In This Issue

House, Senate Pass Irresponsible FY06 Budget Resolutions

The House and Senate passed separate versions of the fiscal year 2006 (FY06) budget resolution last week that would allow for additional tax cuts, mostly targeting wealthy families, while cutting back on spending for programs that serve middle- and low-income America. A split within the GOP ranks may spell trouble for reconciling the two budget resolutions, and, as with the current year, would mean Congress would operate without a budget blueprint.

The House GOP has been very critical of the Senate version of the budget resolution because it did not cut spending deeply enough. Two amendments adopted on the Senate floor March 17 only increased the contempt of the House. Sen. Gordon Smith's (R-OR) amendment to protect the Medicaid program from $ 15 billion in cuts and Sen. Ted Kennedy's (D-MA) amendment to raise the discretionary spending ceiling by $ 5.4 billion will be major obstacles to be negotiated during the conference committee and may threaten the bill entirely.

Both resolutions are fiscally irresponsible and threaten the fiscal health of the United States. By solidifying large deficits for years to come, the Senate budget resolution would further weaken the ability of the federal government to meet the great variety of spending priorities affecting millions of Americans in communities across the country.

The chart below summarizes the major aspects of the bills.

Comparison of House and Senate FY06 Budget Resolutions

	House Budget Resolution	Senate Budget Resolution
Discretionary Cap [302(a) Allocation]	$843 billion	$848.8 billion ^
Cuts to Mandatory Programs	$68.8 billion	$17 billion *
Tax Cuts	$106 billion ($45 billion under reconciliation)	$134 billion (all under reconciliation) **
Assumed Supplemental Military Funding		
FY2005	$81 billion	$81.89 billion
FY2006	$50 billion	$50 billion

^ Committee mark set discretionary cap at $843 billion. The Kennedy amendment added $5.4 billion to that level.
* Committee mark included $3.2 billion in savings. The Smith Medicaid amendment removed $15 billion from the bill
** Committee mark included $70.2 billion in tax cuts. The Bunning amendment added $63.8 billion by repealing the 1993 tax on SS benefits.

For more detailed information on the budget resolution debates in the House and Senate, read these analyses:

- Smith, Kennedy Amendments Could Doom Budget Resolution
- Despite Compromise, House Conservatives Could Threaten Budget Resolution

Smith, Kennedy Amendments Could Doom Budget Resolution

The Senate narrowly passed its fiscal year 2006 (FY06) budget resolution late on the night of March 17 by a vote of 51–49. Several amendments from Democrats that would have greatly improved the bill, including one that would have required both spending increases and tax cuts to be paid for, were narrowly rejected. But two amendments dealing with entitlement and discretionary spending, which did pass, could cause irreconcilable differences between House and Senate versions.

The Senate version of the budget resolution would allow for $ 134 billion in additional tax cuts to be protected under “fast track” non-filibuster procedures, would cut $ 17 billion from entitlement spending over the next five years and cap discretionary spending for FY06 at $ 848.4 billion.

Senate Budget Committee Debate

The Senate Budget Committee spent all of Thursday, March 10 working on the budget resolution. The committee debated a variety of amendments throughout the day, ultimately adopting seven amendments before approving the budget resolution and sending it to the floor for debate by a 12–10 party-line vote. Six of the seven amendments adopted were “sense of the Senate” amendments, which are non-binding.

In an attempt to implement the budgeting rules that helped reduce deficits in the 1990s, Sen. Russ Feingold (D-WI) offered an amendment to establish true or “classic” pay-as-you-go (PAYGO) rules that would require both mandatory spending increases and tax cuts to be revenue neutral. Feingold argued this rule is an integral part of any attempt to reduce federal deficits in a responsible and effective way.

Most Republicans and the GOP leadership favor PAYGO rules to only apply to spending increases, not tax cuts. This “one-sided” PAYGO allows Congress to easily reduce spending levels while at the same time pass fiscally irresponsible tax cuts that are not paid for. The tax cuts envisioned in this resolution would negate any deficit reduction achieved by reducing spending and actually would increase deficits over the next ten years.

Feingold’s amendment was defeated 10–12 but he expressed confidence after the markup that it would pass on the Senate floor with the help of a few moderate Republicans. This PAYGO issue emerged during last year’s debate on the budget resolution. With four Republicans supporting Feingold’s position and the House GOP supporting the one-sided PAYGO, no compromise could be reached — and no budget resolution was ever worked out. With Democrats losing Senate seats in the last election, it remained uncertain what would happen on the Senate floor.

Also of note, Sen. Jon Corzine (D-NJ) offered a “sense of the Senate” amendment stating the Senate budget resolution should not achieve savings through cutting spending for the Medicaid program. This amendment was adopted in committee and paved the way for a binding amendment on the Senate floor to protect Medicaid funding.

One item that ended up in the budget resolution was a provision affecting Senate procedures for considering unfunded mandates pushed by Sen. Lamar Alexander (R-TN). Under the Unfunded Mandates Reform Act, certain intergovernmental mandates can be challenged with a point of order which can be hurdled with a simple majority (51 votes). The Alexander provision would require a super majority (60 votes) to waive the point of order. This change could have profound implications for issues from minimum wage to environmental protections and from family and medical leave to civil rights protections.

Senate Floor Debate

The Senate began 50 hours of debate on the budget resolution on March 15. Both Budget Committee Chairman Judd Gregg (R-NH) and Ranking Member Kent Conrad (D-MT) pushed the chamber to finish the bill last week before Congress broke for its two-week spring recess. After much of the debate time was used up the next two mornings, Gregg and Conrad stacked the remaining amendments the afternoon of March 17 one after another. Voting progressed all day and late into the night with little debate before each amendment.

There were a number of extremely close votes on the floor on key amendments throughout the week including another attempt at establishing true PAYGO rules, protecting Medicaid funding, removing harmful tax cut reconciliation instructions, reversing deep cuts to Amtrak, and removing language allowing drilling in the Artic National Wildlife Refuge. Unfortunately, amendments that would have helped to restore fiscal discipline and achieve equitable deficit reduction were not approved. Below is a list with short descriptions of key amendments voted on during the floor debate. (See a complete, detailed list of floor amendments.)

