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Sunset Commission Bill Imminent

A sunset commission bill could arrive this week, if House leadership sticks to its previously announced plans.

As OMB Watch reported [earlier](#), House leaders intended to hold a vote on sunset commission legislation within the first couple of weeks of returning from the July 4 recess.

With Congress back in session, that promise means that a sunset commission bill should be introduced some time this week. [Several bills](#) have been introduced already, but House Majority Leader John Boehner has been leading negotiations with proponents of those bills to develop a compromise package that will enjoy the [previously guaranteed](#) floor vote.

Among the details yet to be known is whether the final bill will exempt any programs from the sweep of a sunset commission. [Earlier reports](#) suggested that excluding the Department of Defense was a point of contention in the Boehner-led negotiations.

Scattered reports have suggested as well that the final bill could go straight to the House floor, bypassing the committee process.

Congress to Limit Public Participation in Forest Service Decisions

After courts in California and Montana struck down Forest Service rules that limited public participation in certain logging decisions, the Senate has added language to an appropriations bill that would reinstate those rules.

Forest Service Acts to Limit Public Participation

Under the guise of limiting forest fires, the Forest Service issued a series of regulations in the summer of 2003 that [created categorical exclusions](#) for four types of logging projects. This allowed the Forest Service to avoid the environmental assessment and impact statement requirements of the National Environmental Policy Act (NEPA) for land management decisions involving those categorically excluded projects. The regulations also allowed the Forest Service to avoid the public notice, comment, and administrative appeal requirements of the [Forest Service Decisionmaking and Appeals Reform Act \(ARA\)](#).

Under the NEPA, agencies are required to assess the environmental impact of federal projects. The act, however, does allow agencies to exempt projects deemed to have an insignificant effect on the environment. The Forest Service regulations significantly expanded the number of logging projects that fall under the categorical exclusions. Environmental groups warned at the time that the exclusions could serve as a backdoor to increased logging.

"This clears the way for the timber industry and its friends in government to loot public forests and pocket the proceeds, free from public input or environmental review," [said Amy Mall](#), a forest and land specialist at the Natural Resources Defense Council. "Make no mistake - this is not about healthy forests. It's about healthy profits for campaign contributors and healthy budgets for bureaucrats."

Courts Reject Limitations to Public Notice, Comment, Appeal

Prompted by litigation brought by environmental groups, courts in both Montana and California upheld the categorical exclusion of logging projects from environmental review. The courts, however, did rule that the Forest Service had improperly exempted land management decisions from the public notice, comment, and administrative appeal

requirements of the ARA.

Courts have invalidated the following controversial rules:

1. a rule declaring that land management decisions categorically exempted from NEPA would be further exempted from ARA appeal, *see Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1004-05 (E.D. Cal. 2005);
2. a rule declaring that land management decisions signed directly by the Secretary or Under-Secretary of Agriculture are transformed into some other category of agency business and excluded from ARA notice and comment, *see id.* at 1005-06; and
3. a rule limiting ARA administrative appeal rights to people who submitted "substantive written or oral comments" during NEPA comment periods, without regard for the ARA's extension of appeal rights to commenters as well as people "involved in the public comment process . . . by otherwise notifying the Forest Service of their interest," *see Wilderness Society v. Rey*, Civ. No. 03-0119 (D. Mont. April 24, 2006).

Congress to Reinstate Forest Service Regulations

In reaction to the court decisions, the Senate is moving to add language to the appropriations bill for the Department of Interior and Related Agencies ([H.R. 5386](#)) that would restore the exemption from notice, comment and appeal for all projects categorically excluded by an agency. The Senate language was approved in subcommittee on June 27. If the language survives the Senate floor, remains through conference and is enacted into law, the public will be stripped of its ability to comment or appeal logging decisions deemed insignificant by the Forest Service.

Senate Will Hold Hearing on Federal Spending Transparency

A Senate hearing has been scheduled for July 18 to discuss the need for publicly available information surrounding federal spending and how the [Federal Funding Accountability and Transparency Act \(S. 2590\)](#) will create this transparency.

Sen. Tom Coburn (R-OK), the chairman of the Subcommittee on Federal Financial Management, Government Information, and International Security, announced the hearing to focus on legislation he introduced with Sens. Barack Obama (D-IL), Tom Carper (D-DE), and John McCain (R-AZ). The bill would require the Office of Management and Budget (OMB) to ensure that a single searchable website provide free public access to information about contracts, grants, loans, and other forms of federal assistance.

