OMB WATCH
Promoting Government Accountability and Citizen Participation
ACTION CENTER | BLOGS | DONATE
The Watcher
June 10, 2008 Vol. 9, No. 12

In This Issue

Obama and Coburn Shine Brighter Light on Government Spending

Sens. Barack Obama (D-IL) and Tom Coburn (R-OK) have joined forces again to craft legislation that would increase the transparency of how the federal government spends taxpayers' money. The Strengthening Transparency and Accountability in Federal Spending Act (S. 3077), introduced June 3, is a follow-up to the 2006 Transparency Act, which was also spearheaded by the two senators. Obama and Coburn, along with Sens. Tom Carper (D-DE) and John McCain (R-AZ), introduced the new legislation with the goals of making important new data easily accessible and enabling citizens to hold our government accountable for the fiscal stewardship of our shared resources.

In 2006, Obama and Coburn worked together to introduce and pass the Federal Funding Accountability and Transparency Act of 2006, which led to the creation of the government website USASpending.gov. The law required the Office of Management and Budget (OMB) to make it easier for the public to search and understand the complex information on federal

government spending. The site allows people to quickly get answers to questions such as who is getting federal funds, what the money is for, which agencies are spending it, and where in the country the money is going. The effort was heralded by many as a key example of progressives and conservatives finding common ground on the issue of increased government transparency.

The new Obama-Coburn bill has three key sections: technical corrections to the first bill, provisions to improve the quality of data in USASpending.gov, and requirements to make information on contractor and grantee performance easily accessible.

The provisions offering technical corrections would expand the data available to the public by requiring:

- Additional information about when payments are approved and disbursed;
- The name of the agency, department, subagency, or suboffice that approved the award, and whether the award is the result of a legislative mandate, set-aside, or other criteria;
- More detailed data on number and size of all bids submitted for contracts; and
- Socioeconomic characteristics of all recipients.

This additional data is important for the public to understand exactly how the government is spending federal resources. Several of these data fields are already being tracked and provided to the public on USASpending.gov, but the provisions would codify the process to ensure ongoing access.

A major new improvement created within the technical corrections is the requirement that the government provide copies of the request for proposal, announcement of award, actual contract, and scope of work documents, linked to the spending information. This information will allow citizens to more easily assess the value contractors are providing. Additionally, the bill requires all information on USASpending.gov to be accessible through an application programming interface (API), which will create an open architecture that promotes innovative use of the data by Internet programmers and public interest groups.

The data quality section of the bill proposes creation of a robust, user-generated, error reporting system that would enable users to report any suspected errors directly to federal agencies. Such a system will provide useful data on not only the extent of data problems but also on the efforts of the government to correct problems based on legitimate reports of incorrect data from the public. The provisions also include requirements for a government review system for data quality, with biannual audits from Inspectors General offices, to ensure the data is accurate and that agencies are following data standards. Another provision would mandate that company identifiers, including parent ownership, are correct and regularly updated and made available to the public, including through the API.

The new legislation's section on combining and disseminating information about contractor and grantee performance would create a new and useful accountability tool. The bill requires disclosure of instances of default, suspension, debarment, and any information regarding civil,

criminal, and administrative actions initiated or concluded by either federal or state governments in the preceding five years against federal award recipients. Publicly available data concerning worker safety, pay and leave rights, workplace discrimination, labor relations, civil rights, environmental protection, whistleblower protection, tax compliance, and other regulatory protections would be brought together to provide the public with a more complete picture of the entities receiving public funds. In providing such information about recipients of federal funds, the government will enable the public to easily see whether agencies are doing business with scofflaws.

The Strengthening Transparency and Accountability in Federal Spending Act was introduced the same day that Obama became the presumptive Democratic nominee for president. The bill garnered attention not only because of Obama's involvement, but also because he partnered with McCain, who is the presumptive Republican nominee for president. It is rare that two presidential nominees would jointly sponsor legislation, particularly during an election year. The fact that Obama and McCain did bespeaks strong support for the legislation.