- *Restoring funding to Amtrak:* Sen. Robert Byrd's (D-WV) amendment would have reversed proposed deep cuts to operating subsides for Amtrak at $ 1.4 billion. The amendment was defeated 46–52.
- *Drilling in ANWR:* Sen. Maria Cantwell offered an amendment to remove language from the budget resolution that assumes $ 2.5 billion in revenue from leasing drilling rights in the Artic National Wildlife Refuge (ANWR) in Alaska. The amendment fell two votes short and was defeated 49–51. Opening ANWR has been a goal of conservatives in Congress since the late 1980s and by including it in the budget resolution, Senate GOP leadership was able to get around the roadblock of the filibuster that had previously kept ANWR protected.
- *Establishing true PAYGO:* Sen. Feingold's (D-WI) PAYGO amendment, cosponsored by Sen. Lincoln Chafee (R-RI), would have helped restore balanced deficit reduction measures to the budget process. While his amendment in committee was defeated on a straight party-line vote, four Republican senators had previously supported this amendment in last year's budget resolution floor debate. That year a similar amendment was adopted by one vote and ultimately derailed the conference negotiation with the House. Despite the support of those same four Republicans and the added vote of Sen. George Voinovich (R-OH), the amendment failed 50–50.
- *Protecting Medicaid:* Sens. Gordon Smith (R-OR) and Jeff Bingaman (D-NM) offered an amendment to strike the reconciliation instructions in the budget to cut $ 15 billion from the Medicaid program. The skepticism of many senators about cuts to the Medicaid program and a very harsh backlash from governors around the nation has helped reduce support for these cuts. The amendment passed 52–48 and will be a major point of conflict with the House during the conference.
- *Fighting Irresponsible Tax Cuts:* Sen. Thomas Carper offered an amendment to remove from the budget reconciliation instructions that would protect $ 70 billion in unpaid-for tax cuts. Carper described this amendment during the debate as the last opportunity to impose restraint on unfettered, unpaid-for tax cuts that would add to deficits. The Senate once again refused to choose the fiscally responsible path as the amendment failed 49–50.
- *Increasing Size of Tax Cuts:* Sen. Jim Bunning (R-KY) offered an amendment to nearly double the target level for tax cuts in the budget resolution from $ 70.2 billion to $ 134 billion. This amendment would repeal the 1993 tax on Social Security benefits that was dedicated to the Medicare program. It passed 55-45. But a budget resolution cannot require the tax writing committee to include specific tax cuts in their reconciliation bill. Thus, the Bunning amendment has the effect of simply increasing the size of tax cuts that can be offered under reconciliation.
- *Boosting Education Spending:* Sen. Ted Kennedy (D-MA) surprised many late into the voting on amendments to the budget resolution when he secured support for an amendment to increase education funding by $ 5.4 billion. The amendment passed 51–49. The practical effect of the amendment is to raise the overall discretionary spending ceiling from $ 843 billion to $ 848.4 billion. It is thought this increase will create tensions with the House during the conference committee.

Potential Impediments to House/Senate Compromise

The House and Senate passed very different budget outlines and it is expected to be very challenging to resolve those differences during the conference committee. In particular, both the Smith Medicaid amendment and Kennedy amendment to boost education spending could be particularly troublesome in brokering a compromise between the House and the Senate. Adoption of the Smith amendment slashes mandatory savings almost in half in the Senate version to $ 17 billion. The House has included $ 69 billion in savings in their bill. The increase in the discretionary spending cap due to Kennedy's amendment may be difficult to accept for some conservative House Republicans who already expressed displeasure with the House level of spending.

Earlier this month, a small group of conservative House Republicans threatened to withhold support for the budget resolution unless it cut spending more and included mechanisms to enforce those cuts. Lead by Rep. Mike Pence (R-IN), approximately 18–20 members of the Republican Study Committee threatened to vote against the House budget resolution because they felt GOP leaders were not serious enough about enforcing spending cuts. A last-minute compromise between House GOP leaders and the revolting Republicans was reached, but balancing the concerns of those Republicans and senators seeking a smaller level of cuts will be very difficult for the conference committee.

It could cause a situation similar to last year where a budget resolution was never passed when the two chambers were unable to come to a compromise on PAYGO rules. If no compromise is reached and Congress is unable to pass a budget

resolution this year, it will be a major setback for Republicans in Congress and President Bush as entitlement cuts and tax cuts could not be protected by fast-track reconciliation rules.

Despite this possibility, the Senate budget resolution is irresponsible. It sets the stage for increased deficits and misleading budgeting for years to come. The Senate has failed to include proven deficit reduction rules that would greatly increase the effectiveness of the budget in reducing deficits in a responsible way. Instead, it opted for rules that would allow permanent extension of tax cuts causing serious damage to the budget and the fiscal stability of the United States.

Despite Compromise, House Conservatives Could Threaten Budget Resolution

On March 17, the House debated and passed the fiscal year 2006 (FY06) budget resolution by a vote of 218–214, one week after the House Budget Committee voted along party lines to report out the resolution. House GOP leaders managed a last-minute compromise with a number of conservative Republican members of the House Study Committee who threatened to vote against the bill in the weeks leading up to the vote — but final passage will still be very difficult.

The revolt began with a small group of Republican Study Committee leaders, including Reps. Mike Pence (R-IN), Jeff Flake (R-AZ), and Jeb Hensarling (R-TX), and then grew to include over 40 Republican representatives, including some members of the "Tuesday Group" — a caucus of about 30 centrist House members.

While House GOP leaders were eventually able to broker a compromise and pass the budget resolution, the fact that there was dissention from so many conservatives over the budget will likely make negotiations with the Senate during a conference committee particularly precarious. Pence and other conservatives wanted to include a provision requiring a separate floor vote to waive a budget point of order on any appropriations bill that exceeded its spending cap. This would be similar to the procedures used by the Senate. Although GOP leaders argued this provision would tie the leadership's hands and empower House Democrats, they eventually relented when it became clear they did not have sufficient votes to pass the budget resolution.

During the day-long debate on the resolution March 17, the House soundly rejected three alternative budget amendments offered by Budget Committee ranking minority member John Spratt (D-SC), (165-264), Rep. Mel Watt (D-NC), (134-292) and Rep. Jeb Hensarling (R-TX), (102-320).

The version eventually passed by the House sets discretionary spending levels at $ 843 billion for FY06, assumes $ 68.6 billion in cuts to mandatory programs and $ 106 billion in unpaid-for tax cuts. The resolution would cut discretionary programs by at least $ 216 billion over the next five years. This decrease in non-defense discretionary funding will hurt a diverse array of programs, and will impact veteran's benefits, environmental protection, and education spending particularly hard.

President Bush and Republicans in Congress have stated these cuts to mandatory and discretionary spending are necessary to reduce the deficit and have repeatedly claimed this budget would cut the deficit in half by 2009. But under the House's plan, deficits will actually increase by approximately $ 126 billion over the next five years, and then explode after 2010.

Effect of the House Chairman's Budget Plan on Projected Deficits *

Cumulative deficit increases (+) or reductions (-) relative to CBO's March baseline projection, over the five-year period 2006-2010, in billions of dollars

Cost of tax cuts.	+105.7
Reductions in entitlement benefits.	-67.0
Expenditure reductions from $216 billion reduction in funding (appropriations) for domestic discretionary programs.	-144.0
Expenditure increases for defense and international discretionary programs.	+201.9
Increased interest costs resulting from the policies above.	+30.3
TOTAL increase in projected deficits.	+126.9

* Source: Center on Budget and Policy Priorities

The main reason for this increase in deficits is due to the fact that the House chose to permanently extend the 2001 and 2003 tax cuts at a cost of $ 106 billion over five years in the budget resolution. Of that amount, $ 45 billion was set aside under reconciliation instructions – a fast-tracked budget process that protects certain bills affecting mandatory funding levels or tax policies by limiting debate and prohibiting filibusters. Yet after the five-year window, from 2011 to 2015, the cost of those tax cuts explodes to over $ 1 trillion, according to the Congressional Budget Office.

Notably, the House budget resolution proposes cuts in entitlement spending ($ 68.8 billion) which are much deeper than

those proposed by the president in his budget ($ 51 billion). Although it does not designate specific cuts to programs, the resolution does include instructions to the Energy and Commerce Committee to make reductions of $ 20 billion over five years to programs under the committee's jurisdiction. These cuts are expected to come mostly out of the Medicaid program.

