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The Watcher
June 24, 2008 Vol. 9, No. 13

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Toxic Assessment Delays Block New Standards

A House panel recently examined efforts by the U.S. Environmental Protection Agency (EPA) to study human exposure to, and toxic effects of, common industrial chemicals. EPA is not assessing enough chemicals and is taking too long to complete the assessments it does undertake, lawmakers said. Witnesses complained that without rigorous scientific studies as a foundation, federal and state agencies cannot set air and water quality standards that protect public health.

The House Science and Technology Committee's Subcommittee on Investigations and Oversight held the hearing June 12. Much of the hearing focused on the Integrated Risk Information System (IRIS), EPA's program for studying toxins. IRIS is a publicly searchable database for studies on the human health effects of hundreds of industrial chemicals and other substances.

Although hundreds of new chemicals appear on the market every year, EPA's pace for completing IRIS assessments has slowed dramatically in recent years, panel members and witnesses said. Ranking Member James Sensenbrenner (R-WI) pointed out that EPA has completed only two IRIS assessments in each of the last two years. He called the process "broken down."

Critics say revisions to the IRIS assessment process, announced April 10, will worsen delays by adding additional steps to the process. One new provision gives other federal agencies, such as the Department of Defense and the Department of Energy, a guaranteed seat at the table during review of EPA's initial assessments.

Sensenbrenner said the new interagency review requirement, managed by the White House Office of Management and Budget (OMB), may further slow the pace of IRIS assessments. "The EPA needs to limit the time frame of assessments to prevent other agencies from indefinitely delaying the process," he said.

Documents released by the subcommittee show EPA experts unhappy with the OMB interagency review period. OMB began wading into the IRIS assessment process in 2004. IRIS program staff said OMB's presence "has added tremendously to the time it takes to release" draft and final assessments.

Giving certain agencies an opportunity to review IRIS assessments also creates a conflict of interest, critics say. The defense industry, including the Pentagon and its contractors, emit more pollution than any other sector. If EPA finds a chemical poses a risk to public health, these agencies may be held liable in court or forced to clean up the pollution.

Controversy surrounding a past IRIS assessment on perchlorate, a chemical found in rocket fuel, could foreshadow future interference by the Pentagon, according to Linda Greer, Director of the Health Program at the Natural Resources Defense Council. "The Defense Department mounted a years-long battle, and elicited White House support, against IRIS draft assessments in 1998 and in 2002 that had determined that even low doses of perchlorate may be harmful to early development of the human brain," Greer said in testimony.

The perchlorate assessment drew the attention of Pentagon officials and defense contractors because it is widely used in defense activity. Public health advocates have pushed for perchlorate regulation because it has been widely detected in public drinking water supplies and is a proven inhibitor of human thyroid functions. Greer said the delay means "the public remains years away from a national drinking water standard that will protect their health."

An IRIS assessment for trichloroethylene, another common contaminant, continues to be delayed. Lenny Siegel, head of the Center for Public Environmental Oversight, testified that the Navy Department has been integral in the long delay.

Witnesses said the defense agencies are able to delay assessments by questioning the scientific certainty of EPA's work and demanding further study be done before the assessment goes

forward. These constant claims of uncertainty keep EPA in an interminable quest for more data. Sensenbrenner does not believe complete certainty should be a prerequisite for finalizing an assessment. "Data gaps in risk assessments will always exist, as better science is always developing," he said.

The hearing was the second of two held by the subcommittee examining the revisions to the IRIS assessment process. The first hearing focused primarily on OMB's involvement in IRIS and how that involvement contributes to delay in the assessment process.

Following the first hearing, panel chairman Brad Miller (D-NC) wrote to Susan Dudley, head of OMB's Office of Information and Regulatory Affairs (OIRA), the White House office responsible for coordinating the interagency review. Miller accused OIRA of directly delaying and interfering in IRIS assessments. As with review of agency regulations, Dudley maintains OIRA's role is merely to coordinate the review among executive branch departments. "However, documents that have come to the Subcommittee suggest that OIRA plays a direct role in examining and challenging the science that informs EPA's proposed IRIS entries," Miller wrote.

Miller also criticized the lack of transparency in the revised process for IRIS assessments. Communications among EPA, OMB, and other agencies will be considered "deliberative," according to the document outlining the new process. EPA had hoped to make these back-and-forths among the agencies part of the public record, but OMB persuaded the agency to drop the disclosure policy, according to a recent report by the Government Accountability Office.

"The only reason to hide a discussion about science is if the discussion is actually not about science, but about other things that are being used to trump the science," Miller wrote.

Congress, FDA Explore BPA Dangers

Congress and the U.S. Food and Drug Administration (FDA) have begun to further explore the dangers posed by bisphenol A (BPA) and whether to regulate its use, especially in food and beverage containers. BPA is an industrial chemical used to make hard plastic containers, such as baby bottles, and is part of the lining of food cans, where it is used to prevent metal from leaching into foods. Congress recently held a hearing and is considering legislation to limit the use of BPA. The FDA is assessing the toxicity of the chemical to help determine the risk to consumers.