Some have already speculated that, this being an election year, the bill has little chance of making it into law. Many have thought that federal contractors will attempt to slow down, if not derail the bill. Yet with both Obama and McCain as co-sponsors, it is much more likely the bill could be enacted before 2008 is over. Carper's subcommittee of the Homeland Security and Governmental Affairs Committee will likely hold a hearing on the bill sometime during the summer.

Covering Up Mistakes of Torture and Rendition

The Department of Homeland Security's (DHS) Office of Inspector General (OIG) has released a report that investigated the case of a Canadian citizen, Maher Arar, who was taken into U.S. custody in 2002 and removed to Syria, where he was held by authorities for fourteen months. Two House committees held a hearing June 5 on allegations of torture that Arar says occurred during his imprisonment.

The report was requested four and a half years ago by Rep. John Conyers☼ (D-MI), chairman of the House Judiciary Committee, but it falls short of a full disclosure of the facts and policies that led to the imprisonment and alleged torture of a Canadian citizen. The House Committee on the Judiciary's Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the House Committee on Foreign Affairs' Subcommittee on International Organizations, Human Rights, and Oversight held a joint hearing on June 5 to investigate the case.

In September 2002, Arar was traveling from Switzerland to Canada with a layover in New York. The Immigration and Naturalization Service (INS) took Arar into custody because an airport screening indicated that he was a high risk. The INS contacted the Federal Bureau of Investigation, which conducted a series of interviews with Arar over the next several days. The U.S. government alleged that Arar was associated with Al Qaeda. Arar was transported to New Jersey, then Washington, DC, and eventually to Amman, Jordan, where he was transferred to

Syrian officials. Fourteen months later, in October 2003, the Syrian government released and returned Arar to Canada.

Arar successfully sued the Canadian government for its cooperation with the U.S. in his transfer to Syria and the alleged torture that ensued. The U.S. courts, however, have thrown out Arar's suits against the U.S. government because government lawyers have claimed the state secrets privilege. Although, according to a report by *Harpers*, U.S. officials have secretly admitted wrongdoing in sending Arar to Syria and asserting ties with Al Qaeda, the government has failed to publicly acknowledge their mistakes or pay any reparation to Arar.

In 2003, Chairman Conyers requested an investigation of the matter, and it took DHS's OIG over four years to complete the investigation and release a report. The OIG report, however, is heavily redacted and falls short of a full disclosure of the events that transpired, the mistakes made, and the policy of rendition which led to the mistakes. Even the Inspector General's recommended policy changes are redacted as classified.

Furthermore, the OIG has objected to the release of paragraphs that are not classified and has even failed to disclose summaries of such paragraphs. The OIG, moreover, fails to appropriately explain the rationale for the numerous redactions. "It would be my view that those [unclassified] paragraphs should be publicly released," stated former DHS Inspector General Clark Ervin, who initiated the investigation in 2003.

After reviewing the unclassified OIG report, the House Judiciary Committee objected to many of the redactions. The committee requested a paragraph-by-paragraph rationale for the markings, but the OIG has denied such a request. Ervin stated that the OIG may not be legally required to provide such rationales but has "an obligation to provide an explanation for the view that [redacted] information should be classified."

As it stands, the OIG report is an additional effort to cover up the mistakes made in the case of Maher Arar. Essential facts and the needed policy changes are redacted, preventing oversight of the agency's progress in implementing changes. The OIG has an obligation to undertake a full investigation of failed policies and mistaken decisions and to provide public access to its findings.

EPA Asks Public, "What Do You Want to Know?"

The U.S. Environmental Protection Agency (EPA) has invited the public to participate in a week of online dialogue to develop ideas to improve access to environmental information.

The National Dialogue on Access to Environmental Information launched the week-long process to gather ideas for how the agency could improve its transparency and make accessing environmental information easier. The ideas generated by the online dialogue will be used to inform the development of a multi-year strategy on environmental information access, projected to be completed later in 2008. The EPA has already collected input from stakeholder

groups and is making background information and summaries of what has occurred so far available at the National Dialogue page.