Coburn and Obama are rumored to be working with OMB to strengthen the bill. One

controversial provision still being debated deals with collecting grant and contract information from sub-recipients. Currently, the federal government does not collect information about sub-grants or most subcontracts. Increasingly, federal grants are going to intermediary groups that re-grant funds, as is the case with many faith-based grants. Tracking subgrants would increase accountability; however, to do so would also be extremely difficult. State and local governments, which receive the largest share of grants, commingle federal funds with their own, making it difficult, if not impossible, to track sub-recipients. How Coburn and Obama will resolve this issue remains unclear.

Information about federal spending is largely divided into two government databases. The Federal Assistance Award Data System (FAADS) provides information supplied by federal agencies regarding most types of federal spending. FAADS, however, does not include federal contracts and expenses within the federal government, such as spending for salaries. The Federal Procurement Data System (FPDS) provides access to information supplied by most federal agencies regarding federal contracts. Unfortunately, both databases have serious deficiencies and neither provides comprehensive information as some agencies are not required to report.

The Census Bureau provides FAADS data for free in quarterly downloadable files. While it is easy to download these files, it is very difficult to search within them for specific information. Users must have significant computer expertise and resources to access one quarterly file, let alone multiple quarters.

The FPDS data was administered by the General Services Administration until 2003, when the agency awarded a five-year, \$24.3 million contract to [Global Computer Enterprises Inc.](#) of Reston, Virginia, to replace an antiquated procurement data collection system starting in 2004. The new system, called FPDS-NG (NG is for Next Generation), seems to focus primarily on providing an electronic vehicle for reporting and integrating agency procurement systems. Little to no emphasis appears to have been placed on public access to the data.

Access to information about federal spending has been gaining attention recently. The House has passed a bill that calls for an online, searchable database of federal assistance, but not federal contracts. According to [The New York Times](#), Rep. Thomas Davis (R-VA), a sponsor of the House bill, justified not addressing public disclosure of contracts in his bill by claiming that contracts are "more self-policing" and less "susceptible to abuse" than grant, because they are "awarded in a much more competitive environment."

Interestingly, OMB Watch analysis found that, in Fiscal year 2004, 53 entities received grants or cooperative agreements worth \$152.2 million in Davis' congressional district. In that same year, 899 entities received \$3.9 billion in contracts in his district and of those contract dollars at least \$670 million was awarded without competitive bids. In fact, Davis' district is among the top 10 recipients of contract dollars but receives a relatively small share of federal assistance awards (e.g., grants, loans).

Maybe if such data were publicly available, comments from politicians, such as those from Davis, might have more context.

Senators 'Holds' EPA Nominee to Protest Cuts to Pollution Reporting

New Jersey Sens. Frank Lautenberg (D) and Robert Menendez (D) have placed a hold on a Bush administration nominee to protest a set of Environmental Protection Agency (EPA) proposals to dismantle the Toxics Release Inventory (TRI). Last year, EPA proposed significant cuts to the TRI program, our country's most complete inventory of toxic pollution, that would according to [Lautenberg](#), "deny thousands of communities - including 160 in New Jersey - full information about the release of hazardous toxic emissions in their neighborhoods."

Voicing outrage over EPA's proposals, the New Jersey senators have placed a hold on Molly O'Neill, the Bush administration's nominee for EPA Assistant Administrator in charge of the Office of Environmental Information (OEI) - the office in charge of the TRI program. The OEI position has been vacant since January 2006, when Kimberly Nelson left the position. O'Neill was nominated March 27. The Senate Environment and Public Committee then held a [May 17 confirmation hearing](#) to consider O'Neill's qualifications, during which several members of the committee questioned O'Neill about EPA's proposals to weaken TRI reporting and raised their concerns about the cuts.

In September 2005, EPA announced three proposed changes to the TRI program that would allow industry to: (1) release ten times the amount of toxins before detailed reporting is required; (2) withhold information on Persistent Bioaccumulative Toxins (PBTs), like lead and mercury; and (3) report every other year, instead of annually.

The agency's plans immediately raised controversial, because, for nearly 20 years, the TRI has been the essential tool in alerting emergency responders, researchers, workers, public health officials, environmentalists, community residents, and federal and state officials to the presence of toxic chemicals.