In April, the National Toxicology Program (NTP), part of the U.S. Department of Health and Human Services, and Canada's health ministry, Health Canada, released the results of studies on the toxicity of BPA to various subpopulations. According to Health Canada's press release announcing the results, "Canada is the first country in the world to complete a risk assessment of bisphenol A in consultation with industry and other stakeholders, and to initiate a 60 day public comment period on whether to ban the importation, sale and advertising of

polycarbonate baby bottles which contain bisphenol A."

NTP's brief on the effects of BPA concluded that there was "some concern" about neurological effects on infants and children from low levels of exposure. A peer review of the draft brief by a science panel concurred with NTP's concerns for all but one subpopulation, according to a June 12 BNA article (subscription) describing the results of the peer review. The review panel said there was sufficient evidence to support NTP's conclusions about the danger BPA poses to infants and children.

On June 6, FDA's lead scientist asked the agency's science board to convene a subcommittee to study the effects of BPA. That group is expected to report its conclusions in the fall of this year. The science board will also review the scientific literature from around the world to help better understand the implications of exposure to BPA.

On June 10, at a hearing by a subcommittee of the House Committee on Energy and Commerce, FDA's Associate Commissioner for Science, Norris Alderson, testified, saying, "A large body of available evidence indicates that food contact materials containing BPA currently on the market are safe, and that exposure levels to BPA from these materials, including exposure to infants and children, are below those that may cause health effects." Alderson said that if the FDA's science board concludes that BPA is not safe, the agency would consider regulating its use. The likely result of this process, however, is that FDA will not act to regulate or ban BPA in the near future.

Other witnesses at the hearing disagreed about whether BPA and phthalates, another class of chemicals used in children's toys and other products, should be regulated. According to a June 11 article in BNA (subscription), the American Chemistry Council witness said there is no need for concern about these two chemical substances and that "the scientific evidence supports the continued use" of them. Witnesses from public health organizations, however, argued that there is enough evidence for Congress to regulate these chemicals.

Manufacturers and retailers have already started reducing or eliminating the use of the chemicals. For example, after NTP and Health Canada released their studies in April, several companies began to voluntarily remove products that contain BPA. According to an April 19 *Washington Post* article, Wal-Mart Canada began to pull baby products containing BPA from store shelves, and Nalgene, the manufacturer of plastic water bottles, planned to discontinue production of bottles with BPA. Since that time, other manufacturers and retailers have begun to phase out various products.

Rep. Edward Markey (D-MA) introduced a bill June 10, H.R. 6228, which would amend the Federal Food, Drug, and Cosmetic Act and ban completely the use of BPA in food and beverage containers. It has been referred to the House Committee on Energy and Commerce.

House Caves on Telecom Immunity in FISA Bill

After months of negotiations and stalled efforts, the House leadership reached common ground with the White House in passing a bill that reforms the legality of foreign surveillance and grants telecommunications companies retroactive immunity for assisting in warrantless wiretapping. On June 20, the House passed the FISA Amendments Act of 2008 (H.R. 6304) by a vote of 293 to 129. Despite opposition from key senators and the public interest community, at this point it appears likely to pass the Senate as well.

The public interest community heavily criticized the bill for expanding government surveillance powers to permit wiretapping of American citizens without judicial approval and for essentially granting telecommunications companies a free pass for allegedly illegally participating in the National Security Agency's (NSA) warrantless surveillance program.

In the summer of 2007, President Bush signed the Protect America Act of 2007 (PAA), which granted the government the authority to wiretap anyone, including U.S. citizens, without any court approval as long as the "target" of the surveillance is located outside the U.S. The bill included sunset provisions that would automatically eliminate the surveillance powers after six months if Congress did not act to extend the authorities. The PAA provisions expired in March after negotiations between the Senate and House faltered. Since then, the House leadership has been in negotiations with the Senate leadership and the White House.

While hailed as a compromise bill by the House leadership, advocates have criticized the legislation for failing to preserve the Fourth Amendment's protection against unreasonable searches and seizures and for failing to provide adequate access to U.S. courts.

Telecom Immunity

The central issue of contention between the House and Senate has been whether to grant retroactive immunity to telecommunications companies alleged to be involved in the NSA's Terrorist Surveillance Program (TSP). Numerous lawsuits against the companies are currently proceeding through the courts, and the Bush administration, along with the Senate, has been pushing for some mechanism to dismiss these cases. As reported previously in the *Watcher*, Speaker Nancy Pelosi (D-CA) refused to compromise on this issue earlier in the year, and the PAA provisions were allowed to expire.

Under H.R. 6304, the "compromise" leaves the question of immunity for the courts to decide. However, the bill stipulates the use of an easy standard to qualify for the immunity. The bill requires courts to determine if there is "substantial evidence" showing that telecommunications companies received written requests stating that the wiretapping activity was authorized by the president. However, it is well accepted that telecommunications companies participating in TSP have such letters; therefore, the court test is widely viewed as meaningless.

"This immunity provision will effectively destroy Americans' chance to have their deserved day

in court and will kill any possibility of learning the extent of the administration's lawless actions," stated Caroline Frederickson of the American Civil Liberties Union (ACLU).