The Bush administration's tenure has taken a heavy toll on EPA's reputation on transparency by raising the reporting thresholds for toxic pollution under the Toxics Release Inventory, closing numerous agency libraries, and accusations of interference with scientific research. However, with the imminent reality of a new administration, the ideas for improving access may find a receptive audience in 2009.

Ozone Standard Challenged in Multiple Court Actions

The U.S. Environmental Protection Agency's (EPA) new, stricter national air quality standard for ozone is being challenged in multiple court actions, all of which are asking a federal appeals court to review the final rule. Although the new standard, announced March 12, is an improvement over the previous standard, environmental groups, state and local governments, and business interests all have filed lawsuits hoping to force the EPA to reconsider its decision.

EPA regulates ozone under the Clean Air Act. Exposure to ground-level ozone is associated with a variety of adverse health effects including asthma attacks and premature death. The Clean Air Act requires EPA to reevaluate the standard for ozone every five years, although the agency had not revised the standard since 1997. Under the act, EPA sets a primary standard to protect public health and may set a secondary standard to protect special considerations such as ecologically sensitive areas and valuable farm crops.

EPA's decision to set both the primary and secondary standards at the same level drew attention for several reasons. First, the scientists advising the agency recommended more stringent standards than the final levels announced. The act requires EPA to base its decision on the best available science. The EPA Clean Air Scientific Advisory Committee recommended EPA set the standards within a certain range, but the final standards were set above this range.

Second, in its regulatory process, EPA chose for the first time to set the secondary standard at a different level than it had previously. Third, although EPA's final decision was based, in part, on using cost as a consideration, the act prohibits EPA from considering costs when setting the standards; costs may be considered at a later point when deciding how to implement the standards.

Perhaps the most contentious element of EPA's decision, however, was the apparent interference by President Bush and other White House staff. Documents released by EPA show that the agency's decision to set a separate, more protective secondary standard was overridden by Bush after the EPA and the Office of Information and Regulatory Affairs (OIRA), the White House office responsible for reviewing agency regulations, reached an impasse over the secondary standard. OIRA, on the basis of economic considerations, argued for the secondary standard to be the same as the primary standard.

Five environmental groups filed a review petition May 27 asking the U.S. Court of Appeals for the D.C. Circuit to review the final rule. The groups are challenging EPA's decision because the new standards were not set consistent with the best available science. The American Lung Association, Natural Resources Defense Council, Environmental Defense Fund, National Parks Conservation Association, and Appalachian Mountain Club filed the suit. They are represented by Earthjustice, a nonprofit environmental law firm.

Fourteen states and two cities also filed a petition May 27. They seek to have stricter ozone standards than EPA's final rule established. The states are New York, California, Connecticut, Delaware, Illinois, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, and Rhode Island. The cities of New York and Washington, DC, joined the suit.

According to the regulatory impact analysis EPA was required to prepare for the new regulation, the new standard will prevent at least 260 premature deaths, 890 heart attacks, and 200,000 missed school days every year starting in 2020. Had EPA adopted a standard at the weakest end of the range recommended by its scientific advisors, an *additional* 300 premature deaths, 610 heart attacks, and 440,000 missed school days could be prevented *every year*.

Mississippi filed a review petition May 23 hoping to have the standards relaxed. A coalition of industry groups also filed a petition May 27 objecting to the stricter standards. According to a BNA article (subscription), these lawsuits are likely to target the methods and interpretations of the scientific analyses EPA performed during the rulemaking process. Various business groups argued during the rulemaking process that the costs to industry would be too high if EPA chose to change the standard from the 1997 levels.

The coalition of industry groups is the Ozone NAAQS Litigation Group, representing organizations like the National Association of Manufacturers and the U.S. Chamber of Commerce. The Utility Air Regulatory Group, an association of electric generating companies and national trade associations, is also a party in the industry lawsuit.

Roof Crush Standard Flawed, Preempts State Efforts

The National Highway Traffic Safety Administration (NHTSA) has proposed a stricter federal standard for roof strength in passenger vehicles that would prohibit any action on roof safety at the state level — including damages claims brought by victims in state courts. During a June 4 Senate hearing, senators from both parties and auto safety advocates aired their complaints about the proposal.