It is the Medicaid cuts in particular that could create problems during negotiations with the Senate. On March 17, the Senate passed an amendment offered by Sen. Gordon Smith (R-OR) on a vote of 52–48 striking reconciliation instructions that would force cuts in Medicaid. Smith's amendment reduces the amount of mandatory savings in the Senate budget resolution from $ 32 billion down to $ 17 billion. The House resolution proposes cutting $ 69 billion from mandatory spending — a difference of nearly $ 50 billion.

With GOP leaders in the House having sufficient trouble holding on to support from conservatives (12 Republicans voted against the House resolution because it did not make deep enough spending cuts), it will be very difficult to give much ground to the Senate in compromising on levels to cut mandatory and discretionary spending. House Budget Chairman Jim Nussle (R-IA) believes it will be "very challenging" to find an acceptable compromise between the House and Senate and many members of Congress are predicting it will take involvement from the White House to pass a budget resolution this year.

If no agreement is reached in conference, spending levels for FY06 will be set at levels equivalent to FY05, and more importantly, it would remove the possibility of progressing reconciliation bills for spending cuts or tax cuts that would be protected from filibuster in the Senate — a major blow to the Republican agenda.

Bush Pushes Private Accounts as Public Support Drops

President Bush has recently increased his efforts to sell the American public on his plan to privatize Social Security despite continuing evidence that more and more Americans are rejecting his proposals. Yet even while launching a "60 cities in 60 days" tour, the president and other administration officials have been carefully maneuvering to allow whatever reform is adopted to be seen as a victory for the administration.

Congress began a two-week recess on March 18 and many senators and representatives will devote much of their time in their respective districts to the Social Security issue. Republicans in particular will continue to gauge their constituents' feelings on reform options. The president's failure to generate overwhelming support for his proposal among the general public has increasingly made congressional Republicans nervous.

Recent polls have shown very weak public support for the president's approach to Social Security reform. An ABC News/ *Washington Post* poll conducted from March 10–13 revealed that only 35 percent of respondents approve of the way Bush is handling Social Security, and 55 percent stated they "oppose" Bush's proposals on Social Security. Forty-nine percent of the respondents in opposition were between the ages of 18 and 29 a key demographic group from which Bush hopes to receive tremendous support. (See more poll details.)

Another poll conducted by *USA Today*/CNN/Gallup from Feb. 25–27 found similar results; only about 35 percent of respondents approved of the way Bush is handling Social Security. This poll shows a marked drop in support from one conducted three weeks earlier which had found that 43 percent of respondents — eight percent more — had supported the president on Social Security then. Bush continues to stress that with increased education on social security and the problems the program faces in the future, the public will come around to his plan. Reiterating his standard Social Security tagline, Bush recently said, "I've got a lot of educating to do to convince people not only that we have a problem, but we need to come together and come up with a solution to Social Security."

Democratic congressional leaders are all too happy to have the president continue his public education campaign. House Minority Whip Steny Hoyer told reporters, "The president says he wants to educate the public. God Bless him — keep at it. The education is working. [The public] is learning more about his proposal and liking it less."

Many believe that by raising the Social Security debate this year, Bush has provided a spark to Democrats by galvanizing the Party and outside groups opposing the president's plans around a central issue. It may be helping the public perception of the Democratic party and hurting the president's ability to succeed in other areas of his agenda.

In addition to polls of Americans from around the country, the president has suffered two recent setbacks in his attempt to sway members of Congress. On March 3, 41 Democratic senators and Sen. James Jeffords (I-VT) sent a letter to Bush saying his plan for private accounts was "unacceptable" and called on him to "unambiguously announce that you reject privatized accounts funded with Social Security dollars." In addition, two Democratic senators who did not sign the letter have publicly stated they will not support private accounts under the scenarios outlined by the White House.

The second setback came last week during the floor debate of the Senate budget resolution. Sen. Bill Nelson (D-FL) amassed 50 supporters, including five Republicans, for his amendment expressing the sense of the Senate that any Social Security reform should avoid benefit cuts and massive increases in debt — two main consequences of the president's proposal.

Both Democrats and Republicans will be holding numerous town-hall style events over the next two weeks where much of the focus will be on Social Security. Democrats will be continuing to emphasize that responsible, bipartisan Social Security

reform must be devoid of private accounts that would divert a portion of payroll taxes.

Republicans also appear at odds with the president's agenda. Some have created their own reform plans and others support bits and pieces of proposed reforms including raising payroll taxes or the retirement age. Some support Bush's proposal. But it is clear the GOP does not have a consistent point of view on reforming Social Security.

Even though Bush continues to be optimistic about the possibility of his reform plan succeeding, he has gradually shifted his rhetoric on private accounts. On March 16, he twice stated during a news conference that private accounts would not solve the fiscal problems of Social Security. This statement could signal a new flexibility on the president's part and a realization that his proposals may be running out of political steam.

Bush, Congress Hide True Costs of Permanent Tax Cuts

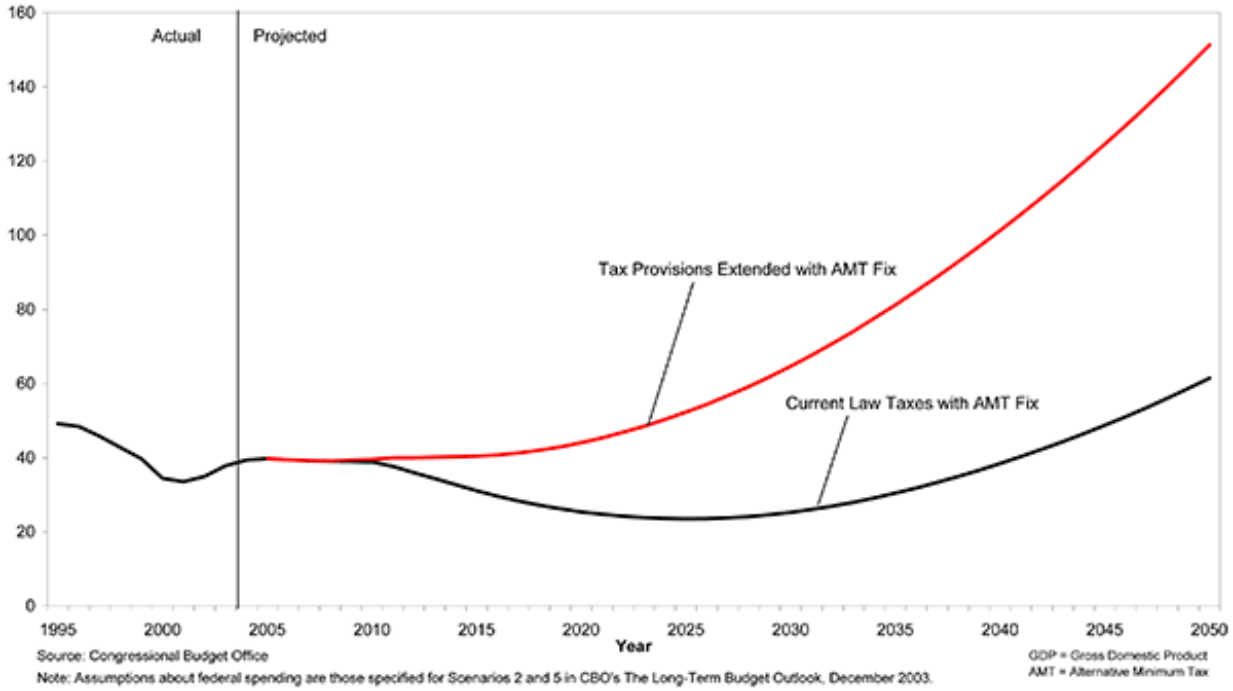
Both the president and Congress have advanced five-year budget plans in 2005. These plans help to mask the true cost of policies to extend the president's first-term tax cuts permanently, which explode after the current proposed budget window ends in 2010.

