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White House Climate Change Policy -- Delay, Delete, and Deny

The Bush administration continues its strong efforts to censor climate change information that reaches the public and Congress. Recent reports indicate that the White House pressured the U.S. Environmental Protection Agency (EPA) to make changes to its regulatory process regarding climate change and that Vice President Dick Cheney's office was responsible for suppressing key sections of the congressional testimony of a high-level official at the Centers for Disease Control and Prevention (CDC).

Full Stall Ahead

In April 2007, the U.S. Supreme Court ruled in *Massachusetts v. U.S. Environmental Protection Agency* that greenhouse gas emissions are eligible for regulation under the Clean Air Act — a position previously rejected by the administration. Subsequently, EPA would have to either regulate greenhouse gases under the Act or prove emissions are not a risk to public health and welfare and therefore not in need of regulation.

In May 2007, the White House ordered the EPA, along with other agencies, to prepare regulatory responses by the end of the year. According to EPA officials, the agency's draft finding and recommendations on the dangers of CO2 emissions, entitled, "Control of Greenhouse Gas Emissions from Motor Vehicles," were sent to the White House Office of Management and Budget (OMB) in a December 2007 e-mail. Since the Clean Air Act requires EPA to regulate emissions that endanger the public, the so-called endangerment finding carries a legal obligation that the agency take action. Officials at OMB refused to open the e-mail or the draft document, knowing that it may trigger regulatory action on climate change. Climate change is being caused by high concentrations of greenhouse gases in the earth's atmosphere.

Investigations conducted by two committees in the House found that the administration delayed acting on the EPA findings. In fact, despite repeated requests for the EPA information, the White House refused to share any related documents until the records were subpoenaed in April by the House Select Committee on Energy Independence and Global Warming.

After reviewing the subpoenaed records, Rep. Edward Markey☼ (D-MA), Chair of the House Select Committee, charged the administration with discarding EPA's science and legally based recommendations to address climate change. Markey reported that the EPA documents supported scientific conclusions that greenhouse gas emissions may "endanger public welfare" and that motor vehicle emissions do contribute to global warming.

Rep. Henry Waxman☼ (D-CA), Chair of the House Oversight Committee, declared the administration's lack of action to be "in violation of the Supreme Court's directive." According to his committee, the draft was the product of about 500 comments from internal EPA review, external federal expert review, and other interagency comments.

Changing Facts

The *Wall Street Journal*, which claimed to have obtained a copy of the original EPA documents, reported that the White House had done more than delay the information — it appeared the administration had attempted to remove entire findings. According to anonymous officials quoted by the paper, the White House pressured EPA to remove conclusions that greenhouse gases endanger public welfare, information on how to regulate the gases, and an analysis of the cost of regulating greenhouse gases. The draft of EPA's findings affirmed "the agency's authority to tackle climate change, and suggest[ed] a variety of regulatory avenues" and concluded that the "net benefit to society" of regulating automobile emissions "could be in excess of $2 trillion." However, the cuts the White House pushed were reportedly intended to rework EPA's findings to indicate that the Clean Air Act is a flawed vehicle for regulating greenhouse gas emissions and that separate legislation is needed.

On July 11, EPA released an Advanced Notice of Proposed Rulemaking (ANPR) on climate change that appears to confirm that the White House changes had been made. The ANPR included conclusions that differed starkly from those listed by the *Journal* and congressional committees. For instance, the ANPR states that the "net present value to society could be on

the order of $340 to $830 billion."

Despite the Supreme Court ruling that the administration has the authority to regulate greenhouse gas emissions, the administration continues to deny the Clean Air Act should be used. Unlike the original draft, the ANPR was accompanied by 85 pages from other department secretaries aimed at attacking the act and included no finding of endangerment or regulatory recommendations. The Department of Energy called the act a flawed vehicle for regulating greenhouse gas emissions, stating that it was "unilateral and extraordinarily burdensome."

The ANPR marked the opening of a 120-day public comment period. EPA is soliciting views on the current state of climate science, regulatory options for curbing greenhouse gas emissions, and the appropriateness of developing greenhouse gas regulations under the authority of the Clean Air Act. Markey called the ANPR "a plan for no-action." Markey's committee asserts that the White House is handing off the responsibility of addressing urgent emissions regulations tasks to the next administration due to special interest influence.

The release is highly indicative of a larger struggle between appointed officials and agency career staff. In his comments on the ANPR, EPA Administrator Stephen Johnson, who had initially supported the original draft findings, referred to the Court decision, stating, "At this point, it is impossible to simultaneously address all of the agencies' issues and continue to respond to our legal obligations in a timely manner."