Expanded Government Surveillance Authority

While the PAA permitted the government to target anyone overseas for surveillance without receiving a warrant or judicial approval, H.R. 6304 limits the scope of such warrantless surveillance to non-Americans. However, warrants or judicial approvals still aren't required even if the overseas target contacts an American citizen. Such "reverse targeting" may provide an end-run around the protections of the Fourth Amendment. While the courts must approve the minimization procedures for collecting such intelligence, there is nothing requiring the government to seek individualized orders once the real target has shifted to an American citizen. Moreover, there is nothing preventing the government from engaging in the bulk collection of overseas communications.

"Congress could have given intelligence agencies the necessary authority to domestically collect the communications of targets abroad while preserving privacy protections for Americans," said Leslie Harris, President and CEO of the Center for Democracy and Technology. "Instead, under this flawed bill, intelligence agencies can authorize themselves to conduct surveillance. Meanwhile, court review of surveillance procedures will often be too little and too late to provide meaningful protection."

Modest Improvements

It appears H.R. 6304 contains a few modest improvements over the PAA without the major changes the Democratic leadership was insisting on at the start of the standoff. First, the bill asserts that the Foreign Intelligence Surveillance Act (FISA) is the exclusive means by which surveillance may be conducted. This may prevent a future administration from engaging in a secret surveillance program, like the NSA spying program, outside of the established legal framework. Second, the bill calls for a review of the TSP program by the inspector general. The administration has thus far successfully resisted a thorough review of the spying program. Third, the bill has a sunset of 2011, which will require the next administration and Congress to reconsider its provisions.

Despite these modest improvements, the public interest community has united to combat the bill in the Senate, where it is expected to come up for a vote on Tuesday, June 24. Several senators have voiced strong opposition to the compromise, including Sens. Russ Feingold (D-WI), Patrick Leahy (D-VT), Christopher Dodd (D-CT), and Arlen Specter (R-PA).

"It is totally insufficient to grant immunity for the telephone companies' prior conduct based merely on the written assurance from the administration that the spying was legal," said Specter.

Feingold asserted that the "proposed FISA deal is not a compromise; it is a capitulation."

Leahy issued a statement explaining his refusal to support the bill. "I have said since the beginning of this debate that I would oppose a bill that did not provide accountability for this administration's six years of illegal, warrantless wiretapping."

Dodd, who called the compromise on retroactive immunity by another name, stressed, "The President should not be above the rule of law, nor should the telecommunications companies who supported his quest to spy on American citizens."

Despite such opposition in the Senate, the bill is expected to pass. The bill is also expected to be signed by the president because it already has support from key administration officials. J.M. McConnell, the Director of National Intelligence, and U.S. Attorney General Michael Mukasey voiced their support, stating that H.R. 6304 provides "the Intelligence Community with the tools it needs to collect the foreign intelligence necessary to secure our Nation while protecting the civil liberties of Americans."

House Considers New Legislation at Chemical Security Hearing

On June 12, the House Energy and Commerce Subcommittee on Environment and Hazardous Materials held a hearing on the current status of the chemical security program at the Department of Homeland Security (DHS) and considered two bills to amend the program.

The current chemical security program was established after Congress mandated in Section 550 of the Department of Homeland Security Appropriations Act of 2007 that DHS develop a temporary program for instituting security performance standards for high-risk chemical facilities. The chemical security provisions of the bill were the result of a heavily criticized backroom deal that excluded bipartisan agreements worked out in the House and Senate. Among the criticisms were the fact that the legislative language specifically exempted approximately 3,000 drinking water and wastewater treatment facilities from the chemical security program and that review of safer technologies was not required as part of the program.

Robert B. Stephan, Assistant Secretary for Infrastructure Protection at DHS, reported that under the current chemical security program, DHS has reviewed approximately 30,000 questionnaires (called "top-screens") from chemical plants. These top-screens are the initial stage in the agency's review of facilities and are used to determine each facility's placement in the tiered risk assessment. Those plants placed in higher-risk tiers are required to address more issues in their vulnerability assessments and site security plans, which will also be reviewed by DHS. Stephan noted that facilities have not yet begun submitting vulnerability assessments, but that DHS would soon be notifying facilities of their obligations to do so.

Stephan also testified to the subcommittee that DHS now supported the inclusion of drinking and wastewater treatment facilities determined to be high-risk in the chemical security program. Benjamin Grumbles, Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA), agreed that the exemption for facilities regulated by the Safe

Drinking Water Act should be eliminated. Grumbles said that because of the exemption, the potential terrorist threat to U.S. water systems "remains alive and well."

The Two Bills

There are two chemical security bills currently pending in the House, and the subcommittee was considering them during the hearing. Rep. Bennie Thompson (D-MS), Chair of the House Homeland Security Committee, introduced H.R. 5577 (Chemical Facility Anti-Terrorism Act of 2008) on March 11; the legislation seeks to fully replace the temporary 2006 law with a more comprehensive program. The Thompson bill includes stronger consideration of safer technologies, greater involvement of plant employees, and would include the previously exempted water treatment facilities in the chemical security program.

Former Rep. Albert Wynn (D-MD), who left Congress after losing in his Democratic primary to challenger Donna Edwards, introduced H.R. 5533, which would essentially make permanent the criticized interim law from 2006 and the temporary DHS regulations that resulted. The Wynn bill would continue to exempt water treatment facilities and would not require consideration of inherently safer technology as part of the program.