The TRI changes has faced growing public opposition. The agency has received more than 122,000 public comments on the proposals - all but a handful of which strongly oppose EPA's plans. Officials and agencies from at least 23 states have also weighed in with the agency claiming that the TRI proposals would damage states' abilities to track pollution, set environmental priorities, and protect public health and the environment.

"This shift in policy is just plain wrong and reckless, which is why we are placing a hold on this nominee," states Menendez. "New Jersey communities have a right to know about pollutants released into their air, their soil, and their water. Once again the Bush administration is abandoning its responsibility to protect Americans. The Bush

administration may side with toxic polluters, but we won't."

Coincidentally, the day after O'Neill's confirmation hearing, on May 18, the House accepted an amendment to the Interior Appropriations bill that would block EPA from moving forward on the TRI changes. The House voted 231 to 187 in favor of the Pallone-Solis Toxic Right-To-Know Amendment, which would bar EPA from spending any money to finalize the proposals. There has been widespread speculation that a similar amendment will be proposed to the Senate version of that appropriations bill.

Placing a hold on a nominee, such as O'Neill, is part of the Senate's unwritten code in which a Senator indicates that a filibuster may await the nominee if brought to the floor for a confirmation vote. Such holds, especially those that involve more than one senator, often effectively block the nominee from being considered for confirmation by the full Senate. Instead, there are often behind-the-scenes negotiations to remove the hold. In this case, the two New Jersey senators are very clear on what it would take to remove the hold: drop the EPA proposals to cut the TRI program.

With the Senate expected to be in recess for most of August and October, the president could do a recess appointment. While such appointments are temporary, they avoid the necessity of a Senate confirmation vote.

FOIA's 40th Anniversary - Bigger Backlogs and Poor Planning

This July 4th marked the 40th anniversary of the Freedom of Information Act (FOIA), signed into law by President Lyndon Baines Johnson. Open government advocates marked the occasion by releasing two reports that simultaneously underscored the importance of FOIA 40 years later and the need for improved agency procedures.

Forty years ago FOIA established the public's right to access government information, however, as OpenTheGovernment.org notes, "from its inception the implementation and usability of the Freedom of Information Act have been matters of concern." In response to increasing pressure to relieve agency backlogs and improve FOIA procedures, President George W. Bush issued [Executive Order 13392](http://ExecutiveOrder13392) on Dec. 14, 2005. The order required, among other things, that agencies develop a plan to improve FOIA procedures, reduce backlogs, and increase public access to highly sought-after government information.

In its [review](#) of the recently released FOIA improvement plans, OpenTheGovernment.org found that "many of the improvement areas were either not addressed or rated as poorly addressed." The Securities and Exchange Commission and the Office of Management and Budget plans received the worst ratings and, of the 27 identified improvement areas, failed to address 24 and 22, respectively. Generally, reviewed agencies and offices

produced reports focused on a narrow set of problems and only explored short-term solutions with little effort to consider larger issues or longer term improvements.

The [Coalition of Journalists for Open Government](#) found that although FOIA requests were down in 2005, the backlog of unanswered requests rose from 20 percent of total requests made in 2004 to 31 percent in 2005. In addition to the increase in unanswered requests, requesters had to wait longer for replies. The worst median response time for complex FOIA requests was within the Department of Agriculture which had an average response time of 1,277 working days. The median response time of the Securities and Exchange Commission doubled from the previous year to 410 working days.

The increasingly dire state of FOIA procedures and backlogs across government agencies and the inadequacy of improvement plans may inspire Congress to resume consideration of FOIA improvement legislation. In February 2005, Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) introduced the [Openness Promotes Effectiveness in Our National \(OPEN\) Government Act of 2005 \(S. 394\)](#), aimed at strengthening FOIA.

"This bipartisan legislation will help to ensure an open and deliberate process in Congress, by providing that any future legislation to establish a new exemption to the federal Freedom of Information Act must be stated explicitly within the text of the bill," Cornyn stated at the time the legislation was introduced.

Then in March 2005, another bill sponsored by Cornyn and Leahy, the [Faster FOIA Act of 2005](#), was reported favorably out of committee that would appoint a commission to study backlog problems and possible improvements of agency procedures.

These new reports may provide ammunition to critics of Bush's FOIA executive order, many of whom believe it to be window dressing to a serious problem that may have killed momentum for the Cornyn-Leahy legislation. Critics have also argued that the executive order cannot significantly improve FOIA, because no new resources were given to the agencies to help them speed up FOIA processing. The two reports appear to validate the critics' contention that, without additional resources, attempts to make government more transparent will be next to impossible.