Although EPA is accepting comment on the ANPR, the content of the notice was immediately condemned by senior White House officials. Susan Dudley, head of the White House's regulatory clearinghouse, the Office of Information and Regulatory Affairs, said the policy "cannot be considered Administration policy or representative of the views of the Administration." Other letters of disapproval came from the White House Council of Economic Advisors and the Office of Science and Technology Policy, the Small Business Administration Office of Advocacy, and the White House Council on Environmental Quality.

The Vice President's Black Marker

A July 18 report released by the Select Committee indicated that departmental criticism was at the behest of Vice President Dick Cheney's office. According to the committee, documents obtained by subpoena and further testimony revealed that pressure from the oil industry, most notably ExxonMobil, drove the administration's decision to reject the EPA's pre-ANPR recommendations and findings, ultimately explaining Johnson's reversal.

Evidence of alterations by the vice president's office is indicative of a larger pattern of high-level administration officials exercising influence over expert recommendations by withholding information. *The Washington Post* recently revealed that the vice president's office was responsible for cutting statements regarding the health risks of climate change from the October 2007 congressional testimony of Dr. Julie Gerberding, director of the CDC. While it had been known that the testimony was altered, the public was not aware that the

interference had come from so high in the administration. The vice president's office removed sections of the original testimony that declared climate change a serious public health concern due to its influence on the spread of disease. The final testimony lacked any such statement.

Implications of Denial and Delay

These incidents indicate a behavior of censorship targeting the scientific community and the government's career staff. One would think that with such cross-agency expert opinions behind the endangerment findings and climate change science, the administration would act quickly to seek out and implement policy changes rather than hide science behind a cloak of secrecy. Sen. Barbara Boxer☼ (D-CA) said of the administration's actions, "This means that the Clean Air Act, signed by Richard Nixon and carried out by every President since, has been shredded by President Bush, who will go down in history as the first president to so gravely endanger the health and safety of the American people."

EPA and Union Agree on Process for Reopening Libraries

In response to a federal arbitrator's decision in February, the U.S. Environmental Protection Agency (EPA) and the American Federation of Government Employees (AFGE) recently signed a memorandum of agreement (MOA) establishing procedures for the reopening of recently closed EPA libraries and bringing the union to the planning table for any future changes to the library network.

The agreement, which takes effect upon review by the head of EPA or within 31 days of its July 10 signing, addresses some of the concerns raised by Congress and watchdog groups over EPA's library plans.

In 2006, the EPA closed libraries in three regional offices and its Washington, DC, headquarters in a purported effort to reduce costs by up to $2 million. The closings included the specialized Chemical Library located in Washington, DC. EPA also reduced operating hours and public access to several remaining libraries. The closings generated substantial controversy and opposition within Congress and among EPA staff, as well as a highly critical report from the Government Accountability Office (GAO). Congress ordered the reopening of the libraries and appropriated $1 million to that goal in December 2007.

The EPA's network of libraries provides the public and EPA staff with technical information and documentation used in enforcement of regulations and the tracking of health risks associated with various chemicals. The scientific information held in these libraries is used in the development and refinement of health and safety rules and regulations by the EPA and state and local governments. Much of the material is unique to the EPA and is not available elsewhere.

The MOA establishes the American Federation of Government Employees, Council #238 as a negotiating participant in any changes to EPA library network operations. The agreement

draws heavily on the EPA's March Report to Congress, outlining how EPA would use the $1 million appropriation to reopen the libraries. The agreement expands upon the agency's plan and elaborates on several parts.

The libraries are still scheduled to reopen by Sept. 30. Each location will be equipped with computer workstations for EPA staff and the public and will be staffed by trained librarians. Libraries must have "appropriate" shelving, space for microfilm and microfiche equipment, and "reasonable square footage" to meet the users' needs. Additionally, space must be provided in regional libraries for local and region-specific environmental materials.

Although several of the concerns expressed by watchdog groups are mentioned in the agreement, many remain unaddressed or unclear. Beyond inclusion of the employee union, there is no mention of additional stakeholder input in the planning process for the library network. The exact amount of physical space and other resources that will be allotted to the libraries is not clear, and the plans for digitizing the library materials remain uncertain. In June, Public Employees for Environmental Responsibility (PEER) reported that the EPA's plans for reopening the libraries provided significantly less space for the remaining materials, and, in the case of the Chemical Library, would amount to just one six-shelf bookcase housed in a 150-square-foot space.

The agreement supports EPA's decision to consolidate the Washington, DC, Headquarters Repository and the Chemical Library into one unit overseen by the Office of Environmental Information (OEI) and the Office of Prevention, Pesticides, and Toxic Substances (OPPTS). Public interest groups have raised concerns about the potential for political interference in library operations resulting from control by the OEI, which is headed by a political appointee. The new inclusion of the employee union in the planning process may serve to address the concerns of stakeholders like PEER and other groups.