House Minority Leader Pelosi (D-CA) requested the Congressional Budget Office (CBO) simulate the effects of two different tax policies. The first simulation assumes current tax policy would remain unchanged — or that tax cuts passed in 2001 and 2003 would expire as scheduled. Under this simulation, the tax cuts include all provisions except the Alternative Minimum Tax (AMT). In the simulation, the AMT would have all of its parameters indexed to inflation and the exemption currently in place would be extended permanently. The second simulation assumes all of the tax cuts from 2001 and 2003 would be extended permanently, including the AMT.

CBO found that under the first tax policy, revenues would slowly climb back to 20 percent of gross domestic product by 2015 from their historically low levels of approximately 16 percent of GDP today. Under the second simulation, it would take until 2050 for revenues to grow to 20 percent of GDP. The difference between these two options, according to the CBO, is an enormous amount of debt for the American people.

The graph below compares the two different tax policies and their effect on the debt held by the public as a percentage of GDP. If current tax policies are made permanent without revenue offsets, as the president and many Republicans in Congress would like, the debt held by the public will explode to well more than 100 percent of the total economic output of the country before 2050. What is interesting about the CBO graph is there is hardly any noticeable difference between the two policies before 2010. This is exactly the reason why both the president and Republican leadership in Congress have planned a five-year budget for this year. By doing so, they are intentionally misleading the American public about the true cost of their current tax and budget policies.

Federal Debt Held By Public Under Certain Long-Term Budget Scenarios
(Percentage of GDP)



Freedom of Information Legislation Moving Forward

The week of March 14 was an important week for open government, with the introduction of two pieces of legislation to improve the Freedom of Information Act (FOIA) — the Faster FOIA Act, and the Restore FOIA Act. Additionally, the Senate Judiciary Committee held the first oversight hearing on FOIA since 1992.

Faster FOIA Act Moves to the Full Senate

Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) introduced the bipartisan Faster FOIA Act March 10, the second FOIA bill which the two senators have introduced in the 109th Congress. On Feb 16, Cornyn and Leahy also introduced the OPEN Government Act, which seeks to strengthen citizens' ability to use FOIA.

The Faster FOIA Act (S. 589) aims to alleviate the long delays which many FOIA requesters experience at federal agencies. The FOIA itself requires agencies to respond to requests within 20 working days, but often requesters receive answers weeks, months, or even years after that deadline. As the National Security Archive reported in 2003, the oldest pending FOIA requests date back to the late 1980s. Significant backlogs are common among agencies, and the problem is not getting better.

The legislation would create a 16-member Commission on Freedom of Information Act Processing Delays, which would study how to lessen delays in the FOIA process. Identified members of Congress would appoint 12 of the Commission members, and at least four of these members must have experience using FOIA in the nonprofit, academic, or media sectors. The Attorney General, the Director of the Office of Management and Budget, the Archivist of the United States, and the Comptroller General would designate the four remaining members.

The Judiciary Committee reported out the Faster FOIA bill on a unanimous voice vote March 17, and the bill now moves to the full Senate for a vote.

Support for FOIA Legislation Voiced at Hearing

Witnesses appearing before the Senate Judiciary Committee's subcommittee on Terrorism, Technology and Homeland Security March 15 expressed tremendous support for the OPEN Government Act, and argued that reforms to the Freedom of Information Act are necessary to ensure an open, accountable and democratic government.

As previously reported in the *Watcher*, the OPEN Government Act (S. 394) would improve the current FOIA legislation so that the public could recoup legal costs of suing for improperly withheld records, extend fee waivers to nonprofits and bloggers, require tracking of requests, and mandate reporting on the Critical Infrastructure Information program. (The full analysis is available at OpenTheGovernment.org .) The measure is an important bipartisan effort, and has picked up Sens. Johnny Isakson (R-GA) and Lamar Alexander (R-TN) as cosponsors.

In his opening statement for the hearing, Cornyn stressed the need for bipartisan support and action on open government legislation, stating, "This is a bipartisan problem – and we need a bipartisan solution to solve it. As Senator Leahy and I have both noted on occasion, openness in government is not a Republican or a Democratic issue. Any party in power is always reluctant to share information, out of an understandable – albeit ultimately unpersuasive – fear of arming its enemies and critics."

Meredith Fuchs from the National Security Archive testified that the current FOIA backlogs are a problem. "A key part of empowering the public, however, is giving them the information they need in sufficient time for them to act." She noted, "The OPEN Government Act of 2005 will go far to motivate agencies to process FOIA request and to process in a timely fashion."

Thomas M. Susman from Ropes & Gray LLP told the subcommittee that "establishing an Office of Government Information Services (OGIS), is the most important provision in the bill. The OGIS will assist the public resolving disputes with agencies as an alternative to litigation, review and audit agency compliance activities, and make recommendations and reports on FOIA administration."

Lisa Graves from the American Civil Liberties Union noted the importance of the bill's assistance in establishing a strong presumption in favor of disclosure, and clarifying existing interpretations of FOIA's nine exemptions.

The hearing coincided with Sunshine Week, a project of newspapers, journalists and media outlets to promote open government that ran last week. As the first FOIA hearing held by the Senate since 1992, the session was a strong indication of the rising importance of freedom of information issues. Full testimony from the panel is available through the Judiciary Committee.

Restore Freedom of Information Act Reintroduced

Leahy also chose Sunshine Week as the opportunity to reintroduce the Restore FOIA bill, which would amend the Homeland Security Act of 2002 to limit "Critical Infrastructure Information" provisions in the law that create new exemptions from FOIA. The bill, S. 622, is cosponsored by Sens. Carl Levin (D-MI), Russ Feingold (D-WI), and Joseph

Lieberman (D-CT), but lacks the bipartisan support of the two other FOIA bills.

The language of the bill is identical to the previous version of the legislation introduced during the 108th Congress. It would fix the language in the Homeland Security Act that provides a FOIA exemption for "critical infrastructure information" (CII). Companies that voluntarily submit information about critical infrastructure vulnerabilities receive an overly broad and vague exemption from disclosure. It allows for corporate immunity and prevents the government from acting on the information to protect the public. Since its inception, the CII program has resulted in 29 submissions of information of which the details are unknown. OMB Watch unearthed the CII numbers as a result of a summons submitted in the District of Columbia Circuit Court to force the Department of Homeland Security to respond to a FOIA request for the information.

