UMWA President Cecil Roberts also counters OMB's argument,

saying the MINER Act is largely aimed at making improvements after accidents have occurred while the S-MINER Act intends to prevent accidents, injuries, and illnesses.

Roberts also challenged Congress to finish work on the bill despite Bush's veto threat: "President Bush has threatened to veto the S-MINER Act. I say, put it on his desk and make him do it."

The S-MINER bill will now move to the Senate. Sen. Edward Kennedy☼ (D-MA), chairman of the Senate Health, Education, Labor, and Pensions Committee, has expressed support for the bill and said in a statement, "I intend to see that the Senate acts as soon as possible."

Public Interest Board Attempts to Improve Declassification

On Jan. 9, the Public Interest Declassification Board (PIDB) released a report, *Improving Declassification: A Report to the President from the Public Interest Declassification Board*, outlining a series of recommendations to improve the declassification of government information.

The report primarily addresses the challenges posed by Executive Order 12958's requirement to automatically disclose classified information 25 years or older. The report recommends improving the efficiency of the system and respecting the historical importance of documents. Moreover, the PIDB report discusses the need to prepare for future challenges — in particular, the need to archive and review electronic records.

The PIDB was formed in 2000 to create more transparency and greater access to declassified documents, but it was not operational until 2006 because Congress provided no funding for the board until then. For the past two years, the board reviewed the current status of declassification procedures and heard testimony from a number of government agencies and private and public sector experts.

Efficiency

The government's efficiency in releasing documents is severely hampered by the magnitude of requests and documents agencies must process. Executive Order 12958, issued by President Bill Clinton in 1995, requires the release of all classified documents 25 years or older unless a department or agency exempts them from disclosure. The executive order, Freedom of Information Act requests, and Mandatory Declassification Review requests have overwhelmed the limited resources that agencies have committed to preview information for possible disclosure and have created enormous backlogs. Moreover, the National Archives is experiencing difficulty keeping up with the large amount of information that agencies are successfully declassifying.

According to the PIDB report, there were 36.4 million pages declassified over the five-year period from Fiscal Year 2002-2006, as compared to 139.8 million pages in the previous five-

year period (Fiscal Year 1997-2001).

To remedy the situation, PIDB recommends:

- Establishing a National Declassification Program under the Archivist of the United States, a Deputy Archivist for Declassification Policy and Programs, and a National Declassification Center (NDC)
- Requiring the NDC to issue guidelines to govern declassification at all agencies
- Consolidation of control for all declassification activities within agencies into one office
- Recording every declassification decision on a centralized computer system and making the database public within five years

Historical Importance

In the report, PIDB notes that government is missing a notion of the public interest in classified documents and that there is "no common understanding among agencies of what 'historically important' information is, nor any common understanding of how such information can be treated once identified as such." Information that has historical importance is essentially lost in the declassification process and not prioritized, despite the importance of its disclosure.

PIDB recommends:

- Establishing a system for identifying historically important information and giving such documents a higher priority in their release and disclosure
- Creating a board of historians to identify records of likely historical importance
- Requiring all agencies with significant classification activity to create historical advisory boards

The PIDB also makes several recommendations related to modern challenges of information management that government agencies face. For instance, the report recommends improvements on handling electronic records, increasing the resources devoted to declassification, and improving problems related to re-review. Similar to points made for historically important documents, the PIDB report also recommends prioritizing and streamlining the review and disclosure of presidential records.

Declassification, the report notes, is a fundamental aspect of a well-informed citizenry and active democracy. "Without historic understanding, the mistakes of the past are destined to be repeated; the triumphs, unappreciated." The PIDB sent the report and recommendations to President Bush on Jan. 3.

SBU Gets New Letters and Maybe a Better Policy

The Department of Defense (DoD) is finalizing policies to streamline categories used to restrict technically unclassified documents. The new policy to eliminate the multiple agency-specific "Sensitive But Unclassified" (SBU) procedures and replace them with a common set of "Controlled Unclassified Information" (CUI) standards is currently under presidential review.