The MOA also creates a six-member Union Management Advisory Board, with equal representation by the union and EPA management. The Advisory Board will review and make recommendations on the operations and development of the library network. The board will conduct a formal needs assessment of the library network and develop recommendations for its strategic direction. The EPA's Office of Environmental Information will review and "seriously consider" the Board's recommendations. The Board's first meeting will be within 90 days of the enactment of the MOA. The union and EPA also agree to collaborate to achieve "balance and cost efficiency" when considering the structure of the library network.

EPA will report within two weeks of the MOA's enactment on the status of its efforts to digitize the library holdings. The agency has agreed to report on digitization every three months after this initial report for the next two years, and then annually.

The American Federation of Government Employees played a significant role in the effort to reverse the decision to close the libraries. In 2006, the union filed a grievance because EPA refused to negotiate with the union over the library closures and reduction in library services. The union sought arbitration to resolve the dispute, which was refused by EPA. In February

2007, AFGE filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA) because the EPA would not select an arbitrator. In May 2007, the FLRA found merit with the union's ULP, concluding that EPA had committed an act of bad faith by not selecting an arbitrator. This decision pressured EPA into agreeing to the selection of an arbitrator. In September 2007, the Agency and union presented their cases to the arbitrator.

In February 2008, the arbitrator ruled against EPA, determining that EPA violated the Master Collective Bargaining Agreement with AFGE and ordering EPA to negotiate with the union on any library network reorganization. The MOA completed on July 10 is the culmination of weeks of negotiations between AFGE and EPA and comes more than two years after the EPA began closing libraries.

House Decides Saving E-mails is a Good Thing

The White House has threatened to veto an already weak bill targeted at preserving electronic records, despite legal action and recommendations from the Government Accountability Office (GAO) on the need for such accountability. On July 9, the House passed the Electronic Communications Preservation Act (H.R. 5811) by a veto-proof margin of 286-137. While targeted at the White House, this legislation will have an impact throughout executive branch agencies.

Under current law, federal agencies have broad discretion to determine how electronic records, such as e-mail, are preserved. This flexibility, however, has led to a number of recent problems, including the loss of e-mails due to poor archival management systems and the use of outside accounts to conduct federal business. The legislation, sponsored by Reps. Henry Waxman (D-CA), William Lacy Clay (D-MO), and Paul Hodes (D-NH), seeks to solve such problems by charging the Archivist of the United States with the responsibility of setting uniform standards for the preservation of electronic records.

The investigation into the leak of CIA operative Valerie Plame's identity first uncovered the loss of White House emails. Citizens for Responsibility and Ethics in Washington (CREW) filed a request under the Freedom of Information Act to discover the extent of the problem, and in May 2007, filed suit against the White House Office of Administration for not complying with the request. The National Security Archive followed with a September 2007 suit against the White House seeking the preservation and restoration of millions of e-mails. Court filings by the White House revealed that the previous administration's electronic recordkeeping system was abandoned without implementing an adequate replacement for years, which resulted in the loss of approximately 10 million e-mail records. On June 16, U.S. District Court Judge Colleen Kollar-Kotelly dismissed CREW's suit, ruling that, despite having responded to FOIA requests for years, the Office of Administration is not an agency and therefore is not subject to FOIA. CREW is appealing the decision.

Also in 2007, a congressional investigation into the firing of eight U.S. attorneys discovered that the White House had used Republican National Committee (RNC) e-mail accounts for

some official business. The RNC regularly deletes e-mail from its servers and is not subject to the Federal Records Act. As a result, at least four years of e-mails sent through the RNC from White House senior adviser Karl Rove have been lost. Over the course of administration, approximately 50 White House officials have received such RNC e-mail accounts.

On July 8, the day before the House passed H.R. 5811, the White House issued a Statement of Administration Policy about the bill. The administration argues that H.R. 5811 would create a costly and inefficient recordkeeping system. It suggests that, "Congress should reconsider whether mandating that all government e-mail records be preserved in electronic form is consistent with the greater goals of the Federal Records Act."

The Congressional Budget Office (CBO) has estimated that implementing H.R. 5811 would cost $13 million in 2009 and approximately $155 million over five years. However, it should be noted that the current search and review process for documents kept in paper form is also a costly burden on the government, one that could be reduced with improved management of electronic records.

A number of open government advocates were disappointed in the White House response to the bill. Some noted that the White House reluctance to support the bill would have grave implications for accountability. National Security Archive director Tom Blanton commented, "What is most shocking is that if anyone at the White House was deleting their e-mails during the invasion of Iraq, those e-mails are not on any back-up tapes."

The goal of H.R. 5811 is supported by a June Government Accountability Office (GAO) report, which recommends that the National Archive and Records Administration (NARA) take stronger oversight and enforcement measures to see that electronic records are properly preserved under the Presidential Records Act and the Federal Records Act. The GAO report also criticized the recordkeeping practice used by many agencies, including the Department of Homeland Security, of "print and file" rather than electronic archiving. The report found the paper archiving process to be "unreliable."