Grumbles told the subcommittee that the administration had not taken a position on either bill, and Stephan did not discuss legislation. Several subcommittee members, however, took issue with a recent DHS letter to Thompson that expressed the agency's strong opposition to H.R. 5577. In the letter, DHS claimed that H.R. 5577 would have "a negative impact upon current and future efforts to secure the nation's high-risk chemical plants." Despite the subcommittee's scheduled hearing on the legislation just two days after the letter was sent to Thompson, no copy was sent to the subcommittee, and Stephan reported that he had not been authorized to share information in the letter with the subcommittee.

In Thompson's June 12 response to DHS, he expressed suspicion over the agency's timing and stated that he is "doubtful that DHS is still interested in continuing our good faith efforts at collaboration on this critical homeland security initiative."

Other Testimony

Among others testifying before the subcommittee was Philip J. Crowley, Senior Fellow and Director of Homeland Security at the Center for American Progress, who supported H.R. 5577 and the legislation's efforts to include water facilities and inherently safer technologies. Crowley also urged immediate action on the legislation, warning that chemical security was "too important an issue to fall victim to inter-agency or inter-committee rivalries."

Brad Coffey of the Association of Metropolitan Water Agencies explained that the association was opposing H.R. 5577 because of its belief that the legislation would undermine drinking water utilities' ability to operate effectively. Coffey expressed concern over the possibility that safer technologies could be required and claimed that "overall public health relies on our

undisputed ability to choose the optimal drinking water disinfection method."

Marty Durbin, Managing Director of Federal Affairs for the American Chemistry Council (ACC), voiced concern over provisions in H.R. 5577 that provide DHS the authority to require the use of safer technology. Durbin explained that ACC supported reauthorizing and making the current chemical security program permanent, but that "Congress should allow the program to be fully implemented before making any significant, substantive changes."

Dr. Andrea Kidd Taylor, an assistant professor at Morgan State University's School of Community Health and Policy and previously the labor representative on the U.S. Chemical Safety and Hazard Investigation Board, supported H.R. 5577 and stressed the importance of implementing safer technologies as apart of the effort to make chemical plants more secure. "Substituting more secure alternatives for hazardous substances, where technically and economically feasible and comparable risks are not shifted," Taylor explained, "is the best way to protect workers, their families, and their communities."

Improving Information Sharing at DHS

On June 11, the House Homeland Security Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment held a hearing on a bill (H.R. 6193) introduced by Rep. Jane Harman (D-CA), chair of the subcommittee, to improve information sharing at the Department of Homeland Security (DHS).

As previously reported in the *Watcher*, President Bush recently released a memo on improving information sharing through a new regime for controlled unclassified information (CUI). Since 9/11, restricted but unclassified categories for information, often broadly referred to as Sensitive But Unclassified, have proliferated throughout federal agencies. More than one hundred different categories with varying restrictions and definitions have severely impaired the flow of information within government and to the public. The presidential memo eliminated the numerous confusing categories and replaced them with one basic category for all agencies, CUI, with the hope that a consistent, well understood category would make it easier for agencies to share such information with other government officials. The memo placed authority for developing and implementing the new regime with the National Archive and Records Administration.

Harman's bill, the Improving Access to Documents Act of 2008, focuses on the implementation of the CUI framework at one particular agency — DHS. Considering the government-wide nature of the presidential memo, the single-agency focus of the bill is somewhat unconventional. Some critics of the legislation actually support the policy changes proposed by Harman's bill but would prefer the provisions apply to all agencies, not just DHS.

The bill seeks to limit the use of the new CUI category by restricting the number of employees who can designate something as CUI. Other provisions of H.R. 6193 establish transparency with regular auditing and reporting to Congress of the number of documents marked as CUI

and requirements that DHS publicly disclose the list of CUI documents withheld under the Freedom of Information Act (FOIA). The bill also explicitly distinguishes between CUI and FOIA exemptions, clarifying that CUI-marked documents are not automatically exempt from disclosure under FOIA.

Patrice McDermott of OpenTheGovernment.org, a broad coalition that includes OMB Watch, supported the legislation and advocated for greater public involvement in the process of developing and implementing CUI policy. Stating that the "public and the press have been almost entirely excluded," McDermott argued in her testimony before the subcommittee that public involvement is the only way to move from a need-to-know to a need-to-share environment.

Meredith Fuchs of the National Security Archive stressed the need to preserve the distinction between CUI and FOIA exemptions and to ensure that CUI does not become another mechanism for increased government secrecy. Failure to adequately define CUI and the creation of a highly malleable concept can easily lead to increased government secrecy. "The CUI framework sketched out in the Presidential Memorandum does not confront this problem directly," said Fuchs in her testimony.

The Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment forwarded H.R. 6193 to the full Homeland Security Committee with unanimous consent.