Since 9/11, federal agencies have been extremely cautious in sharing information with other agencies, the public, and the private sector. The multitude of SBU categories, agency subjective definitions, and unclear disclosure policies create a breeding ground for unchecked government secrecy. Adding to the confusion are category names used at multiple agencies but with different meanings and dissemination standards. For example, the Law Enforcement Sensitive (LES) category is used in ten agencies with different levels of restriction on disclosure. Given that designations do not include an indication of the source agency, it is frequently difficult to accurately determine the correct level of protection information should receive. The goal of the CUI standards is to establish a system that will be simple, "easily understood," and identical across agencies.

Standardizing SBU categories has long been in the making.

- In December 2005, President Bush issued a memorandum specifically directing that SBU procedures be standardized across the government.
- In April 2006, the Government Accountability Office issued a report that highlighted the lack of consistency both within and among agencies.
- In April 2007, Information Sharing Environment (ISE) program manager Amb. Thomas E. McNamara testified before Congress that over 100 SBU categories exist, many redundant and/or contradictory.
- In December 2007, the ISE issued a memorandum to prepare government officials for this administrative overhaul.

The focus thus far has been on eliminating inefficiencies and enabling smoother government operations with little concern for public access to the information. An overhaul of the SBU procedures could also greatly increase the public's access to information previously withheld from the public because of confusion and uncertainty over the handling of SBU information. The lack of clarity about disclosing SBU information has caused agencies to be overly conservative, restricting many documents unnecessarily. Though not mentioned in government information sharing plans, the new CUI standards could correct some of these problems.

President Bush is expected to approve the new policy shortly.

Supreme Court Asked to Hear Challenge to New FEC Rule on Issue Ads

In December 2007, Citizens United, a 501(c)(4) organization, filed a lawsuit against the Federal Election Commission (FEC) in the U.S. District Court for the District of Columbia claiming that television ads for its film, *Hillary: The Movie*, should not be subject to donor disclosure requirements under FEC rules. On Jan. 15, a three-judge panel ruled against the group. The organization has since asked the U.S. Supreme Court to consider its case. The suit is a response to the FEC's new rule implementing the Supreme Court's *Wisconsin Right to Life* (WRTL) decision that allows genuine issue broadcasts to air in the period before federal elections.

The Citizens United suit contends that its ads for a film about Sen. Hillary Clinton☼ (D-NY) are purely commercial, that the film itself is no different from documentaries seen on television, and that it should be exempt from any type of regulation. Additionally, the group argues that FEC donor disclosure and disclaimer requirements are unconstitutional as applied to its three advertisements for the movie.

The FEC issued a new electioneering communications rule defining exemptions from the general ban on corporate funding for broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary, in order to comply with the WRTL decision. The rule allows broadcasts of genuine issue ads but requires disclosure of donors who contribute $1,000 or more to pay for the ads. It also requires a disclaimer as to who is responsible for the ad content. The rule also includes an exemption for commercial messages.

The district court rejected two major arguments put forward by Citizens United. First, the court ruled that the group could not run ads for its film without complying with the donor disclosure requirements. The court said 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." In addition, they 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." The three-judge panel said the film does not address legislative issues but criticizes Clinton's positions and record, comparing her to "a European Socialist." Consequently, the film and its ads were deemed "electioneering communications."

The Associated Press detailed the exchange in the court room: "What's the issue?" asked Judge A. Raymond Randolph. Citizens United attorney James Bopp replied, "That Hillary Clinton is a European Socialist. That is an issue." Judge Randolph further responded, "Once you say,

'Hillary Clinton is a European Socialist,' aren't you saying vote against her?" Bopp disagreed because the movie did not use the word "vote."