While H.R. 5811 takes important steps toward addressing current problems, it also seems to be a continuation of a pattern of making strong plans for better electronic recordkeeping, with little follow through. In 1998, NARA endorsed the Department of Defense (DOD) electronic records management design for software applications (DOD 5015.2-STD), meaning that it officially recommended the DOD records management applications for agency use. Little has been done since to create a standardized system or to promote standing recommendations. The bill grants NARA 18 months to establish minimum functional requirements and software certification.

Patrice McDermott of OpentheGovernment.org stated in testimony to Congress that "the blame in terms of compliance falls most squarely on NARA, which ... has a statutory obligation to promulgate standards, procedures, and guidelines."

Life's Value Shrinks at EPA

An Associated Press (AP) investigation released July 10 showed that the U.S. Environmental Protection Agency (EPA) has been devaluing human life when it prepares cost-benefit analyses for new regulations. Federal agencies such as EPA use the life value, an inaccurate statistic, to help them determine whether a proposal's benefits will outweigh compliance costs to industry.

The AP investigation found EPA's most recent life value, $6.9 million, to be about $1 million lower than it was five years ago. According to AP's Seth Borenstein, "[I]n 2004, the agency cut the estimated value of a life by 8 percent." Then, in a May 2008 regulation for train and ship pollution, EPA failed to adjust the value for inflation. "Between the two changes, the value of a life fell 11 percent, based on today's dollar," AP says.

When preparing to release a proposed or final rule, EPA counts as many of the potential benefits as it can, such as reduced incidences of asthma attacks, averted toxic spills, or lives saved. The agency also estimates the costs that will be levied upon industries expected to comply with the new policy.

In order to compare costs and benefits on the same scale, EPA translates benefits into dollars. Since lives saved are the greatest benefit of regulation, they also become the benefit of the highest value after the so-called monetization.

EPA uses a figure called a Value of a Statistical Life (VSL) to assign a dollar value to each life it expects a regulation will save. Technically, the VSL approach does not value a human life but rather a "statistical life." The benefit to society, which is monetized in the approach, represents a reduced risk of death for a population, not the certainty of avoiding death for any given individual.

But for decision making purposes, there is little difference. When it's time to study the potential effects of a regulation, EPA estimates the number of lives the regulation will save, then multiplies that figure by the VSL.

EPA is not the only federal agency to use a VSL, but the statistic is not consistent across the federal government. Although EPA has been the subject of criticism in the wake of the AP investigation, its sinking VSL is still higher than that of most other agencies.

In March 2008, the U.S. Consumer Product Safety Commission used a life value of $5 million in a proposal to reduce the risk of furniture fires. In a September 2007 Department of Homeland Security proposal to expand air travel security, the U.S. Customs and Border Patrol estimated life-saving benefits using two separate life values: $3 million and $6 million. New guidance from the Department of Transportation (DOT), sent to DOT subagencies in February, sets a VSL of $5.8 million for current and future transportation safety proposals.

One of the most common ways to distill market data into a VSL is to use so-called willingness-to-pay measures. In the willingness-to-pay approach, economists measure wage differences

among industries of varying risk. For example, if an individual requires a higher wage to find employment as a firefighter, rather than as an administrative assistant, at least part of that wage increase must be due to demand for compensation in the face of a higher risk of death, analysts believe.

But why do regulators feel compelled to use VSL in the first place? Agencies must comply with the analytical requirements put in place by the White House Office of Management and Budget (OMB). President Bill Clinton's Executive Order 12866 says, "Each agency shall assess both the costs and the benefits of the intended regulation." The Clinton White House also issued a memo on how costs and benefits should be assessed, including guidance on using VSL. Prior to the Clinton order, previous administrations had their own policies for mandatory cost-benefit measurements.

Under President George W. Bush, cost-benefit analysis's importance has expanded. The Office of Information and Regulatory Affairs (OIRA), an OMB office responsible for reviewing and approving regulations, has used its position as regulatory gatekeeper to expand the role of cost-benefit analysis as a regulatory decision making tool.

Under the Clinton order, OIRA reviews agency regulations before they can be proposed, and again before they can be finalized. Bush's OIRA has placed even greater significance on the quality and conclusions of agency cost-benefit analysis by providing greater detail on how to conduct cost-benefit analysis and elevating its importance in a January 2007 executive order. If monetized costs and benefits cannot prove a proposal will yield a net economic gain to society, the proposal may not clear OIRA review.

For example, OIRA recently rejected an EPA proposal because EPA's cost-benefit analysis showed compliance costs may outweigh benefits once the proposal takes effect. The rule would have established a national program for the recycling of pesticide containers and is widely supported by the pesticide industry and state environmental administrations. But in a July 3 letter, OIRA administrator Susan Dudley sent the proposal back to EPA for reconsideration, saying the rule would be too costly and that the cost-benefit analysis did not adequately assess alternatives to EPA's proposal.