In August 2005, NHTSA proposed a revision to the federal standard for vehicle roof crush resistance. The standard exists to help ensure the structural integrity of vehicles during rollover crashes and, in turn, prevent injuries and fatalities. NHTSA reopened the proposal for public comment in January 2008.

In the original notice, NHTSA claimed its final rule would prohibit states from enacting positive law — that is, laws passed by state legislatures and regulations developed by state agencies — different from the federal standard. NHTSA also claimed the rule would "preempt all conflicting State common law requirements, including rules of tort law," thereby eliminating a consumer's right to sue an automaker if the consumer is injured in a rollover crash.

NHTSA's decision to preempt tort law has drawn the most scrutiny. Federal agencies are responsible for enforcing the positive law enacted by Congress. However, even when positive laws and regulations work, citizens must have an opportunity to seek legal redress if a product causes harm. Tort law provides that opportunity by allowing citizens to seek damages from the makers of those products.

Senators complained about the preemption language during the hearing of the Senate Commerce Committee Subcommittee on Consumer Affairs, Insurance, and Automotive Safety. Sen. Claire McCaskill☼ (D-MO) claimed NHTSA would err by eliminating "every American's right to go to their courthouse in their state and have people from their community decide whether somebody has messed up or not."

Sen. Mark Pryor☼ (D-AR), chair of the panel, encouraged NHTSA Deputy Administrator James Ports to abandon the preemption language when finalizing the rule. Pryor said preemption is not in the public's best interest, is outside of NHTSA's authority, and would result in "bipartisan opposition in the Senate."

The preemption language has become a boilerplate provision included in many vehicle safety rules — an invention of President Bush's NHTSA. For example, in a February 2007 final rule on door locks and retention, NHTSA argued its regulation prohibits positive law at the state level. An April 2007 final rule mandating electronic stability control for vehicles used identical language.

McCaskill said, "All of the sudden preemption language is popping up like spring flowers" and expressed suspicion "that there is a plot somewhere in this administration to see if they can't wipe out the right of Americans across this country to access their local courts."

Preemption language at a glance

NHTSA is revising the federal standard for vehicle roof strength under the Motor Vehicle Safety Act. With regard to preemption, here is what NHTSA claims compared to the language of the act.

Preemption of state positive law

NHTSA's view:
"...section 30103(b) of 49 U.S.C. provides, 'When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.' Thus, all differing state statutes and regulations would be preempted." 70 FR 49245

Motor Vehicle Safety Act:
"Preemption.—(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter." 49 U.S.C. 30103(b)

Preemption of tort law

NHTSA's view:
"...if the proposal were adopted as a final rule, it would preempt all conflicting State common law requirements, including rules of tort law." 70 FR 49246

Motor Vehicle Safety Act:
"Common Law Liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. 30103(e)

NHTSA's decision to preempt state positive law and tort law through its regulation is in plain violation of the major federal law the agency enforces, the Motor Vehicle Safety Act. The act expressly states that NHTSA rules should be the floor, not the ceiling, for safety standards. The act permits states to adopt their own rules, so long as they are more stringent than the federal standard. On the issue of tort law, the act states, "Compliance with a motor vehicle safety standard" enforcing the law "does not exempt a person from liability at common law." (See sidebar above.)

Ports testified that NHTSA has not yet decided if it will pursue preemption when finalizing the rule.

The Bush administration has been criticized for inappropriately including preemption language in a variety of other public health and safety standards. For example, the Food and Drug Administration included tort preemption language in rules for prescription drug labeling, and the Consumer Product Safety Commission included a preemption clause in a rule to reduce the risk of mattress flammability.

In addition to the preemption language, critics of the roof crush proposal say it would not go far enough in protecting drivers. The rule would tighten the existing roof crush standard, which has not been updated since it was first promulgated in 1971. However, the rule does not meet the requests of safety advocates and would lead to relatively small increases in driver safety.

The crux of the roof crush standard is the strength-to-weight ratio. Currently, a vehicle's roof must be able to withstand pressure of at least 1.5 times the vehicle's weight. The proposed standard would strengthen the ratio to 2.5.