The provisions in the Restore FOIA Act derive from compromise language that Leahy, Levin and Sen. Robert Bennett (R-UT) developed during 107th Congress in 2002 when the Homeland Security Act was under discussion in the Governmental Affairs Committee. Although the Senate passed the compromise language, more restrictive House language made it into the final version of the bill. Among other provisions, the language would:

- remove restrictions on the government's ability to use the information to fix vulnerabilities;
- eliminate criminal penalties for whistleblowers that reveal CII when reporting waste, fraud and abuse; and
- narrow the FOIA exemption to specific records submitted as CII.

Differences between the Homeland Security Act and the Restore FOIA Act are detailed further in this chart.

Healthy Californians Biomonitoring Program

On Feb. 18, California State Sens. Deborah Ortiz (D-Sacramento) and Don Perata (D-East Bay) introduced SB 600, a biomonitoring bill entitled "The Healthy Californians Biomonitoring Program." The bill proposes establishing a statewide program to measure toxic chemical exposure levels of state residents by testing blood, tissue, and urine samples from Californian volunteers. If passed, California will be the first state in the nation to track and report on the presence of toxic chemicals in its citizens.

Recent research showing industrial chemicals in our bodies provide a strong argument for biomonitoring programs. For example, a January 2003 study by the Mount Sinai School of Medicine, Environmental Working Group, and Commonweal tested nine adult Americans and found an average of 91 industrial compounds, pollutants, and other chemicals in their blood and urine.

The U.S. Centers for Disease Control manages a limited biomonitoring study that annually analyzes blood samples from individuals nationwide to project the toxic exposure for the population as a whole. These studies consistently find carcinogens, neurotoxins, reproductive toxins, developmental toxins, and endocrine disruptors in people, although in most cases below traditional levels of toxicological concern.

The Healthy Californians Biomonitoring Program will provide the public and lawmakers with more information on toxic exposure in the state. The bill requires the state to make the testing results publicly available, while keeping volunteers' identities confidential. This new approach to tracking chemicals could reinforce the need for increased chemical testing and improved regulatory protections.

Ortiz, one of the bill's sponsors, explained that "the bill will enable us to know just which toxic pollutants are in our bodies and move accordingly to improve everyone's health and safety."

While the chemicals tracked in biomonitoring studies are known toxins, current U.S. chemical regulations do not require companies to test the safety of tens of thousands of other synthetic chemicals on the market. The public and decision-makers lack basic health and environmental information on the majority of chemicals in everyday items such as fabrics, toys, paints, and other consumer products. In fact, the U.S. Environmental Protection Agency lacks basic safety data on more than 85 percent of chemicals in commerce.

The current bill is a narrowed version of a more aggressive biomonitoring bill of the same name that was introduced in California last year, which failed to move. Several public interest groups have already stepped forward to support the latest version of the bill including the Breast Cancer Fund, Commonweal, National Environmental Trust and the California Interfaith Partnership for Children's Health and the Environment.

The bill has been referred to the Senate Health Committee, for which Ortiz is the chairman. The committee has scheduled a short hearing on the biomonitoring bill for March 30. The committee only allows two witness in support of the bill and two in opposition of the bill to testify for three minutes a piece.

Sunshine Week Shines Surrounded by Secrecy's Shadows

Government secrecy has become so pervasive and overgrown that journalists last week used newspapers, TV, and radio to focus public attention on the problem and promote open government as part of the first-ever national Sunshine Week.

Over 1,000 stories ran in newspapers across this country, including a week-long series of editorials and op-eds in the USA Today, a wide-ranging series of stories in the Atlanta Journal-Constitution on how local citizens use open records laws to make their communities safer and many stories on how the public uses public records to become involved in local land-use and other community decisions. The Journal-Constitution ran stories analyzing local governments' response to an average citizen's request for public records, the federal government's problems putting safety ahead of parochial secrecy and political cartoons on the topic. And a poll commissioned for Sunshine Week found that 7 of 10 Americans are concerned about excessive government secrecy and support for open government is as high today as it was before 9/11. In addition, the University of Florida donated print advertising created to highlight how laws that guarantee the public ability to examine government records help citizens make informed decisions.

This effort represents a coup of sorts, as freedom-of-information issues rarely find their way into news stories. Ironically, journalists rely heavily on freedom-of-information laws, such as the federal Freedom of Information Act (FOIA), to prepare significant news stories, but rarely do they focus stories on the laws themselves. That, however, is changing. Following up on a speech last year in which Associated Press (AP) President Tom Curley decried excessive government secrecy today, the AP has directed its organization to cover freedom-of-information issues much more. In addition, Cox News has created a news beat on secrecy, and other newspapers are paying greater attention.

Whether this will translate into greater public pressure to strengthen open government remains to be seen. The major national daily newspapers did not participate in Sunshine Week this year, although the success of the effort this year makes it harder for them to ignore the story next year.

For its part, the nation's most diverse open government coalition, OpenTheGovernment.org (co-chaired by OMB Watch), is running banner advertising which can be seen at the National Journal website.

Data Quality Act Debated

Data Quality Act experts, featuring OMB Watch's Sean Moulton, will be debating the faults and merits of the Data Quality Act (DQA) at a March 30 discussion hosted by the Environmental Law Institute (ELI). Among the law's aspects to be discussed are judicial review, and its implications for environmental protections.

Since its passage as an unnoticed rider on an appropriations bill, which underwent no debate in Congress, the DQA has been criticized as an unnecessary bureaucratic requirement that unfairly allows industry to delay, dilute and derail environmental, health and safety protections. The act, and its subsequent guidelines developed by OMB and federal agencies, allow affected parties to challenge and recommend corrections of information disseminated by agencies. However, the DQA itself does not specifically address whether challengers may take their complaints to court if unsatisfied by an agency's response after all administrative avenues are exhausted.

Public interest groups view the prospect of judicial review as another method to delay agencies from enacting important environmental protections. Groups also contend that court review would allow companies to shift responsibility for complex scientific information from the most experienced officials to less knowledgeable and less experienced courts in hopes of getting a more favorable decision. Industry advocates claim that judicial review is an essential tool in achieving transparency and accountability on DQA.

A recent court ruling found the DQA is not judicially reviewable, and prompted ELI to hold this discussion. The U.S. Chamber of Commerce and the Salt Institute sued the National Heart, Lung, and Blood Institute under the DQA regarding agency statements that recommend lower sodium consumption will improve the health of all individuals. The U.S. District Court for the Eastern District of Virginia dismissed the case, ruling both that the DQA is not judicially reviewable and that the plaintiffs lacked legal standing to file the lawsuit.

OMB Watch's Senior Information Policy Analyst, Sean Moulton, will participate in the initial panel debate. The other panel members will be Jim Tozzi of Center for Regulatory Effectiveness and Rena Steinzor of the Center for Progressive Regulation and the University of Maryland's Environmental Law Clinic. Tozzi, a former OMB official, is often credited with writing the DQA.

ELI's announcement has more details including RSVP details and how to listen to the discussion by phone.

527 Reform Legislation Heats Up in the Senate

On March 8, the Senate Rules Committee held a hearing to consider the 527 Reform Act of 2005 (S. 271). The hearing revealed the complexity of issues raised by the proposed extension of federal election regulations to independent political committees (527s). The testimony and questions from senators highlighted the likely consequences of passing the bill in its current form, including migration of soft money to 501(c) groups, who, unlike 527s, do not disclose donors. Rules Committee Chairman Trent Lott (R-MS), a co-sponsor of the bill, said he wants to move the bill quickly, in order to prevent a "train wreck" in the 2006 federal election. Meanwhile, an alternative 527 bill was introduced in the House of Representatives.