Employees Weigh in to Save EPA Libraries

Presidents of 17 Local Unions representing more than 10,000 U.S. Environmental Protection Agency employees [wrote to Senate appropriators](#) on June 29 to protest deep cuts to EPA funding that would close the agency's libraries. The letter urges Congress to reinstate full funding to EPA libraries and explains how the cuts will impede EPA's ability to respond to public health, enforcement and homeland security emergencies and restrict public access to vital health and safety information.

President Bush's budget proposal released in early February included a whopping 80

percent slash in EPA's library budget from 2006 funding levels, dropping it from \$2.5 million to only \$500,000. In response to the cuts, EPA appears to be developing a plan to close the agency's Headquarters library and discontinue the Online Library System, an electronic catalogue, without which regional libraries will be unable to locate individual holdings. The [EPA materials](#) obtained by Public Employees for Environmental Responsibility (PEER) also consider the closing of other regional libraries or significantly reducing services.

EPA officials have repeatedly stated that the agency has made no decisions about the library budget situation. But according to the June 29 letter, the proposed cuts have already affected EPA library services in as many as 19 states. The unions maintain that "the dismantling of EPA libraries is already underway, without a coherent plan in place."

Proponents of the \$2 million budget cut claim that library closures will promote efficiency, and that electronic access to the same information that the libraries provide will be maintained. However, in their letter, EPA staff claim that "nothing could be further from the truth," noting that EPA's repository of electronic documents, called the National Environmental Publications Information System, only holds about 13,000 documents, while the Agency has about 80,000 documents that should be retained. The EPA has not announced any plans to convert the nearly 67,000 paper only documents to an electronic format.

The letter also notes that contrary to claims that the budget cut is a necessary cost saving measure, a Nov. 2005 cost-benefit analysis done by the agency concludes that shutting libraries will actually lead to a much larger financial burden for EPA. [Business Case for Information Services: EPA Regional Libraries and Centers](#) found that EPA's library network saved more than 214,000 hours of EPA staff time, at a cost savings of approximately \$7.5 million.

The library budget cuts will only become final if the Senate passes its Interior appropriations bill, which allocates funding for the EPA, with the library budget cut. If Congress chooses to it may alter President Bush's budget proposal and more fully fund the agency's libraries, which is what the EPA union letter called on Senate Appropriations Committee staff to do. After the House passed the Interior appropriations bill with the President's library funding cut on May 18, the Senate became the last resort for preserving the EPA's library resources.

The Senate Interior Appropriation Committee passed the Interior Appropriation Bill out of committee without reinstating the library budget. However, the bill may still be modified on the floor when the full Senate votes on the legislation. If the Senate did increase the library funding, such a provision would also need to make it past the conference process, by which differences between House and Senate bills are resolved.

Reports Show the Good and Bad in Agency Classification Procedures

Continuing its study of classification procedures, the Government Accountability Office (GAO) released two reports, one focusing on the [Department of Defense \(DOD\)](#) and the other on the [Department of Energy \(DOE\)](#). The reports offer a stark contrast, bemoaning DOD's "lack of oversight and inconsistent implementation" of classification policies, while praising DOE's "systematic training, comprehensive guidance, and rigorous oversight."

Previously, in [Managing Sensitive Information](#), GAO found that both departments lacked clear policies, oversight, and training on handling sensitive but unclassified information. When it comes to procedures pertaining to classified information, however, the departments diverge markedly.

GAO concluded that DOE "had a largely successful history of ensuring that information was classified and declassified according to established criteria." GAO cited a National Archives' finding that DOE's management of classified information is among the best in the federal government. The agency has extensive classification guides that specify what information is to be classified, how it should be classified and at what level.

The GAO report also takes note of DOE's "extensive and rigorous oversight program." DOE regularly conducts onsite inspections at field offices, laboratories, and weapons manufacturing facilities across the country. DOE reviewed 12,000 documents from 2000 to 2005 and only 20 documents were found to be misclassified.

DOD's handling of classified information, on the other hand, lacks oversight and contains "weaknesses in training, self-inspection, and security classification guide management," according to GAO. The report reviewed a sample of 111 classified documents and found that 26 percent were misclassified. Moreover, of the 19 training programs reviewed, 8 failed to cover "fundamental classification management principles." GAO found that with over 1.8 million personnel possessing security classification authority, DOD suffers primarily from the lack of a centralized oversight process to ensure conformity with agency policy and existing law.