Although agencies must assess costs and benefits and attempt to monetize lives saved to satisfy White House requirements, the laws passed by Congress sometimes prohibit regulators from even considering the conclusions of the economic studies. For example, the Clean Air Act prohibits EPA from considering economics when setting national air pollution standards. Instead, the Act mandates EPA only consider factors related to public health based on the latest and best available scientific research. Nonetheless, EPA prepares a cost-benefit analysis, and uses VSL, when proposing new air pollution standards.

It remains unclear how OIRA resolves conflicts with laws mandating standards other than cost-benefit analysis, such as use of best available technology or putting safety first. However, there are cases where it appears that cost-benefit considerations trump statutory standards.

Despite the drawbacks of the VSL approach, for now, agencies will have to live with it. If agencies failed to monetize lives saved — the greatest benefit of public health and safety regulations — their proposals might not pass the White House's cost-benefit litmus test.

Congress Votes to Reauthorize Administrative Conference of the United States

The House voted July 14 to reauthorize the Administrative Conference of the United States (ACUS) by accepting an earlier Senate-passed bill. The bill now moves to the White House, where President Bush is expected to sign the legislation. ACUS was a small government agency, abolished in 1995, that advised Congress on reforms to administrative and regulatory processes and saved the government millions of dollars over its life.

ACUS was created in 1968 as an independent agency with a small staff assisted by outside experts in administrative law, government processes, judicial review and enforcement, and agency regulatory processes. The conference had a reputation for producing high-quality, independent, nonpartisan analysis and is credited with issuing more than 200 recommendations, many of which were implemented, as well as a variety of reports and studies on how to improve government.

ACUS was dismantled in 1995 as part of the new Republican agenda to reduce the size of government. At the time, the ACUS staff numbered approximately 20, and its budget was about $1.8 million, according to a July 16 article in BNA (subscription). Although estimates of the savings achieved from implementing ACUS recommendations are not well documented, at the time the agency was abolished, there were estimates that some recommendations saved millions of dollars from just a few program improvements.

Congress initially reauthorized ACUS in 2004 but failed to appropriate any funding for the conference to reorganize and begin work. That authorization expired in September 2007. The current reauthorization effort began in 2007, when Rep. Chris Cannon☼ (R-UT) introduced H.R. 3564. The bill passed the House on Oct. 22, 2007, but the Senate did not take any action on the bill until June of 2008.

According to the BNA article, the bill "also enjoyed bipartisan support in the Senate where it was pushed by Sen. Patrick Leahy☼ (D-VT), chairman of the Senate Judiciary Committee, and Sen. Arlen Specter☼ (R-PA), the Judiciary Committee's ranking member." Sen. Tom Coburn☼ (R-OK) introduced an amendment to the House bill that extended authorization of appropriations for FY 2009 through FY 2011. The amendment was accepted by the Senate on June 27 and sent back to the House, which gave its approval a few weeks later.

The bill that is headed to the White House authorizes appropriations of $3.2 million each year. BNA reports that Cannon and Rep. Linda Sanchez☼ (D-CA), one of the co-sponsors of the bill, are trying to secure appropriations in this Congress. Cannon was the chair of the Commercial and Administrative Law Subcommittee of the House Committee on the Judiciary in the 109th

Congress; Sanchez is the current chair.

However, current disagreements in Congress between the political parties and between Congress and the White House put the ACUS appropriations at risk, even with widespread bipartisan support for the agency. Few appropriations bills are expected to be passed in the House and the Senate. The result of the appropriations process this election year is likely to be a continuing resolution to keep government operating until a new president takes office. An alternative might be to extend the continuing resolution for the entire fiscal year, giving the new president and a new Congress room to begin the next budget year's fiscal cycle. Although any continuing resolution could contain the necessary appropriations language to fund ACUS, especially given its broad support, Congress may seek to fund only ongoing government activities.

The recommendations developed by ACUS during the years it operated are available online at Florida State University's College of Law ABA Administrative Procedure Database.

Appropriations Breakdown Threatens Federal Investments

As the FY 2009 appropriations process grinds to a halt, a new OMB Watch analysis of the past nine fiscal years reveals that the nation's priorities are better served when Congress and the president work together to complete the annual appropriations process. Congress's abandonment of the FY 2009 appropriations process increases the risk that the resources critical to vital government supports will be further constrained as both sides of the aisle simply refuse to work toward agreement on FY 2009 appropriations legislation.

The analysis looked at a sample of health, education, and labor programs and found that those programs received funding increases when individual appropriations bills are passed by Congress and signed by the president. However, these same programs are cut when Congress and the president rely on consolidated appropriations ("omnibus" bills) because they cannot enact specific appropriations bills.