Citizens United has filed a notice with the U.S. District Court that it will be taking its challenge to the Supreme Court. They have asked for an expedited decision, requesting the Court consider the case at its Feb. 15 conference so that the group could air the ads during the election season if the Supreme Court rules in its favor.

Primary Season Generates Complaints about Church Engagement in Partisan Activities

The 2008 presidential campaign is in full swing, and so is the debate over what charities and religious organizations can say or do without violating the tax code's ban on partisan electoral activity. The Internal Revenue Service (IRS), which enforces the law through its Political Activities Compliance Initiative (PACI) program, has already received numerous requests for investigations, and one church has challenged it to investigate a 2006 sermon. The controversy reflects a healthy interest in public affairs within the nonprofit sector, as well as an unhealthy uncertainty about what is allowed in many election-related activities.

The Texas Freedom Network (TFN), a government watchdog group that promotes religious freedom, has asked the IRS to investigate whether a private foundation, the Niemoller Foundation, improperly funded the Texas Restoration Project's efforts to mobilize members of conservative Christian churches in Texas to support Gov. Rick Perry's (R) reelection campaign in 2006. According to the TFN press release, the Texas Restoration Project held six "Pastors' Policy Briefings" in 2005 with "thousands of pastors and their spouses" present "at a time when Republicans Sen. Kay Bailey Hutchison☼ and state Comptroller Carole Strayhorn were considering seeking their party's nomination for governor. They sponsored a seventh event to celebrate Gov. Perry's inauguration in 2007. Gov. Perry spoke at all seven 'briefings.' No other candidates or potential candidates for governor in 2006 received invitations to speak."

The TFN press release also states that "before the gubernatorial election in November 2006, the Texas Restoration Project sent e-mails to pastors on its mailing list, encouraging them to participate in a statewide conference call . . . to 'discuss what we can do this election cycle to motivate our pews to vote their values.'"

Similar initiatives are occurring elsewhere, modeled after the Texas Restoration Project's efforts. For example, the Florida Renewal Project planned a series of "pastors' policy briefings" in advance of Republican primaries in several states, including South Carolina, California, and Florida. The South Carolina Renewal Project and Iowa Renewal Project have also hosted speeches by Republican presidential candidate Mike Huckabee, and he is the only presidential candidate to speak at any of the pastors' briefings. In a 2007 Revenue Ruling, the IRS made it clear that charities and religious organizations must give all candidates an equal opportunity to appear at events they sponsor.

In another allegation of partisan activity, Americans United for Separation of Church and State (AU) has asked the IRS to investigate a Nevada church for a possible endorsement of Democratic presidential candidate Barack Obama. According to the AU press release, "Obama spoke during services at the Pentecostal Temple Church of God in Christ in Las Vegas on Jan. 13 in what the *Las Vegas Review-Journal* described as a 'surprise appearance.'" Obama's appearance occurred six days before the Nevada caucuses. Pastor Leon Smith told the congregation, "If you can't support your own, you won't get anywhere. . . . The more he [Obama] speaks, the more he wins my confidence, and . . . if the polls were open today, I would cast my vote for this senator." Whether or not these statements amount to an endorsement that violates the law depends on how the IRS interprets the "facts and circumstances" test of the case.

After numerous accusations of improper partisan activity, one church has decided to challenge what it feels are unnecessary and mistaken IRS constraints on pastors. The Calvary Assembly of God Church, in Algoma, WI, ran an advertisement in *The Wall Street Journal* written in the form of an open letter to the IRS declaring, "We're writing today to call your bluff," challenging the IRS to investigate the church and a November 2006 sermon for possible campaign intervention.

The ad was paid for by the Becket Fund for Religious Liberty, an interfaith, public-interest law firm. The Becket Fund's National Litigation Director said the law firm is basing its legal arguments on the church autonomy doctrine, which prohibits states from interfering with the way a church is governed. They charge that the IRS is misinterpreting federal tax law to censor sermons about political figures and political issues. The Becket Fund's press release argues that "clergy speaking to their congregations is not the same as a church, as a legal entity, endorsing a candidate." The press release also has a video of the sermon in question.