NHTSA estimates the rule change would result in 13 to 44 fewer rollover fatalities every year. Critics say a new rule should make significantly more progress than that. In 2007, more than

10,000 people died in rollover crashes. "Rollover crashes should be highly survivable," said Joan Claybrook, head of the consumer group Public Citizen, in testimony.

Other details of the rule also rile safety advocates. The rule would continue to require roof strength be tested by applying pressure on the vehicle using a metal plate, instead of attempting to model real-world situations in order to better understand the physics of rollover crashes. In testimony, Jacqueline Gillan, vice president of Advocates for Highway and Auto Safety, which represents consumer and public health groups and insurance companies, said some manufacturers are already using real-world modeling and urged NHTSA to require the technology for the safety testing of all vehicles.

Critics say the rule would also artificially inflate a roof's strength during crash testing by mandating the windshield remain intact and the side windows remain rolled up. In a crash, windshields may shatter or dislodge, and side windows may be rolled down.

NHTSA is updating the standard in response to legislation Congress passed in 2005, but Congress mandated a more aggressive approach to rollover safety, advocates say. "Despite legislative instruction to address the necessary safety measures in a coordinated manner to prevent deaths and severe injuries in rollover crashes, the sad truth is that NHTSA is taking an inadequate and piecemeal approach to rollover safety," Gillan said.

Congress mandated completion of the standard by July 1, 2008, but also gave NHTSA flexibility if the rule proved too difficult to complete by the deadline. During the hearing, Sen. Tom Coburn☼ (R-OK) said NHTSA should give higher priority to eliminating the rule's flaws than to meeting the deadline. "If we have a little increase in roof strength that doesn't result in a major decrease in fatalities and injuries, we've done nothing," Coburn said.

Congress Adopts Mixed-Bag Budget Resolution

A rare event occurred in Washington on Thursday, June 5: Congress approved a budget resolution during an election year, a feat not seen since 2000. This fact and a human needs-oriented approach to spending signal that Congress is addressing national priorities while attempting to more responsibly manage the country's finances. However, Congress's eliding of pay-as-you-go rules and unrealistic assumptions about war spending and Alternative Minimum Tax (AMT) relief have marred an otherwise responsible budget resolution.

By a vote of 48-45 in the Senate and 214-210 in the House, Congress adopted the $3.03 trillion budget resolution conference report. The plan's $1.013 trillion in discretionary spending bests the president's request by some $21 billion, setting up a showdown on spending bills later in 2008.

The plan reflects priorities more consistent with the needs of Americans, particularly under increasingly difficult economic conditions. For example, the budget resolution acknowledges sharp price increases in recent months for everyday necessities such as food and home cooling

that are stretching family budgets. To address these, the budget resolution adds funds for critical programs like Women, Infants and Children (WIC) and the Low Income Home Energy Assistance Program (LIHEAP), as well as the refundable Child Tax Credit and unemployment insurance. Equally important, the resolution staves off cuts proposed in the president's budget for housing, health care, nutrition, education, and employment that could further imperil living standards for millions of Americans.

Accepting that the Senate has little appetite for offsetting tax cuts, House conferees forged a compromise with their Senate counterparts that would omit filibuster-proof reconciliation instructions on implementing an AMT "patch" that would hold things even with today. The $70 billion AMT provision was the preeminent point of contention between the chambers, and the capitulation by House conferees enabled the resolution's passage in the Senate. It should be noted that while reconciliation instructions to enact a fully-offset AMT patch are not included in the budget resolution, Congress retains the option to provide revenue-neutral AMT legislation when it takes up the matter later in 2008. However, contrary to history and all indications for the future, the spending plan assumes all future AMT legislation will be revenue neutral.

Congress also unfortunately repeats the president's fantastical assumption that spending on the wars in Iraq and Afghanistan will cease after FY 2009, even though the most optimistic of anti-war advocates would not concede that this is a realistic forecast. Like the president, Congress has opted to reject a plausible war-spending scenario for the sake of claiming that budget surpluses will materialize in 2012 and 2013. This projection is very likely not to happen.