OMB Mid-Session Review Gives Limited Picture Of Budget Crisis

Today, the Office of Management and Budget (OMB) released its annual Mid-Session Budget Review, and has lowered by \$127 billion the projected FY 2006 budget deficit - from \$423 billion estimated earlier this year to \$296 billion. The reduction is attributed to an unexpected rise in corporate and personal income tax receipts and revenues from capital gains taxes. Beneath the increased tax revenue, however, is a frightening reality:

the ever-widening gap between the very rich and the rest of us. Moreover, OMB's lowering of its initial projections is consistent with the White House agency's strategy of predicting drastically over-inflated deficits in order to release revisions that give the appearance of improving fiscal health.

The revised deficit figures are already being spun by the administration as good news and a mandate for their economic policies, but the short-term outlook obscures important facts about budget forecasts, revenue growth, and the long-term health and sustainability of current federal budget policies. Nothing in the new report provides optimism surrounding these concerns or the long-term budget outlook.

The [mid-session report](#) shows that for the first nine months of the fiscal year tax receipts increased by 13 percent, with corporate tax payments increasing 19 percent. Not only have corporate profits skyrocketed, but so have capital gains, which typically result when upper income earners liquidate large assets. Even as the upper end of the income scale prospers, average wages for workers have failed even to keep pace with inflation, [lagging more than 1 percent behind inflation over the last year](#), further adding to growing income disparity in our society.

Budget deficits, while not always easy to pinpoint, can be predicted with some measure of accuracy. OMB is but one of several offices within the federal government that make such projections, and its predictions of the annual deficit earlier this year differed greatly from those of other analysts. In March, the [Congressional Budget Office predicted](#) a \$336 billion deficit for FY 2006, much more in line with private analysts' expectations than OMB's figures. When compared to CBO's projection, OMB's unexpected \$127 billion in extra revenues is actually only a \$40 billion "surprise."

OMB's failure to accurately predict the budget deficit this year is far from a one-time occurrence. Over the last several years, OMB has made it a practice to play an artificial expectations game in its budget analysis. The current review is the latest example of the Bush administration overshooting budget deficits and then announcing, with much fanfare, that the deficit will be less than originally projected. The news is then used as evidence to support the president's misguided economic policies.

At the beginning of 2004, OMB projected a \$521 billion deficit for [FY 2004](#), and Bush was pleased to announce later that the deficit was only \$412 billion at year's end. The next year [a similar situation occurred](#): OMB forecast a \$427 billion deficit, but later, when it became apparent that the projection was unrealistic, the president announced that the deficit would be only \$318 billion for [FY 2005](#). In both instances, the president mistakenly gave credit for the improved outlook to his tax cutting policies.

When discussing his fiscal policies and the federal budget deficit, President Bush often omits critical information that belie his claims of national fiscal health. Notably, when Bush announces progress in his quest to ['cut the deficit in half by 2009'](#), he omits two critical pieces of information. First, the deficit that he endeavors to cut in half is wildly-

off-the-mark and just a projection used in OMB's expectations game. The OMB-projected FY 2004 deficit of \$521 billion, for instance, never materialized because the analysis that produced it was deeply flawed.

Second, and perhaps more importantly, Bush consistently fails to mention what happens to the budget deficit after 2009. His [FY 2007 budget](#), released in February, forecasts that the deficit will only be reduced to \$183 billion in 2010, but will increase to \$205 billion in 2011. In other words, the White House has no plan for even coming close to eliminating the budget deficit, and, in fact, the result of Bush policies will create increasing and sustained budget deficits over the long-term.

While a declining budget deficit is certainly a positive development, the short-term picture in OMB's mid-session review obscures a looming budget crisis. When the president or tax cutters in Congress talk about budget deficits, they usually refer to the "[unified budget deficit](#)." In short, the unified budget deficit refers to the difference between how much the government spends and how much revenue it brings in through taxes, fees, and other sources.

This deficit includes extra money brought in by payroll taxes collected to fund the Social Security trust fund in the future. Money from the fund is loaned to the federal government, which will need to pay back the loan when funds are needed to pay Social Security benefits to retiring Baby Boomers. By invoking budget figures as defined by this method of accounting, the president omits [\\$170 billion in deficit spending](#) - the money brought in this year for the Social Security program that must eventually be paid back. So, when the president's budget heralds a \$318 billion deficit, he is actually boasting about a \$488 billion deficit.