Witnesses include the bill's sponsors, Sens. John McCain (R-AZ) and Russell Feingold (D-WI), the chairman of the Federal Election Commission (FEC), Scott Thomas, and FEC Commissioner David Mason. Expert testimony was provided by attorney Bob Bauer, Fran Hill, a consultant to the Campaign Legal Center, and Michael Malbin, executive director of the Campaign Finance Institute.

McCain testified he believes federal campaign finance contribution limits should apply to any group that engages in partisan activities for the purpose of influencing a federal election. FEC Chairman Thomas echoed this view, saying, "I have philosophically always taken the approach that these kinds of groups, given their tax status [527], should be reporting to us and regulated as federal political committees ...." Michael Malbin of the Campaign Finance Institute said there is no rationale for not having contribution limits.

Other witnesses discussed constitutional concerns. The potential for corruption by independent groups, which do not have direct ties to candidates or parties, was questioned. Commissioner Mason said, "And so, when you are regulating organizations that only make independent efforts, that are not controlled by parties, not controlled by candidates, not coordinating, there is a live and open constitutional question as to whether or not that can be limited."

Malbin told the committee he thinks 527 contributions will grow rapidly in the future if not regulated, since only one out of eight soft money donors from past elections gave to 527s in 2004, noting "there is a lot of room for growth in this sector." The result would be that donors to large 527s would be able to get attention from officeholders and parties after the fact, creating a potential "nexus of reciprocity" resulting from officeholders being aware of major donors to 527 groups that support them.

The bill's sponsors responded to criticism that the bill will have negative impacts on 501(c) organizations, saying their intention is to limit the impact to 527s. Feingold indicated a willingness to make changes to clarify the bill's language if necessary. Most of the discussion during the hearing focused on where money that now goes to 527s will go if federal contribution limits are imposed. The primary focus was on groups exempt under 501(c) of the tax code, including charities, social welfare organizations, unions and trade associations. One witness predicted contribution limits on 527s would steer donations toward the political parties because of negative gift tax consequences of large donations to 501(c)(4) groups.

Sen. Mark Dayton (D-MN) warned about the "law of unintended consequences," saying, "to take this action as it applies to 527s and leave the door open for these activities to go elsewhere where we can identify in advance where that is likely to be, the 501(c)(4) or 501(c)(6), if that is the case it seems to me to be missing half the boat ... So I would urge, Mr. Chairman, that we look at this comprehensively and look at the functions being performed that this bill addresses and rather than limit it to one particular category of the IRS or whatever that we apply it to any organization that is engaged in those purposes and apply that standard to them."

Although Lott wants to move quickly, it is likely the committee will be considering a series of amendments addressing issues raised at the hearing. Given Feingold's repeated statements that the sponsors are open to changes, and the complexity of the issues, it may be impossible to move the bill by June.

Two days after the hearing, on March 10, Reps. Mike Pence (R-IN) and Albert Wynn (D-MD) introduced the 527 Fairness Act, which takes the opposite approach of S. 271 by expanding the ability of both 527s and political parties to operate. A news release from Pence's office said the bill would:

- Repeal part of the "electioneering communications" provision in the Bipartisan Campaign Reform Act of 2002 so that all types of nonprofits, not just 527s, can use individual contributions to pay for broadcasts that refer to federal candidates within 60 days of a federal election or 30 days of a primary;
- Remove the aggregate contribution limits that BCRA imposed on individuals giving to influence federal elections, thus allowing them to avoid having to choose among donations to parties, candidates and federally regulated independent groups;
- Remove limits on how much the parties can spend in coordination with candidates;
- Allow state and local parties to spend soft money on voter registration drives for elections, including those involving federal candidates; and
- Eliminate the taxes nonprofit 501(c) organizations pay on communications that do not include "express advocacy" for the election or defeat of federal candidates.

IRS Asking Justice Department to Step in on NAACP Audit

The Internal Revenue Service is referring to the Justice Department the refusal by the National Association for the Advancement of Colored People to respond to an IRS summons, according to BNA. The case arose in the fall of 2004 when the IRS notified the NAACP it was conducting an examination into whether a speech by Chairman Julian Bond that criticized policies of President Bush constituted prohibited campaign intervention. NAACP has requested the examination be closed, and the IRS has told the NAACP it has made no conclusions about whether illegal partisan activity took place, and that the group is unlikely to lose its tax-exempt status.

In January, the NAACP challenged the legality of an IRS summons and refused to respond, claiming the IRS investigation into alleged prohibited political activities during the 2004 election was politically motivated and procedurally deficient. On Feb. 23, IRS attorneys wrote attorneys for the NAACP saying, "There is ample judicial and statutory authority to support the Service's action in commencing the examination into the NAACP's activities, as well as supporting enforcement of the summons at issue." They set a March 11 meeting for the NAACP to respond to the summons, and suggested a March 2 meeting to discuss the case.

In a March 10 letter to the IRS, Marcus Owens, of Caplan and Drysdale, attorney for the NAACP, stated the NAACP's continuing objection to the summons and declined to attend the March 11 meeting. The letter asked the IRS to close the case immediately and issue a letter stating the NAACP continues to be exempt under 501(c)(3) of the tax code.

The discussion at the March 2 meeting, held by conference call, apparently clarified the IRS's view of the likely outcome of the case. Owens' letter summarized the call saying, "Specifically, during our conference call, you assured us that the Service has not drawn any conclusion regarding whether Mr. Bond's speech at the annual convention in July 2004 constituted prohibited political campaign intervention. Moreover, we understand that the Service is not taking the position that 'flagrant' political expenditures were made, and ... that the NAACP's exempt status likely is not at risk."

Referral of the case to the Justice Department escalates the situation.

Court Says AmeriCorps Teachers in Catholic Schools Allowed to Receive Subsidies

On March 8, the U.S. Court of Appeals for the District of Columbia ruled that taxpayer funds can subsidize volunteer instructors that teach in religious schools. The ruling reversed a July 2, 2004 decision by U.S. District Judge Gladys Kessler, who admonished the government for failing to monitor programs sufficiently to ensure compliance with the law and called the line between secular and religious activities "completely blurred." The American Jewish Congress (AJC) may appeal the decision.

AJC filed the suit in 2002, alleging that AmeriCorps, a network of national service programs that engage more than 50,000 Americans a year, had crossed the line between church and state by funding participants who taught religion as well as secular subjects in Catholic schools. The suit, *American Jewish Congress v. Corporation for National & Community Service*, claimed that three AmeriCorps grantees were using program funds to teach Christian values. The three grantees were the University of Notre Dame's Alliance for Catholic Education, known as ACE; the Catholic Network of Volunteer Service; and the Nebraska Volunteer Service Commission.

AmeriCorps receives federal funds that are given as grants to nonprofits, such as Habitat for Humanity, the American Red Cross, and Boys and Girls Clubs, as well as many small faith-based and community organizations. These groups help recruit, place and supervise participants.

Participants in the AmeriCorps Education Awards Program are required to perform 1,700 hours of community service at a pre-approved school in exchange for $ 4,725 in financial aid for college tuition and student loan repayment.