The budget resolution also allows for partial extension of the 2001 and 2003 tax cuts, including preserving the ten-percent tax bracket, maintaining the child tax credit, eliminating the "marriage penalty," and cutting the estate tax. The enactment of these tax cuts, however, depends on the materialization of those same unlikely projected budget surpluses in 2012 and 2013.

Congress's current approach to fiscal governance is encouraging compared to those of the recent past, because it emphasizes putting human needs before tax cuts for the wealthy. But the dubious assumptions on which it depends to arrive at budget surpluses indicates an unwillingness to confront the troubling realities of the longer-term fiscal outlook. Acknowledging that the nation's priorities and the revenue levels required to fund them are not in sync is the first step in enacting responsible budgets.

Spike in Jobless Rate Restarts Focus on Unemployment Insurance

On June 6, the Bureau of Labor Statistics (BLS) reported a jump in the national unemployment rate from 5.0 percent in April to 5.5 percent in May, the single biggest month-to-month increase in 22 years. Another 49,000 Americans joined the ranks of the unemployed in May, bringing the yearly total thus far to 324,000. The news took analysts by surprise, and

along with rising oil prices, helped push stocks down by three percent on all three major American exchanges and re-ignited talk of a possible recession.

The new jobs report also restarted discussions in Congress about extending state unemployment insurance (UI) an extra 13 weeks. Merely days before, the House Democratic leadership had indicated that it would remove a provision extending unemployment benefits that was added to the war supplemental bill by the Senate on May 22, but the BLS figures immediately spurred renewed talks in Washington and added pressure to pass a UI benefits extension.

The UI extension provision in the Senate bill is similar to one approved by the House Ways and Means Committee in April. It calls for up to 13 additional weeks of federal UI benefits in every state for workers who have exhausted the 26 weeks of regular state unemployment insurance payments. In states with unemployment rates exceeding six percent, extensions of 26 weeks would be available.

Two days before the May Senate vote that added UI benefits to the war supplemental, the Bush administration issued a veto threat of the Senate war supplemental bill, specifically disapproving the UI extension on the grounds that "the unemployment rate is 5.0 percent — a low rate by historical and economic standards." Following the recent BLS report, the administration released a "fact sheet" on June 6, stating it had already taken action to alleviate employment problems by signing the stimulus bill — an "economic growth package" that is expected to "help create more than half a million jobs by the end of 2008."

Unfortunately, the Bush administration badly misread the BLS numbers, which are worse than they may appear and indicate an extension of UI benefits is long overdue. Those most directly affected by ongoing troubles in the job market are the long-term unemployed, a sizable proportion of whom are not even counted in unemployment rate statistics because they have stopped looking for work and are deemed to be no longer in the workforce. These citizens, not those who are unemployed for short periods, are the ones most in need of a UI benefits extension.

In testimony before the Income Security and Family Support Subcommittee of the House Ways and Means Committee on April 10, University of Michigan Economics Professor Rebecca M. Blank said that the standard unemployment rate measures those actively looking for work. If the "marginally attached," those who want a job and have recently looked for a job, but are currently not looking because jobs are so scarce, and the underemployed — those available for full-time work but who have had to settle for a part-time schedule — are added to the unemployment picture, the unemployment rate as of March 2008 would have been 9.1 percent. Today, that figure would be closer to 9.5 percent.

According to a Joint Economic Committee press release on May 21, there are 1.4 million unemployed workers who have been out of work and searching for a new job for at least six months. Regardless of the overall unemployment rate, the average duration of a jobless spell today is longer than at any time Congress has taken action to extend unemployment benefits in

the past 30 years. The share and number of UI beneficiaries exhausting their benefits is already higher than at the beginning of the 2001 and 1990-91 recessions. 36.4 percent of unemployed workers had exhausted their UI benefits by the end of the first quarter of 2008.