Fiscal Responsibility, War Critics Take a Back Seat in House War Supplemental

When the House Democratic leadership introduced a supplemental appropriations bill the week of June 16, chock-full of popular spending measures, it ensured easy passage of the $257 billion package. The Democrats and President Bush can each claim they won items in the negotiation over the bill: the Democrats won increased spending on domestic programs; Bush was able to kill any requirements for withdrawal of soldiers from Iraq. Yet the bill remained controversial because the Democrats refused to include fiscally responsible measures or accede to the opinion of 63 percent of Americans that soldiers should return home within two years.

The inclusion of a multitude of additional domestic spending items, including a pair of massively popular provisions to extend Unemployment Insurance (UI) benefits and expand the GI bill, presented members of Congress and Bush with an irresistible basket of fiscal goodies. This spending would provide, among other things, relief for thousands of victims of natural disasters, maintain important Medicaid services, increase disaster protection for the citizens of New Orleans, and help feed victims of the global food crisis.

In addition, the bill excludes fiscally responsible offsets to new mandatory spending, a previous stumbling block to passage of the bill for almost all Senate Republicans.

The House spending package is a response to a war supplemental bill the Senate approved on

May 22, and, like the Senate version, is composed of two amendments. The first amendment in the House bill is the version passed by the Senate in May and would provide $99.5 billion to fund the wars in Iraq and Afghanistan through the end of the current fiscal year (FY) on Sept. 30 and $65.9 billion for the first half of FY 2009. This amendment was approved by the House 268-155. The second amendment, approved by the House 416-12, would reduce this funding by $3.6 billion and provide about $95.7 billion in non-defense domestic spending. While ultimate passage in the Senate is not certain, final congressional approval of the bill is likely to occur the week of June 23.

Emergency Supplemental - Appropriations Breakdown *(in millions of dollars)*		
Amendment #1	**Bush Request**	**House Bill**
Department of Defense 2008	100,054	99,506
Department of Defense 2009	66,063	65,921
Subtotal Amendment #1	***166,117***	***165,427****
Amendment #2		
Foreign Aid	9,423	10,089
State Department/USAID FY08	*5,074*	*5,164*
State Department/USAID FY09	*3,605*	*3,680*
PL480 Food Aid FY08	*350*	*850*
PL480 Food Aid FY09	*395*	*395*
Military Construction & VA Hospitals	2,438	4,642
Disaster Relief	0	2,650
FEMA Disaster Relief Account	0	1,297
Army Corps of Engineers	0	606
SBA — Disaster Loans	0	267
Agriculture Assistance	0	480
Louisiana Levees (FY09)	5,761	5,761
Louisiana Housing Vouchers	0	73
Department of Justice	186	271
Program Shortfalls	0	1,048
FDA	0	150
Bureau of Prisons	0	178
Census Cost Overruns	0	210
Increased UI Claims	0	110
Science	0	400
Veterans Education Benefits — Admin. Costs	0	120
Defense Reduction	--	-3,578
Death Benefit — Mrs. Lantos	0	0.169
Subtotal Amendment #2	***17,758***	***21,075***
TOTAL COST FOR APPROPRIATIONS ITEMS	**183,876**	**186,502**
Estimates for GI Benefits and Unemployment Extension		

	2-Year Estimate	11-Year Estimate
Expanded GI Benefits	$769 million	$62.8 billion
Unemployment Extension	$12.5 billion	$8.2 billion

Source: House Appropriations Committee press release

Construction of the final war supplemental bill has followed a strange and arduous path. After the Senate passed its version, House Majority Leader Steny Hoyer (D-MD) anticipated that the Senate's war supplemental would likely be rejected by the House Blue Dog Coalition, because it omits a $54 billion tax increase to pay for the expanded GI bill. Hoyer also believed the chances of UI extension would fare better in a stand-alone bill (H.R. 5749). But when the Bureau of Labor Statistics reported June 6 that the unemployment rate jumped by the largest monthly change in over 20 years (from 5.0 to 5.5 percent), House Democratic leadership realized that the UI bill would help passage of the war supplemental. House Blue Dogs, meanwhile, kept mum on demanding that this increase in mandatory spending be offset by either increased revenues or cuts to other mandatory programs.

To further increase bipartisan support of the war supplemental package, House Democratic and Republican leadership worked out a compromise by which the UI extension would be limited to 13 weeks; language to add an additional 13 weeks to workers living in "high-unemployment" states was dropped. House Democratic leadership apparently also struck a bargain with the Blue Dog Coalition on offsetting a GI bill expansion. When the House added the GI bill expansion to its initial war supplemental (approved by the House and sent to the Senate in May), Democratic leadership placated the Blue Dogs by including a $54 billion revenue raiser. No such offset was included in this latest package, yet Blue Dogs overwhelmingly approved the $71 billion in new mandatory spending.

When President Bush issued an approving Statement of Administration Policy (SAP) on the war supplemental on June 19, it became apparent the House would be voting on an incredibly popular bill. Earlier this year, the president made his position on including domestic spending in a war supplemental spending bill clear:

> ...I will not accept a supplemental over $108 billion or a supplemental that micro-manages the war, ties the hands of our commanders.
>
> We will work with Congress on these veterans' benefits. I'm a firm believer that we ought to treat our veterans with respect. In the State of the Union I talked about the idea of transferring — a soldier being able to transfer educational benefits to a spouse or children. We've sent legislation to that effect up to Congress; we would like for them to move on it quickly. But the $108 billion is $108 billion.