The federal budget is on an unsustainable track and our nation's long-term fiscal outlook, rather than looking brighter, is actually growing dimmer. Although OMB and the president will trumpet the positive news about short-term budget prospects, they obscure or outright hide several important facts in their discussions of the deficit. Erroneous and overtly simplistic assertions about the relationship between tax rates and economic expansion, glib talk about revenue "surprises", and convenient omissions of the long-term fiscal outlook do nothing to motivate solutions to fixable deficit problems.

The current policies that have created structural deficits endanger the ability of the government to repay its obligations right now, but especially in the future. The longer this administration puts off straight talk about the budget and the deficit, the more daunting future challenges will be.

Congress Running Out of Time for Approps Work

Lawmakers returned to Washington on Monday after a week-long 4th of July break. Both chambers of Congress are far behind in their work for the year and appear to lack

momentum toward completing contentious legislation, including immigration and pension reform, additional tax cuts, and budget process changes. This already nearly guarantees that a continuing resolution (CR) will be necessary for funding the federal government after the start of the fiscal year on Oct. 1, and that this Congress will then need to return after the November elections to wrap up essential legislation before the next Congress convenes.

While Congress has usually waited until September to declare dead the chances of completing must-pass appropriations bills on time, rumors have circulated all year long about the need for continuing resolutions and a post-election lame duck session. These rumors could be due to the extremely short length of this legislative session - [among the shortest](#) in the modern history of Congress. Yet the shortened session aside, this Congress has been particularly inept at finishing what should be its top priority - appropriations bills.

With just seven weeks left until the targeted adjournment for the year, the Senate has yet to pass one appropriations bill. In fact, the Senate appropriations committee has approved [only half of its 12 bills](#) for the year so far.

The \$31.7 billion Homeland Security appropriations bill is scheduled for floor debate in the Senate this week, and debate is expected to take at least a full week as Senators prepare a host of amendments to add funding for border, port, and rail security. The bill is already \$715 million over the president's requested funding level and \$1.5 billion more than the amount enacted for FY 2006. Republican leaders in the Senate hope to keep the focus on military and security spending for the rest of July by bringing the Defense and Military Construction appropriations bills to the floor later this month, following their approval in committee.

While these bills are more likely to be completed before the start of the fiscal year, the outlook for the remaining appropriations bills is far less clear. If the Senate can complete those three defense-related spending bills by the end of July - no small feat - nine bills would still need to be finished in the Senate and then conferenced with the House, and there'd be just one month to do so.

Moreover, those three bills are among the least controversial of the group. The Labor-HHS-Education bill - the only bill yet to be passed by the House - contains a divisive increase to the minimum wage to be phased in over the next two years and has encountered intense scrutiny by members of both chambers to the total amount of funding for the bill. The Transportation-Treasury bill has contentious provisions such as funding for Amtrak and a pending congressional pay raise and usually one of the most benign bills - the Legislative Branch bill, which appropriates funding for Congress - has run into opposition.

Because of the limited time remaining in the legislative session, and conflicts and controversies over funding in many of the appropriations bills, the Senate may decide to

add a continuing resolution to the Defense appropriations bill this month. This unusual step may be necessary to assure the passage of a CR in the divided political environment of an election year. Congress would then need to return after the November election to finish the appropriations bills before the CR runs out.

This CR would, in all likelihood, under-fund government programs by continuing current funding levels without adjusting for inflation. It could also include an across-the-board cut in discretionary spending - a popular device touted as a fiscal control that in reality saves very little money.

Regardless of the tactics used moving forward, the budgeting process of Congress is clearly on the verge of breakdown. With legislators spending so few days in session actually working, it's no wonder they cannot complete in a timely manner their most essential work: that of funding the government through appropriations.

Report Finds IRS Program Could Hamper Free Speech for Organizations

A new OMB Watch [report](#) finds fault with the Internal Revenue Service (IRS) program to enforce the ban on partisan activities by charities. The report's most serious findings suggest that the IRS's Political Activities Compliance Initiative (PACI) threatens the constitutional rights of nonprofit organizations and churches to speak out on issues of the day. It also suggests that the IRS exaggerated the extent of noncompliance in an agency report on its enforcement efforts in 2004. Finally, the potential for abuse of the program in order to harass or retaliate against an organization is of concern during the upcoming election season.