The March 8, 3-0 ruling by the U.S. Court of Appeals for the District of Columbia reverses a lower courts decision. In the lower court decision, Kessler noted that "direct government involvement with religion crosses the vague but palpable line between permissible and impermissible government action under the First Amendment." The appeals court disagreed. Judge A. Raymond Randolph, writing for the appeals court, observed that the participants, who are chosen without regard to religion, teach religion as a matter of personal choice, and are not compensated for doing so.

Randolph commented, "The AmeriCorps program creates no incentives for participants to teach religion. They may only count the time they spend in non-religious activities towards their service hours requirement. And if they teach religious subjects, they are prohibited from wearing the AmeriCorps logo when doing so." This means that if AmeriCorps participants did spend time teaching religion or participating in religious activities, such as attending Mass, that time cannot count towards the 1,700 hours of community service that qualifies for financial aid.

Randolph further compared the AmeriCorps arrangement to school voucher programs in which the government provides an education subsidy to individuals, who in turn decide whether to use the vouchers at a religious or secular institution. However, in voucher programs, any school that wants to participate is eligible to do so. There is no government selection of schools. In this case, the government is pre-approving the schools which will receive government funds.

The government made the case that religious and secular services were always kept separate. However, the AJC alleged that there is very little monitoring of the program, and any current monitoring is a result of the lawsuit. According to Marc

Stern, AJC's assistant executive director, "We have documents from a Freedom of Information Act request, which shows AmeriCorps people listed as teaching religion and nothing else." While Stern did not indicate whether AJC would appeal the decision, this may be a factor in deciding whether to appeal. AJC has 90 days to appeal the decision.

According to AJC, the government is relying on the children knowing the distinction between the AmeriCorps volunteer teaching a secular class and the same individual not representing AmeriCorps as a religious teacher. The Supreme Court, in *Grand Rapids City Board of Education v. Ball*, held that children cannot be expected to know that in one period teachers are religious school employees, and in another period they are secular employees who are not able to teach religion.

OMB Rejects Findings on Propaganda Using Federal Funds

On Feb. 17, David M. Walker, the Government Accountability Office's (GAO) Comptroller General, issued a letter to all federal agencies reminding them that Congress banned use of federal funds for propaganda, and during 2004 "several prepackaged news stories produced and distributed by certain government agencies violated this prohibition." On March 11, the Bush administration rejected these findings by sending a contradictory memo to agency heads.

The memo from GAO notes cases of broadcast news videos distributed by the Department of Health and Human Services and the office of National Drug Control Policy that failed to inform viewers that the government was the source of the information. The letter notes that the law has prohibited use of federal funds for propaganda since 1951. It says, "Statutory limits on the domestic dissemination of U.S. government-produced news reports reflect concern that allowing government to produce domestic news broadcasts would infringe upon the freedom of the press and constitute (or at least give the appearance of) an attempt to control public opinion."

Joshua Bolton, director of the Office of Management and Budget (OMB), sent the March 11 letter to agencies informing them that the Department of Justice's Office of Legal Counsel "has interpreted this same appropriations law in a manner contrary to the view of GAO," and agencies are bound to follow that legal opinion. Bolton said the GAO, as an arm of legislative branch, cannot give the agencies, part of the executive branch, legally binding advice. A supporting memorandum from Steven Bradbury, principal deputy assistant attorney general, says purely informational material that does not include advocacy, does not need to disclose government as the source.

Walker responded in a *Washington Post* article by noting, "This is more than a legal issue. It's also an ethical issue ...." He went on to say, "Congress may need to provide additional guidance with regard to their intent in this overall area." Sens. Frank Lautenberg (D-NJ) and Edward Kennedy (D-MA) said they will propose an appropriations rider to provide clarification, stating, "Whether in the form of a payment to an actual journalist, or through the creation of a fake one, it is wrong to deceive the public with the creation of phony news stories."

Bush Budget Fails to Support Non-itemizer Deduction

The Bush Administration has indicated that it will no longer push for passage of the non-itemizer deduction, even as a new study shows the provision would increase charitable giving. However, the non-itemizer provision remains a centerpiece of legislation introduced by Sen. Rick Santorum (R-PA) and a priority for Republican leadership.

For the first time since taking office, Bush's FY 2006 budget does not contain the non-itemizer deduction, and he has dropped it from his speeches promoting the Faith-Based Initiative. The non-itemizer was once the centerpiece of his "Compassionate Conservative Agenda." It is not clear why the president has dropped the tax break, but the provision may be too costly now that earlier Bush tax cuts have passed and the president is calling for additional tax cuts.

The Family and Community Protection Act of 2005 (formerly the CARE Act) re-introduced on Jan. 24, contains the non-itemizer provision. Under this provision, single tax filers who currently use the standard deduction could deduct contributions over $ 250 up to a ceiling of $ 500. Joint filers would be able to deduct contributions over $ 500 up to a ceiling of $ 1,000. This is much less costly than the president's original plan, which allowed many more non-itemizers to deduct charitable contributions.

According to a new United Way of America study, the proposed non-itemizer deduction could result in an additional $ 217 million — a 26.7 percent increase in giving to United Way through non-itemizers — in annual revenue to United Way. This represents an 8.4% increase in overall individual giving to United Way or a 6.0% increase in total giving to United Way.

The vast majority of their donors give less than $ 500, and 94 percent of United Way donors give an average gift of $ 101. Consequently, 41 percent of these donors do not itemize their contributions, and therefore receive no tax break from their donation. The proposed non-itemizer may spur charitable giving, and increase the likelihood of new donors, United Way claims. According to a 2002 Congressional Budget Office (CBO) paper, extending deductibility to people claiming the standard deduction should increase contributions.

However, the amount of the increase is debatable. The CBO study found that allowing nonitemizers to claim a deduction for charitable contributions would be unlikely to increase the level of giving by more than 4 percent. The findings are similar to an earlier Congressional Research Service report earlier this year.

The Senate's Family and Community Protection Act of 2005 requires the Treasury Department to study the effect of the non-itemizer deduction on increased charitable giving, and of taxpayer compliance (by comparing compliance by itemizers and non-itemizers). The Treasury would be required to report to the Senate Finance and House Ways and Means committees by Dec. 31, 2006.

Although the Family and Community Protection Act of 2005 still remains without a House counterpart, Republican leadership has indicated that the legislation is a priority in the 109th Congress. The legislation passed both houses of Congress last year but failed to be brought to conference.

Study Shows Business Outspends Nonprofits 5-1 on Issue Ads

The Annenberg Public Policy Center has published new research examining legislative issue ads, focusing on the Washington, DC, area during the 108th Congress. They found "Corporate interests outspent citizen/cause interests by more than five to one," and that advertising on many issues was one-sided. Not surprisingly, the side that spent more was more likely to have a favorable outcome.

Studies of sham issue ads in elections have dominated discussion of issue advocacy over the past few years. The Annenberg study is a welcome change of focus to look at the impact of "pure" issue ads in the legislative arena. The study focused on both print and broadcast media in the Washington, DC, area, and looked at air time or newspaper space cost only, excluding the cost of production.

During the 108th Congress, $ 404.4 million was spent on 67,653 print and television ads by 914 groups. The top 1 percent of groups spent 57 percent of the overall total. Corporate interests spent 79 percent of the total, while spending by citizen groups represented only 14 percent. The remainder was spent by groups with "ambiguous or potentially misleading names."