Although previous SAPs (here and here) echoed this sentiment, the president's support for relief for victims of the Midwestern floods in this bill signaled a back peddling from opposition

to the inclusion of domestic spending. His opposition was likely softened after the Senate voted by a veto-proof margin (75-22) to approve UI extension and GI bill expansion. And when the House overwhelmingly approved an amendment to the revised supplemental spending bill, it became clear that any veto would almost certainly be overridden.

The Democratic leadership has chosen the politically expedient path of crafting a war supplemental package that would provide vital support to the unemployed, reward the nation's military for their service, and cover a host of other emergency spending needs, all while not asking for the necessary sacrifice to pay for these priorities. House Speaker Nancy Pelosi (D-CA), Hoyer, and Senate Majority Leader Harry Reid (D-NV) well understand that 60-vote majorities in the Senate for revenue increases or war-policy mandates are virtually impossible to achieve, let alone mustering two-thirds majorities in both chambers for veto overrides.

Congress Struggles with Tax Bills ahead of July 4 Recess

In the dwindling days before the July 4 congressional recess, the House and Senate will try to break the longstanding logjams on three critical pieces of tax legislation: a proposal to approve a "patch" to hold constant the number of taxpayers liable to the Alternative Minimum Tax (AMT), a bill to renew dozens of tax provisions collectively referred to as the "extenders," and the tax title of Rep. Barney Frank's (D-MA) Federal Housing Administration (FHA) foreclosure guarantee bill.

It is likely that Congress will enact some version of these bills before the legislative year is over. Without passage of the "patch," upward of 25 million Americans will find themselves paying an average of $2,000 in additional income tax under the AMT, according to White House estimates. In addition, hundreds of America's largest corporations have urged congressional leaders to pass the "extenders" package — even if it means offsetting the cost of the bill to get it through the House.

The disputes over these bills in recent weeks reprise arguments that the parties involved have been invoking for months, if not years. Foremost among the points of contention is the perennial issue of fiscal responsibility. The House and Senate PAYGO rules require that any tax cut or mandatory spending increase that adds to the deficit over five- and ten-year windows needs to be offset by the amount added to the deficit. The rule comes into play regarding the AMT patch and the extenders package. Currently, the FHA bill is revenue neutral.

The price tag of the patch is $61.6 billion. In his AMT patch bill, House Ways and Means Chair Charles Rangel (D-NY) proposes to pay for the patch with four main offsets: taxation of carried interest as ordinary income (which would raise an estimated $30.98 billion over 10 years), denial of Section 199 benefits for certain major integrated oil companies ($13.57 billion over 10 years), tighter tax enforcement of merchant credit card payments ($9.80 billion), and a limitation on the use of foreign tax havens ($6.94 billion). All but the credit card provision have passed the House in separate legislation that then died in the Senate, which has been the

graveyard of prior House efforts at fiscal responsibility. Rangel has been adamant so far about paying for the patch in 2008, but previous years' precedent of waiving PAYGO for the patch may still happen in the end.

Interestingly, the odds of a partial or fully PAYGO-compliant extenders package are better. Again, Rangel and the House leadership insist on paying for the $55.5 billion package. However, the Senate has sent mixed signals. Senate Finance Committee Chair Max Baucus (D-MT) has proposed a fully-paid-for package, but votes to cut off debate on the package failed on June 10 and June 17, with at least 40 Republican senators opposed. Meanwhile, a consortium of 379 large American corporations sent a letter to the Senate leadership on June 16, making clear that the extenders package was such a high priority that they would rather have it paid for if that would enable its passage in the House.

At the heart of the FHA bill is a $300 million loan guarantee program that CBO estimates would prevent half a million foreclosures. The sticking points in the FHA bill debate have changed often, as the administration issues new veto threats against different aspects of the bill after their old demands have been met by legislators. For example, when the administration demanded that FHA modernization and GSE (government-sponsored enterprises) reform be included in the bill, Rep. Frank added such provisions. After that, in a veto threat sent to Congress on June 19, the administration took issue with the bill's provision to pay for the loan guarantee program by tapping into a new affordable housing trust fund, saying that it now opposes the creation of such a fund. On June 24, the Senate invoked cloture to move forward on the bill.

Innumerable other issues relating to these three bills have yet to be resolved, but in an election year, it is more likely than not that those issues, as well as the ones described above, will be resolved before Congress adjourns.

Grassroots Lobbying Campaign on Climate Bill Runs into FEC Rules

Two recent grassroots media campaigns promoting action on climate change learned that campaign finance rules can be a trap for unwary advocates, illustrating how federal election law has reached beyond partisan campaigning to treat traditional grassroots issue advocacy like electioneering. Both ads appeared to comply with the Internal Revenue Service (IRS) prohibition on intervention in elections.

The Alliance for Climate Protection (ACP) and the Environmental Defense Action Fund (EDAF) both ran ads in April and May that supported action on climate change, timed to coincide with Senate consideration of the Climate Security Act. The ACP ad featured House Speaker Nancy Pelosi (D-CA) and former Speaker Newt Gingrich, a Republican, who said that while they disagree on many things, they agree that the climate change problem must be addressed. The ad was part of an "Unlikely Alliances" series in ACP's wecansolveit campaign. A previous ad featured Revs. Al Sharpton and Pat Robertson and a new ad, announced June 9,

features liberals and conservatives holding signs that highlight differences, such as "burgers" and "tofu," but saying they all agree on the need to address climate change.