These facts argue for immediate extension of UI benefits for the marginally attached and underemployed, and macroeconomic conditions support an even broader extension. The Congressional Budget Office has estimated that, once up and running, a national UI extension would put more than $1 billion per month in the hands of jobless workers and their families. As the Economic Policy Institute reminds us, Mark Zandi of Economy.com estimates that every dollar spent on unemployment insurance boosts the economy by $1.73. UI stimulus is effective because the long-term unemployed, who are likely to have depleted their savings, tend to quickly spend every dollar they receive on necessities.

The spike in the unemployment rate announced June 6 caught the attention of almost everyone in Congress, which is now much more likely to act. The proposal to extend benefits that the House Ways and Means Committee approved in April has seen no action since then, but the House leadership has announced that it seeks a floor vote on a stand-alone UI extension measure sometime during the week of June 9. It seems likely that the issue will be revisited by the Senate, although the method by which the extension is approved has not yet been determined. It could be attached to the war supplemental bill or a broader stimulus package, or passed as a companion to the House stand-alone bill.

It is unclear if the president would still veto an extension of UI benefits given the new economic and employment data, but strong support in Congress and an impending election could yield sufficient votes in Congress to override a presidential veto.

OMB Watch Calls for Clear IRS Rules for Election Activities

In response to an Internal Revenue Service (IRS) request for input on its 2008-09 guidance priorities, OMB Watch submitted comments that stated the top IRS priority should be the creation of a bright-line definition of prohibited political intervention for charities and religious organizations exempt under Section 501(c)(3) of the Internal Revenue Code (IRC). The IRS is continuing its public education efforts to inform groups about the prohibition on partisan election activities and will soon release two field directives for IRS agents to guide them in enforcing the rules.

Each year, the IRS seeks public input on it Guidance Priority List "to identify and prioritize the tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance." The OMB Watch comments said that clearly defining "what is and is not allowed for issue advocacy and voter education efforts by 501(c)(3) organizations is critically needed to guarantee basic constitutional rights of free speech and association. It is also necessary to remove the chilling effect of the current vague facts and circumstances test so that 501(c)(3) organizations can become fully engaged in

activities that support election reform and the goals of the Help America Vote Act."

OMB Watch recommends that the IRS consider the U.S. Supreme Court's 2007 decision in *Federal Election Commission v. Wisconsin Right to Life* in developing a bright-line standard. That decision exempted genuine issue advocacy broadcasts from the "electioneering communications" ban on corporate-funded broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary. The IRS could adopt guidelines similar to what the FEC approved as permissible issue advocacy. According to the FEC rules, if the focus is on a legislative issue, and an officeholder is urged to support that position, or the public is called to support a position and contact an officeholder to urge him or her to do so, it is not an electioneering communication.

The OMB Watch comments included an attachment of a draft bright-line approach proposed by attorney Gregory Colvin of Adler and Colvin in San Francisco that can be used as the foundation for drafting bright-line guidance. Colvin's document distinguishes genuine issue advocacy from partisan political intervention. Colvin's safe harbor proposal considers that if the activity does not take a position on any candidate's character or fitness for office, it would not be considered partisan politicking by the IRS.

Meanwhile, during a May 28 District of Columbia Bar Section on Taxation luncheon, Judith Kindell, an IRS senior technical adviser in the exempt organizations area, announced two forthcoming field directives for exempt organizations agents that will guide them in enforcing the rules on prohibited political activity. One directive will discuss the issue of Web links and the other issue advocacy. In determining whether a 501(c)(3) organization engaged in partisan politicking, "issue advocacy is not just the statement, but the context of the distribution of the statement that we look to." Kindell said that for this election season, the IRS will not pursue cases where a website a 501(c)(3) organization is linking to is its related 501(c)(4) social welfare organization.

Another speaker on the same panel, Marcus Owens, an attorney with Caplin & Drysdale, said the IRS should issue bright-line regulations because of "differing interpretations of the facts-and-circumstances standard that IRS applies" and because "there are too many gray areas." He said some IRS offices have a more liberal interpretation where only allegations of explicit statements of campaign intervention lead to investigations, while other offices are more willing to look at allegations of implicit or indirect campaign intervention. Owens also discussed "inferential" intervention, which he described as "inferences derived from discussions of candidate's positions on an issue ... but somewhere else in the organization, another Web site or something off a Web site could carry with it a flavor of the organization's position on the same issue, and IRS could conflate those two and come to the conclusion that there was inferential intervention."