In the nine fiscal years — FY 2000 through FY 2009 — consolidated appropriations were used in six to fund the operations of most non-defense governmental programs and operations. Looking at a random selection of 12 labor, health, and education programs for those years shows that they were cut, on average, by 0.5 percent (see table below). When adjusting for inflation, those programs were cut by 3.5 percent. However, in the three fiscal years in which all of the appropriations bills were signed into law, those programs saw their funding increased by 17.8 percent, or 14.9 percent after adjusting for inflation.

The Department of Defense was the only federal agency to see its funding approved as a stand-alone bill in all nine years. From FY 2000 to FY 2008, the Pentagon saw its funding increase from $287.2 billion to $600.9 billion. After adjusting for inflation, the Defense Department averaged annual increases of 7.5 percent.

Changes in Funding for Selected Labor, Health, and Education Programs, FY 2000 - FY 2008 *(percent)*		
Program	**Funded Through Consolidated Appropriations**	**Funded Through Individual Bills**
Adult Employment and Training Activities	-15.9	93.5
Dislocated Worker Employment and Training Activities	-11.0	38.7
Community Service Employment for Older Americans	0.0	-2.4
Maternal and Child Health Block Grant	-3.5	-2.9
Healthy Start	-4.7	0.2
Preventive Health and Health Service Block Grant	-6.8	-5.7
Community Services Block Grant	-2.0	4.9
Head Start	-4.8	18.9
Child Care and Development Block Grant	-0.3	19.7
WIC (Special Supplemental Nutrition/Women, Infants and Children)	3.5	0.6
Even Start	-10.0	1.8
Education for Homeless Children	1.3	18.3
Pell Grants	10.2	7.9
Average	-3.4	14.9
Department of Defense	*N/A*	7.5

It is how programs are funded (consolidated appropriations or regular appropriations bills), not which party controls government, that impacts whether funding for the programs above is increased or cut. Every year in which an omnibus spending bill was passed to fund the government for the entire year (FYs 2000, 2003-2005, 2007, and 2008), the programs saw a reduction in funding. Of the three years that were not financed through an omnibus measure (FYs 2001, 2002, and 2006), only two saw an appropriations process that boosted funding for the programs.

In all of the years, a Republican was president, but party control of Congress varied. Republicans controlled the House in FYs 2001, 2002, and 2006. (In calendar years 2000, 2001, and 2005, they determined FYs 2001, 2002, and 2006 spending levels.) But Republicans shared control of the Senate with Democrats when funding bills for FY 2002 were signed into law. In 2007, Democrats controlled both houses of Congress, but they passed a consolidated appropriations bill that reduced the programs' funding by 8.3 percent.

It is the president who seems to wield considerable power over the appropriations process. Without the two-thirds majority necessary to override a presidential veto, Congress risks playing a game of fiscal chicken with the president. In 1995, a Republican Congress and a Democratic president could not agree on appropriate funding levels, and without the necessary spending bills signed into law, the government ceased most day-to-day operations for several weeks. The public overwhelmingly sided with Democratic President Bill Clinton over GOP Senate Majority Leader Bob Dole (R-KS) and House Speaker Newt Gingrich (R-GA). Both Democrats and Republicans apparently learned the same lesson from that episode: better to submit to the president's demands than risk a similar political train wreck. This political calculus can explain why, in 2007, Democratic leadership in the House and Senate approved a continuing resolution (CR) for FY 2008 that called for an appropriations "top-line" funding level identical to the President Bush's budget request — only $22 billion below that of the congressional budget resolution.

There are additional disadvantages when the normal appropriations process breaks down. If Congress and the president cannot agree on spending levels before the end of the fiscal year (Sept. 30), Congress must pass a CR to fund government operations until spending bills for the remainder of the year can be enacted. Because continuing resolutions typically either "flat fund" (i.e., keep a program's funding for the new year at the same level as the current year) or reduce spending on existing programs, new programs may end up not being funded at all. Consolidated spending bills, on the other hand, can increase funding for specific programs by adjusting spending levels for inflation and population growth. The result of employing CRs is that for part of the fiscal year — or in the case of FY 2007, an entire fiscal year — programs are deprived of a certain amount of funding that Congress intended for them to spend. On July 9, the Senate Appropriations Committee added a provision to the Transportation-HUD FY 2009 appropriations bill that would transfer $8 billion from the General Fund to the Highway Trust Fund to ensure adequate funding for the nation's transportation's needs. This funding shift may not be continued in an anticipated FY 2009 CR, because the provision simply did not exist in FY 2008 and therefore cannot be continued.

Another disadvantage is that non-spending policy provisions included in individual funding bills may not be included in a CR. For example, both the House and Senate Appropriations Committees have both approved language that would effectively end the IRS's wasteful private debt collection program by zero-funding it. However, because controversial policy changes are unlikely to be tucked inside must-pass spending legislation like a CR or consolidated appropriations bill, the problematic program will likely continue to operate for at least another year.