The report raises questions and issues about the IRS enforcement initiative. It summarizes the new PACI procedures that apply to the 2006 election season and beyond, as well as the new IRS Fact Sheet 2006-17, which provides guidance on voter mobilization, individual activities by leaders, voter guides, candidate appearances, issue advocacy, business activity, web sites and combined activities.

Because IRS investigations are confidential few details are known about their examinations of political activities. But some organizations under investigation or people that file complaints with the IRS have disclosed information about their specific cases. A special supplement to the report provides details of ten known cases, including the NAACP, gathered from news reports and complaints.

Questions and issues raised include:

Vagueness of the Facts and Circumstances Test and the Reasonable Belief Standard
Charities, educational institutions, and religious organizations are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to,

any candidate for public office. But tax law lacks clear rules defining prohibited intervention in elections, instead considering the "facts and circumstances" of each case.

Is the Political Activities Compliance Initiative a Solution in Search of a Problem?

The answer is far from clear. IRS statements exaggerate the level of noncompliance by charities and religious organizations. The IRS claimed 74 percent of cases investigated involved violations, a figure based only on cases that were not dismissed after two rounds of investigation. A closer look at the IRS data reveals a very different picture. In all, no violation was found in 64 percent of all completed investigations.

Is the IRS Program Effective Enforcement or an Unconstitutional Infringement on Speech?

Several factors, when taken as a whole, raise constitutional concerns around the PACI program:

- the vagueness of the "facts and circumstances" test
- secrecy regarding enforcement action
- IRS statements regarding its intent to prevent repeat violations before an election
- the threat that an organization's tax-exempt status will be revoked
- lack of deadlines for closing cases

Uneven Enforcement and Harassment Issues

A lack of transparency creates confusion and uncertainty about the enforcement process. Section 6103 of the tax code protects the privacy of individual charities and religious organizations. It also has prevented the IRS from adequately informing the public of the agency's interpretation of the law. Absent a bright line test, the most useful information for avoiding noncompliance comes from details of specific cases.

So far what has come to light raises concern about unevenness in how the IRS treats similar fact situations. Also, publicity around the PACI program could lead to a flood of retaliatory and harassment complaints in the 2006 election year, unless the IRS develops standards to screen out such abuses of its procedures.

Sanctions: Should the Law be Changed?

IRS staff has recommended changes in the law that would provide them with more enforcement options. But what sort of legislative modifications are anticipated? No specific proposals have been made public. Congress could devise a bright line test, add intermediate sanctions, such as advisory letters, to the IRS enforcement tool box, or both.

The conclusion and recommendations notes that the IRS's new approach to enforcement could hamper nonpartisan issue advocacy and voter education and mobilization efforts and identifies the lack of a bright line rule defining what is partisan and what is not as a major problem.

Nonprofits File Suit Contesting Ohio's New Voter Registration Requirements

A coalition of organizations and individuals have filed suit to stop new voter registration rules in Ohio, charging they are designed to suppress the registration of minority and economically disadvantaged voters.

The organizations are requesting an injunction to prevent rules established by Ohio Secretary of State Kenneth Blackwell from being implemented. In the [complaint](#), the groups argue that the new rules will be burdensome on volunteers who register voters and may have a chilling effect on the ability of nonprofit organizations, such as Project Vote, Common Cause, and the People for the American Way, and their volunteers to register new voters.

At issue are procedural requirements for the return of the voter application forms and a new interactive training program. Specifically, the organizations charge that the [rules](#) require any "compensated worker" to return voter registration forms directly to the Ohio Secretary of State or Board Elections Office. Failure to do so is a felony punishable by six to 18 months in jail.

On June 14, the rules were revised to allow return to the Secretary of State by mail, but forms must still be sent by the person that registered the voter, not an organization sponsoring a voter registration drive. Critics argue that the requirements make it difficult for the third-party group organizing voter registration activities to double-check forms and keep necessary records. Additionally, although the new requirements apply only to compensated workers, the rules do not define "compensation." According to the [Toledo Blade](#), groups like the League of Women Voters of Ohio fear that the failure to define "compensation" will discourage volunteer efforts because potential volunteers may think "compensation" could include drinks, t-shirts, or food.

Another of the organization's major concerns is a [requirement](#) that voter registration workers complete an individualized online training program. The regulations provide no alternative to completing the training online, making it difficult to train workers in poorer, disadvantaged neighborhoods with little or no access to the Internet.