The letter references the All Saints Episcopal Church case that ended without the church losing it tax-exempt status despite an IRS finding that they did in fact intervene in the campaign. "But now you've all but admitted that you can't enforce these rules against the All Saints Episcopal Church in Pasadena, California. We're happy to see that, after some hemming and hawing, you finally dropped your offensive investigation into that church."

AU has responded, considering the letter "mocks the IRS and dares the federal agency to investigate his church for a supposedly political sermon he delivered in 2006. . . . the ad is based on inaccurate information and could lead unwary religious groups to violate federal tax law, encounter fines and lose their tax exemptions."

Convictions Based on Publications Raise New Questions for Nonprofits

On Jan. 11, three former leaders of an Islamic charity based in Boston were convicted of tax fraud and making false statements because they did not include a description of their newsletter and its content in their tax-exempt status application and annual Internal Revenue

Service (IRS) Form 990 filings. The prosecution argued that the now-defunct group, Care International, supported jihadist movements in articles in its newsletter and postings on its website. The defense argued that no funds went to jihadist groups and that the leaders were being prosecuted for expressing unpopular political views. The convictions, which could result in prison terms of up to five years, are being appealed. The circumstances of the case, combined with public statements of the prosecutors, raise questions about the free expression rights of nonprofits and the level of detail required when reporting to the IRS.

Care International was formed in 1993 and collected $1.7 million over a ten-year period for "providing assistance to victims of natural and man-made disasters..." The criminal case began in May 2005 with an indictment charging Muhamed Mubayyid and Emadeddin Muntasser with concealing material facts from the IRS, conspiring to defraud the United States, filing false tax returns, and making false statements to the FBI. A third defendant, Samir Al-Monia, was charged later. The factual basis of the charges was that the group raised funds for publications supporting jihad, as well as its humanitarian operations, and that it concealed the fact that it was an outgrowth of another nonprofit, Al-Kifah, whose Brooklyn branch had been linked by the media to the World Trade Center bombing in 1993. The defense argued that the Boston branch of Al-Kifah was separate and that the defendants started Care to break away from the New York group.

Although the prosecutors spoke broadly that Care used its funds to "support" jihad, the only evidence they presented related to publications, including their newsletter, *Al-Hussam*, which was also the name of Al-Kifah's newsletter. According to a Nov. 28, 2007, *Worcester Telegram* article, prosecutors read lengthy articles from the newsletter to the jury, while the judge frequently warned them that the defendants had the right to hold and publish their views. The convictions were for the technical crime of not informing the IRS that the group would publish such articles. However, in an FBI press release after the conviction, prosecutors made statements that indicate their motivation in bringing the case was to discourage such publications. U.S. Attorney Michael J. Sullivan said, "Today's convictions should be a warning to organizations or persons who intend to fund their support of any militant organization or goal, including mujahideen and jihad, by abusing our nation's tax laws, that they will be proactively investigated and prosecuted to the fullest extent of the law."

The *Worcester Telegram* reported that on Jan. 18, Judge F. Dennis Saylor, who presided over the trial, disputed the government's claim that the case was about terrorism, saying there was no evidence of terrorism presented in the trial. During the trial, Judge Saylor banned references to terrorism and repeatedly reminded the jurors that the case was about tax fraud. The judge later heard arguments on whether to release the defendants on bail until their sentencing and said there would be a decision soon.

The case leaves open the question of when a nonprofit could be prosecuted for advocating views the FBI deems "militant." Charities and religious organizations are not limited to providing services to qualify for tax exemption under Sec. 501(c)(3) of the tax code. In fact, 26 D.F.R. 1.501(c)(3)-1(d)(2) explicitly states that:

[t]he fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) …."

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

Combined Federal Campaign #10201