None of the ACP ads mention the election, voting, political parties, or any officeholder's character or fitness for office. They address an issue central to ACP's mission and are part of an ongoing issue advocacy campaign. As such, they appear to be within criteria set by IRS Rev. Rul. 2007-41, which sets out factors the agency uses to distinguish genuine issue advocacy from partisan messages. However, a May 9 *New York Sun* article quoted Republican campaign finance attorneys Jan Baran and James Bopp, Jr., who said the ad may violate the Federal Election Commission's coordination rules. This is because Pelosi was also running for re-election in a June 3 primary; the ad aired nationally, including in her district in San Francisco, within 90 days of the primary election; the ad was not paid for by Pelosi's campaign; and she appeared in the ad. The FEC coordination rules prohibit references a candidate within 90 days of a primary and 120 days of a general election. If Baran and Bopp are correct, the ad would be considered an illegal corporate contribution to Pelosi's campaign.

On May 23, Judicial Watch filed a complaint at the FEC seeking an investigation of the ad. It said that no FEC disclosure reports have been filed. Pelosi's spokesman denied coordination between her campaign and ACP. A spokesman for ACP, which was founded by former Vice President Al Gore and partially funded with his Nobel Peace Prize, told the *Sun*, "This is clearly a nonpartisan issue ad that has a call to action to the public on climate change. We are confident that this ad is in compliance with the rules." Baran disagreed, saying, "Well-meaning ads still violate the statute." Bopp pointed out, "I've been arguing all along that these rules were going to entangle a member of Congress when they're simply doing their job working with a nonprofit group. Well, here it is."

The impact of the FEC coordination rules on grassroots lobbying efforts may become more serious as the result of a June 13 ruling of the U.S. Court of Appeals for the District of Columbia. The long-running litigation, brought by Rep. Chris Shays☼ (R-CT), challenges the FEC's coordination rule for being too lenient in applying the Bipartisan Campaign Reform Act of 2002 (BCRA). In particular, the 90-day limit on coordination restrictions was rejected by the court, which said, "Does the challenged regulation frustrate Congress's goal of 'prohibiting soft money from being used in connection with federal elections'? McConnell, 540 U.S. at 177 n.69. We think it does. Outside the 90/120-day windows, the regulation allows candidates to evade—almost completely—BCRA's restrictions on the use of soft money."

The court's assumption that all joint efforts between public officials and nonprofits are somehow campaign related could result in an even stricter FEC coordination rule. The FEC has not yet said whether it will appeal.

An EDAF climate change ad, part of a $4 million grassroots lobbying effort, triggered FEC electioneering communications rules because the broadcasts referred to federal candidates within 30 days of a primary election. A May 30 *New York Sun* article reported that 25 versions of the ads mentioned Pelosi and more than three dozen other members of Congress, including Sens. Elizabeth Dole (R-NC) and Mark Pryor (D-AR), in an effort to generate support for the

Climate Security Act. The article again quoted Baran, who said the FEC's electioneering communications rules require EDAF to file a report at the FEC and name donors who contributed more than $1,000 for the ads.

EDAF spokesperson Emily Diamond-Falk told the *Sun* that the ads "have nothing to do with Speaker Pelosi's primary election at all. This is strictly about the Climate Security Act." On June 18, the *Sun* reported that EDAF had filed a report at the FEC indicating the group spent nearly $710,000 on its grassroots lobbying campaign. A spokesman for the organization said it learned about the filing requirement from the reporter's earlier inquiry. The group did not file the names of individual donors since it did not raise funds specifically for the ad campaign.

On June 6 the Climate Security Act fell short of the 60 votes necessary to cut off debate and bring the issue to a vote.

Pastor Invites IRS Scrutiny with Opposition to Candidates

The Rev. Gus Booth of Warroad Community Church in Minnesota, a delegate to this year's Republican National Convention, gave a sermon in May urging the opposition of Democratic presidential candidates Barack Obama and Hillary Rodham Clinton. About two weeks after the sermon, Booth sent an e-mail message to Americans United for Separation of Church and State (AU), noting that he had used his pulpit for partisan purposes and attaching a copy of a newspaper article describing the sermon. As a result, on June 11, AU asked the Internal Revenue Service (IRS) to investigate the church for possible illegal campaign intervention in violation of its tax-exempt status.

501(c)(3) organizations, including churches, are not allowed to endorse or oppose political candidates. A pastor may make an endorsement as an individual, but not as a representative of the church. IRS Rev. Rul. 2007-41 states, "Leaders cannot make partisan comments in official organization publications or at official functions of the organization."

According to AU's letter to the IRS, Booth's sermon was profiled in a local weekly newspaper, the *Warroad Pioneer*, under the headline, "Local pastor uses scripture to oppose presidential candidates Clinton and Obama." In addition, the *Minneapolis Star Tribune* reported that Booth said during his sermon, "If you are a Christian, you cannot support a candidate like Barack Obama or Hillary Clinton for president because he/she stands opposite of every one of the Biblical mandates we have addressed today."