In addition, on May 27, the IRS posted the transcript of an interview with Steve Miller, commissioner of the Tax Exempt and Government Entities Division, discussing tax-exempt organizations and their involvement in elections. In describing enforcement of the ban on election activity, Miller said the IRS "read[s] the newspapers about possible problems that

have occurred. When we get that information, a team of folks takes a look and determines actually whether they think there's enough for us to go out and actually do an investigation." If the IRS determines that an entity acted illegally, "action can be as minimal as a letter to the charity explaining the rules or, in some cases, possibly an excise tax. In other cases, we could revoke the tax-exempt status." Use of such second-hand sources for enforcement purposes calls attention to the need for a bright-line rule that clearly defines prohibited political intervention activities for charities and religious organizations.

In an OMB Watch press release, Kay Guinane, Director of Nonprofit Speech Rights, said, "By protecting the ability of the nation's only nonpartisan sector to speak out on the issues of the day, on any day, on any issue, no matter how controversial, the IRS can ensure debate on public policy issues is informed by the expertise and public interest perspective of 501(c)(3) organizations."

Free Speech Questions Linger After Judge Dismisses Most Charges against Charity Leaders

Concerns about the freedom of association and the right to express unpopular points of view in organizational newsletters remain after conspiracy charges against three officers of a defunct Muslim charity, Care International, Inc., were dismissed in Boston on June 3. Two other convictions were upheld, including one against the former treasurer of the organization because he failed to report newsletters supporting "jihad" to the Internal Revenue Service (IRS).

Ruling from the bench, U.S. District Court Judge Dennis Saylor IV overturned three convictions for conspiracy to defraud the IRS by obtaining tax-exempt status in 1993 for Care International. The group ceased operations in 2003. Saylor said there was no proof of conspiracy when the group was created. The three leaders were convicted in January and have been in prison ever since. After the ruling, Samir Al-Monla was released, and sentencing for the other two defendants, Emadeddin Muntasser and Muhammed Mubayyid, is scheduled for June 12. Attorneys for both sides said they are considering appeals.

Prosecutors from the U.S. Attorney's office admitted the group spent funds to assist widows, orphans, and disaster victims around the world but also said the group supported violent jihad. However, the defendants were not charged with material support of terrorism, and the judge said no evidence of use of charities to promote terrorism was produced during trial, despite the extremely broad claims made by prosecutors. The evidence of the alleged support was limited to statements in the group's newsletter.

Failure to disclose the newsletter articles was one basis of Mubayyid's conviction for filing a false tax statement in 2000, which was upheld. The prosecution's theory that publication of such articles is a crime unless reported to the IRS raises fundamental free speech issues. Harvey Silvergate, attorney for Muntasser, told the *Worcester Telegram*, "There has never been a prosecution under this theory ... absolutely every — not most every — application for

tax-exempt status would potentially be the basis of a criminal charge.... Invariably you have to omit a huge amount of information or else have a 16,000 page application." In addition, the right to hold and advocate unpopular points of view is clearly protected. The 1969 U.S. Supreme Court ruling in *Brandenburg v. Ohio* said, "Speech can only be curtailed when it is intended to and has the effect of causing imminent lawless conduct. Mere abstract advocacy of violence, however objectionable, may not be barred." Muntasser's conviction for making a false statement about a visit to Afghanistan was also upheld.

The prosecution also argued that the defendants failed to report that Care International was an outgrowth of the Al-Kifah Refugee Center, which media reports linked to the 1993 attack on the World Trade Center. The basis of the argument appears to be Muntasser's past relationship to Al-Kifah, which he left after 1993. At trial, the defense argued that Al-Kifah was separate and that the defendants started Care to break away from it. News reports about the trial do not include information about evidence of control or a formal relationship between the two groups. More information may become available when the judge's written order is filed, but for now, the "outgrowth" theory raises questions about freedom of association and whether nonprofits must report all past affiliations of their leaders and employees in order to avoid possible criminal prosecution.

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