In the suit, the organizations claim the rule has already begun to hinder their voter registration efforts. According to the [Plain Dealer](#), Donita Judge, staff attorney with the Washington-based Advancement Project, argues that, "the effects of the law and rules disproportionately affect voter registration drives in minority communities, where many residents don't have transportation, lack the technological skills to register online and are, in some cases, functionally illiterate."

The rules stem from Ohio House Bill 3, passed by Ohio's state legislature and signed by

Gov. Bob Taft in January, intend to create strict procedures for registering voters. The new rules were upheld in a party-line vote by the state's Joint Committee on Agency Rules Review (JCARR), which, according to [Patrick Cramer](#) of Ohio State's Moritz School of Law, cannot alter the proposed rule, but can instead recommend to the General Assembly that it invalidate the rule.

Catholic Group Responds to IRS Complaint By Forming New Group

A Catholic anti-abortion group, Catholic Answers, recently announced it will form a new organization, [Catholic Answers Action](#), after a 2004 complaint filed with the Internal Revenue Service (IRS) claimed its Voter's Guide for Serious Catholics was a partisan intervention in that year's election. The new group is a social welfare organization exempt under 501(c)(4) of the tax code, and is not subject to the ban on partisan activity that applies to charities and religious organizations under section 501(c)(3). It intends to publish a similar 2006 version of its voter guide.

The 2004 complaint was filed by [Catholics For a Free Choice \(CFFC\)](#), citing an August 2004 ad sponsored by Catholic Answers in *USA Today* that urged readers not to consider voting for candidates who were on the wrong side of five 'non-negotiable' issues. The ad also sought tax-deductible contributions to support distribution of the guide. A [CFFC press release](#) announcing the complaint noted that Catholic Answers founder Karl Keating also engaged in electioneering by targeting presidential candidate Sen. John Kerry (D-MA) in the group's e-newsletter. Keating is quoted as saying Kerry "flunks the test given in Catholic Answers' Voter's Guide for Serious Catholics: He is wrong on all five 'non-negotiable' issues listed there."

In April Keating posted a [letter](#) on Catholic Answers Action's Website announcing the formation of the new group, maintaining his group was "forced to start it" because of the IRS complaint filed by Catholics For a Free Choice. He noted that, "For more than a year her [Frances Kissling, CFFC president] complaint has been wending its way through the IRS, which has been sending us loads of interrogatories to answer."

Although he denied Catholic Answers had violated the ban on partisan activity, he said the group did not want to cope with the time and expense of further IRS complaints that the 2006 guide would likely generate. As a result, CAA was incorporated in January, with the same board of directors as Catholic Answers. However, Keating's letter notes the two groups have separate activities, funding, and accounting and publish separate e-newsletters. The two groups will share office space and staff.

In his letter Keating correctly states that the 501(c)(3) organizations can discuss political principles but cannot endorse or oppose candidates. However, he incorrectly states that the 501(c)(3) cannot support or oppose specific legislation. In asking for donations, he

notes contributions to the new 501(c)(4) are not tax-deductible, but goes on to note that "Starting a new organization gives us two advantages: We won't be hassled with groundless but financially debilitating complaints filed [by] the IRS. We will be able to be more outspoken than we have been."

The [Voter's Guide for Serious Catholics](#) for 2006 instructs readers to research candidate positions on five non-negotiable issues (abortion, euthanasia, embryonic stem cell research, human cloning, and "homosexual 'marriage'"), and vote for candidates that support the Catholic Answers Action position. It also claims that "Distribution of this voter's guide does not violate the Internal Revenue Service regulations governing dioceses, parishes and other non-profit organizations." However, 501(c)(3) organizations would be well-advised to consult legal counsel and review the recent [IRS Fact Sheet 2006-17](#), which stresses that voter guides must not focus on a narrow range of issues or be structured to reflect bias. In addition, the IRS notes that 501(c)(3)s' distribution of biased voter guides prepared by other organizations can still amount to a violation of the ban on partisan activity.

Catholics For Free Choice welcomed the announcement of the new group, noting that "reporting violations works." This year it has filed a complaint against [Priests for Life](#). In a [press release](#) announcing the complaint, the group says Priests for Life is recruiting volunteers to expressly elect pro-life candidates. According to Frances Kissling, CFFC president, "Priests for Life's current violations and open and flagrant contempt for the IRS [and] the tax-exempt regulations is breathtaking."