At this point, most in Washington have acquiesced to the idea that appropriations bills will not be completed before the start of the new fiscal year on Oct. 1. Like any other year where a CR will be used, the breakdown in the current appropriations process will create difficulties at federal agencies in planning staffing levels, managing program resources, and continuing to implement federal programs. The White House recently admitted as much in their pleas for Congress to enact a Department of Defense spending bill before they recess for the year.

This political breakdown also comes at a difficult time for the nation's economic condition. As the country's housing values have plummeted and state tax revenues have shrunk, important infrastructure and human needs investments have been pared back at the state level. Most states have a constitutional requirement to pass a balanced budget each year, and they cannot run deficits to continue important investments during difficult economic times. As the Center on Budget and Policy Priorities has documented since the beginning of the year, struggling state budgets exacerbate economic hardship, usually at exactly the point when help is needed most.

Although the president has yet to officially threaten a veto, his adamant insistence in 2007 that Congress hew to his budget's top-line figure seems to indicate that he will take a similar stance this year. Yet because President Bush will leave office in January 2009, Congress will have a new partner with whom to bargain for their preferred spending levels — a negotiation their actions show they would prefer. While a partial CR may be all but inevitable, federal programs face a more favorable budgeting environment should the next president be willing work with Congress and sign into law the 12 appropriations bills as prescribed by regular budget process. The ensuing uncertainty, however, will continue to limit the resources federal employees will have to implement federal priorities.

Hill Briefing Addresses Impacts of Counterterrorism Measures on Nonprofits

On July 14, Grantmakers Without Borders and OMB Watch released a paper, *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, and hosted a panel discussing the topic. Six experts all agreed that shortsighted, undemocratic policies are stifling free speech, constraining the critical activities of the charitable and philanthropic sectors, and ultimately impeding the fight against terrorism. OMB Watch and Grantmakers Without Borders were lauded by many speakers and attendees for drawing attention to this issue.

At the briefing, Kay Guinane, Director of Nonprofit Speech Rights at OMB Watch, recognized nonprofits and charities as "a key to helping democracy." She noted that Grantmakers Without Borders and OMB Watch collaborated to write the paper because very little public attention has been paid to how charities and foundations are affected by counterterrorism laws. The public mostly only hears about how individuals are affected, such as when people are wrongly tagged on no flight lists or detainees at Guantanamo are not afforded due process, Guinane

said.

Guinane said that short-term solutions are now having harmful, long-term consequences. As a result of the "war on terror," the work of humanitarian aid, development, and conflict resolution programs is hindered at best, politicized at worst. She noted, "This counteracts the positive role charities and foundations can play in fighting the root causes of terrorism. Freedom of speech and association are undermined by policies that equate dissent with terrorism. Congress has not utilized its oversight powers to review counterterrorism programs and weigh the pros and cons of alternative approaches."

The six speakers included:

- David Cole, Professor of Law, Georgetown University Law Center
- Rob Buchanan, Director of International Programs, Council on Foundations
- Todd Shelton, Senior Director of Public Policy and External Affairs, InterAction
- Jim Harper, Director of Information Policy, Cato Institute
- Nimmi Gowrinathan, Director of South Asia Programs, Operation USA
- Lisa Graves, Deputy Director, Center for National Security Studies

Cole compared the current situation to the McCarthy era, stating that both are "driven by a fear of the unknown." He described the constitutional issues surrounding the government's expanding interpretation of what is considered prohibited "material support" of, or "otherwise associat[ing] with," designated terrorist organizations or individuals. For example, in the criminal prosecution of the Holy Land Foundation, the prosecution argued that by providing $12.4 million for the charitable activities of non-designated zakat committees in the West Bank and Gaza Strip, Holy Land gave indirectly to Hamas, a designated organization. Prosecutors argued that although the zakat committees were not designated organizations, the defendants "should have known" they were "otherwise associated" with Hamas.

Harper pointed out how illogical this anti-terrorism strategy is for charities. Due to bureaucracy, it is next to impossible to get off any terrorist watch list. He said the margin of security benefit is heavily outweighed by financial costs and loss of personal freedoms.

Buchanan spoke to the concerns facing the grantmaking community. He pointed out that the charitable mission of grantmakers counters terrorism, and foundations already effectively demonstrate due diligence. Buchanan also noted the frustrations the nonprofit community faces when dealing with the Department of Treasury. Treasury continues to assert that charities are a problem without providing any details, and it continues to stand by flawed guidance, such as its Anti-Terrorism Financing Guidelines, which have been called unworkable by many in the charitable sector.