AU said the message Booth sent them said, "I am writing you to let you know that I preached a sermon in my church on Sunday, May 18, 2008, that specifically addressed the current candidates for President in the light of the Bible. As you can see from the attached newspaper article, I specifically made recommendations as to who a Christian should vote for."

ABC News said Booth invited an IRS investigation. "Booth, 34, is one of several religious leaders who this year hope to challenge federal law by flouting the regulations about endorsing

candidates from the pulpit — a move that could potentially cost them their tax-exempt status, creating financial ruin for many congregations." Booth told ABC News, "The government is trying to censor me and other religious leaders. I may be taking on the IRS, but the IRS has taken on the Constitution unchallenged since 1954. I feel like the only law that should dictate what I am allowed to say is the First Amendment."

Privacy laws prohibit the IRS from announcing its investigations, so it is currently unknown whether the agency has opened an investigation into this case. However, it is likely that Booth will make a public announcement if the IRS starts an investigation, considering he wrote a letter to the IRS explaining what he had said, challenging the agency to do something.

Nonprofit Input Sought on the Future of Communicating with Congress

The Congressional Management Foundation (CMF), a nonprofit, non-partisan organization working to improve communications between citizens and members of Congress, recently released two important documents that could have significant implications for Congress and the public. One report, *Communicating with Congress: How the Internet Has Changed Citizen Engagement*, reveals that the Internet has revitalized citizen communication with Congress. A draft report, *Communicating with Congress: Recommendations for Improving the Democratic Dialogue*, seeks public comment on a new model for constituent communications and makes specific recommendations for congressional offices, citizens, and advocacy groups.

CMF started the *Communicating with Congress* project to improve communications between Congress and American citizens and began extensively researching all stakeholders' problems and interests. This includes working with Congress, advocacy organizations, technology vendors, and good government organizations. CMF states, "We hope this collaborative approach will result in a new model for communications between constituents and their elected officials which will have the support and commitment of as many people as possible. It is our goal that the model we propose will, if implemented, reduce or remove the current frustrations and barriers, facilitate increased citizen participation in the public policy process, and promote a meaningful democratic dialogue that benefits our country."

CMF commissioned the Zogby International polling firm to conduct a telephone survey of over 1,000 adult Americans and an online survey from a panel of 9,500 people to learn about their interactions with Congress and their expectations. The report found that almost half of all voting age Americans contacted a member of Congress in the last five years. Unfortunately, the majority do not believe Congress is interested in what they have to say.

The Internet report has some important findings about citizens' use of the Internet to engage Congress. These include:

- The Internet has become the primary source for learning about and communicating with Congress
- Internet users who contacted Congress were motivated to do so because they cared about an issue, even if a request was made by a third party
- Information from interest groups was considered to be more credible than information from Congress
- Internet users generally felt disconnected from Congress but wanted to feel engaged
- Internet users felt strongly that advocacy campaigns are good for democracy
- Congress needs to improve online communications and needs additional resources to effectively manage Internet citizen participation
- The organizers of grassroots advocacy campaigns can help facilitate more positive communications between members and citizens, for example, messages that thank a member
- The organizers of grassroots advocacy have a duty to act as educator and facilitator

The culmination of CMF's nine-year project on communicating with Congress is a draft report for public comment, which will be followed by a final report. The draft report proposes a new model for constituent communications and includes specific recommendations for congressional offices, citizens, and advocacy groups. For example, it suggests that individual messages are more persuasive than identical form communications in grassroots advocacy campaigns. In addition, CMF recommends that constituents be adequately prepared when making calls to congressional offices. Details of this model are outlined in the draft report.

CMF has set up a ten-minute online survey to gather input on its recommendations. The deadline for completing the survey is July 18.

The draft report "concept for a new model of constituent communications relies on the development and implementation of a new dual-channel 'dashboard' view of electronic messages. Regardless of whether a message comes in through the Member's own Web form or as part of a grassroots advocacy campaign, this new model would treat all communications as individual messages from individual constituents. . . . The new model would allow offices to manage the volume without losing the meaning of the campaign or the sense of the involvement of the individual constituent behind each message."

More specifically, the model:

- Pulls all of the communications about a particular topic or advocacy campaign together;
- Can verify that grassroots communications are sent from real citizens;
- Clearly identifies the subject of messages; and
- Can identify the sponsoring organization and its vendor

These recommendations are intended to improve the current environment in which those who communicate with Congress do not think their members are interested in what they have to say and do not think their members keep them informed of what they are doing in Congress.

Instead, people are relying on the organizations they trust to inform them of what is happening in Congress and to help them communicate with members.

Meanwhile, congressional staffers doubt that the constituents are actually informed on the issues they are writing about and doubt mass e-mailing campaigns include messages from real people. This results in an ineffective circle of mistrust between citizens and the offices of elected officials.

Despite the frustrations, these new findings suggest that citizens really do want to hear from and interact with their members of Congress. The CMF draft report concludes, "We can either agree to work together to develop more effective solutions to address these new challenges, or we can continue on the current and unsustainable path."

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