Shelton described concerns surrounding the U.S. Agency for International Development (USAID) plan to move forward with the implementation of a new Partner Vetting System (PVS). Under the proposed PVS, every organization that applies for USAID funding would have to collect and submit highly personal information to the U.S. government. The objective

is to ensure that neither USAID funds nor USAID-funded activities provide support to individuals associated with terrorism. However, Shelton pointed out practical problems with watchlists used for such vetting, as well as the danger such information sharing could create for aid workers, if they are perceived as agents of U.S. security and intelligence agencies. InterAction is a leader in the opposition to the PVS program.

Gowrinathan discussed on-the-ground impacts that organizations operating overseas face regarding these new counterterrorism policies. She said her organization tries to stay under the radar, out of the concern that publicizing the programs in conflict areas would place them at risk of being shut down. An environment of fear has impacted donor confidence, and her organization has experienced delays in funding due to ethnicity of donors. She also noted the danger associated with ambiguity in the PATRIOT Act, which has been reproduced by some other governments.

Graves noted problems with the definition of prohibited "material support" of terrorism and the fact that the only exceptions are for medicine and religious material. She said the same "association with" language Cole discussed puts peace organizations at risk to be placed on terrorist lists. She further discussed the chilling impact of surveillance of organizations that dissent and how spying on peace groups is a waste of money.

The panel and the paper raised the need for congressional oversight and action. Speakers argued that government unfairly characterizes nonprofits as conduits for terrorist funding and a breeding ground for aggressive dissent. Instead, government should recognize the nonprofit sector as a valuable ally in the war on terror and build policies that enable rather than hinder its work.

House and Senate Release Updated Lobbying Disclosure Guidance

On July 16, the House Clerk and Secretary of the Senate released updated guidance that applies to any organization that registers as a lobbyist under the federal Lobbying Disclosure Act (LDA), as updated by the Honest Leadership and Open Government Act (HLOGA). House and Senate leaders directed the Secretary of the Senate and the Clerk of the House to rewrite the guidelines in response to complaints about the original guidance.

HLOGA, passed in 2007, requires all individual lobbyists and lobbying organizations to disclose any campaign contributions of more than $200, connections to any political action committees, and expenditures for certain events that honor covered officials. The form to report such information, Form LD-203, was made available on June 30. The Secretary and Clerk originally issued updated LDA Guidance on May 29 to provide a number of examples of reportable expenditures. This interpretation for when lobbyists must report was criticized as extremely broad. For example, lobbyists had to report the fee involved if a "covered official" was simply in attendance at an event. This would have required a lobbyist who paid for a table at a charitable event to report the cost if a member of Congress appeared at the event, even if it

was a surprise appearance.

Legal counsel representing labor and nonprofit organizations who register under the LDA wrote July 8 to the Secretary and the Clerk regarding the LD-203 Contributions Reporting System and the new LDA guidance. They expressed concern that the new guidance "misinterprets" HLOGA, and will "chill ordinary interaction and association with Members of Congress and impose undue and unreasonable recordkeeping and reporting burdens on registrants and their employed lobbyists ... Members of Congress and other government officials frequently attend or speak at events that are sponsored or funded, at least in part, by entities that employ lobbyists, including policy forums, seminars, meetings, conferences, conventions and other events that have nothing to do with 'honoring or recognizing' the officials."

Under the guidelines, even a conference where a lawmaker made a speech could be interpreted as an event "honoring" that official. This could have ended up in not only exhaustive reporting, but could have also had an effect on those officials who wanted to participate in events.

In response to such concerns, the Secretary and the Clerk rewrote the guidelines as they pertain to LD-203, and now some events involving covered officials may not have to be reported on the form. Under the changes, an event does not "honor" or "recognize" a covered official when:

- A covered official acts as, and is listed as a speaker, but not an "honored" speaker
- The official is listed on event materials as "attendee" or "guest"
- The official is recognized as being in attendance
- The titled "The Honorable" is used in connection with the official's name at the event or in the event's materials
- The covered official is listed on the event materials or acts only as an "honorary co-host", but "honored co-host" would be considered to be honoring the official and would have to be reported

Lobbyists also do not have to disclose money raised for a charity that is not created or controlled by a lawmaker or that names the legislator as an "honorary co-host." Other changes include that buying a ticket or table at an event honoring a covered official would not be considered payment that has to be disclosed. However, it would need to be disclosed if the lobbyist is a sponsor or host of the event.

There has been some backlash in response to the new guidance, including accusations that the changes were made to create new loopholes for lobbyists' funding of events, particularly during political party nominating conventions. As the *Wall Street Journal* notes, "Nor will the new ethics rules clamp a lid on industry-paid merrymaking at Democratic and Republican nominating conventions this summer. The new guidance exempts companies from revealing their sponsorship of most parties at the conventions."

The deadline for filing LD-203 is July 30, and along with it, a filer must certify that he or she

understands and has complied with the Gift and Travel Rules.

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