The top three issues were the economy, health care and energy/environment, which accounted for 59 percent of overall spending. Half of the issues identified had ads on only one side of the issue. Where spending did occur on both sides it was uneven, with only 6 percent having competitive spending levels.

Appeals Court Rejects Right of Action in Open Government Law

A federal appeals court has ruled that the Federal Advisory Committee Act (FACA), an open government statute designed to guarantee that committees advising federal agencies are not biased, does not create a private right of action.

The Ninth Circuit Court of Appeals ruled on Mar. 17 in *Manshardt v. Federal Judicial Qualifications Committee*, No. 03-55683, that an attorney seeking appointment as a U.S. Attorney could not use FACA to challenge the validity of a committee created by California Sens. Diane Feinstein (D) and Barbara Boxer (D) to recommend names to the White House for federal district court nominees and U.S. Attorneys in California. The court held that FACA, which has no express right of action, creates no implied right of action for private enforcement in the courts.

Legal Context

There are essentially three ways that private citizens can litigate to enforce statutory law.

1. The easiest case is an *express right of action*, meaning that the statute explicitly allows for litigation. The Freedom of Information Act, for example, has an express right of action for citizens to sue when their FOIA requests are unjustly denied. *See* 5 U.S.C. § 552(a)(4)(B).

2. An *implied right of action* exists when a statute does not explicitly create a right of action but its text is written in such a way that a private right of action is implied by the statutory language. For example, Title IX (which promotes gender equity in higher education) does not expressly create a right of action, but it does include a command that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" — language that indicates Congress's intent to confer a specific benefit, private enforcement of which would not frustrate the purposes of the statute. *See Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

3. The third way is to use some other statutory right of action as a vehicle to enforce unrelated commands. The two most used are 42 U.S.C. § 1983, which is a vehicle for vindicating rights arising under federal constitutional or statutory law, and the Administrative Procedure Act, which confers a right to force federal agencies to conduct the regulatory process appropriately.

Although many courts, including the Supreme Court, have assumed that FACA creates an implied right of action to challenge advisory committees that are biased or conduct their proceedings in secret, *see, e.g.*, *Public Citizen v. United States*, 491 U.S. 440 (1989), the Supreme Court has not directly addressed the question. When faced with FACA most recently in the dispute over its applicability to the National Energy Policy Development Group, commonly called the Cheney Energy Task Force, the Court concentrated on separation-of-powers questions and the proper scope of discovery

against the vice president, again assuming without addressing the private enforceability of FACA. *See Cheney v. United States Dist. Ct.*, 124 S. Ct. 2576 (2004).

The *Manshardt* court attacked the private enforceability of FACA based on two recent Supreme Court decisions addressing the enforceability of other statutes. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court held that the disparate impact regulations promulgated under section 601 of Title VI of the Civil Rights Act of 1964 did not create private rights of action. Section 601 of Title VI confers an implied right of action to vindicate intentional discrimination, and section 602 authorizes agencies to promulgate regulations enforcing the antidiscrimination principles of the act. The regulations have barred not only intentional discrimination but also practices with an adverse effect on minorities. The Supreme Court had ruled in a 1974 case that the statute likewise proscribed disparate impact discrimination, but many subsequent decisions narrowed the ruling until section 601 itself appeared to bar only intentional discrimination. The *Sandoval* plaintiffs attempted to pursue a disparate impact claim on the basis of the regulations enforcing section 601, but the Supreme Court destroyed that argument by noting that the regulations did not merely interpret the statute but instead regulated conduct beyond the specific terms of the statute.

The more recent case of *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), harmonized the standards for enforcing statutory rights through section 1983 with the standards for finding implied rights of action. The *Gonzaga* Court rejected a claim that a university violated a student's right to privacy of educational records under the Buckley Amendment, arguing that the statutory clause cited was not written with the sort of "right-creating language" that unambiguously created rights that could be vindicated under section 1983. The opinion, authored by Chief Justice Rehnquist, was not a model of jurisprudential scholarship; it seemed, in fact, to rely on an antiquated Langdellian ontology of legal entities, in this case "rights." (Moreover, it is not clear why there should be any merger of the doctrine of implied rights of action and the standards for finding statutory rights that can be pursued under section 1983; the combination of an implied right of action and the *Ex parte Young* doctrine would make section 1983 superfluous as a vehicle for litigating rights arising under federal statutory law.) Because the statute was written only to mandate that "[n]o funds shall be made available" to any school with a "policy or practice" of failing to guard student privacy, the Court held that the language was "two steps removed from the interests of individual students and parents" and thus failed to phrase the claimed right in terms of an individual entitlement, in contrast with the Title IX guarantee of gender equity in higher education that the Court approved in *Cannon*.

About This Decision

The *Manshardt* decision follows the trend of narrowing rights from *Sandoval* and *Gonzaga* without carefully applying the rules of those precedents, much less other Supreme Court precedents such as *Cannon*. The opinion is only a cursory eight-page treatment that does not even bother to quote specific language from FACA or identify the basis for applying *Sandoval*.

The *Manshardt* court is in fact so hostile to private enforcement of FACA that it appears to be on the verge of holding that there can never be any implied rights of action at all:

> *Sandoval* requires more than mere congressional intent to create a private right; a private right of enforcement exists only if the statute also reveals congressional intent to create a private remedy. Our examination of the text and structure of FACA reveals nothing to indicate Congress intended a private remedy. FACA contains no express private right of action, nor does it include any provision for judicial review. Indeed, FACA is entirely silent as to the appropriate remedy for violation of its requirements.

Slip op. at 3339. Here, the court teeters on the brink of rejecting any possibility of implied rights of action. The very basis of implied-right-of-action jurisprudence is that there are some statutes, such as higher education's Title IX and Title VI of the Civil Rights Act, that grant rights but do not expressly provide for judicial review and citizen suits. If Congress explicitly creates judicial review provisions, it thereby creates express rights of action; there would be no need at all for any doctrine of *implied* rights of action. The *Gonzaga* Court did not require express rights of action across the board; it only held that both rights enforced by section 1983 and claims pursued under implied rights of action are created by statutory language drafted in terms that, like Title IX, create a clear mandate to protect specific beneficiaries. Moreover, there can be no *right* without a *remedy*; they are one and the same. Congress can use the language of rights in a merely precatory manner, as with the patient's "bill of rights" in the Developmentally Disabled Assistance and Bill of Rights Act, *see Pennhurst State Sch. & Hosp. v. Haldeman*, 451 U.S. 1 (1981), but this inquiry — in which there is no real right, and thus no remedy at law — is completely separate from the doctrine of implied rights of action.

The *Manshardt* court also completely ignores the binding precedent of *Cannon* by arguing that FACA cannot create a private right of action because "FACA . . . appears to contemplate that monitoring and oversight of compliance with its requirements will be achieved, not through private enforcement, but rather by governmental regulation." Slip op. at 3339. Again, the opinion verges on rejecting implied rights of action altogether, because statutes from which rights of action may be implied invariably provide for some sort of regulatory oversight but do not specifically mention private suits. Moreover, the Supreme Court in *Cannon* found an implied right of action in Title IX even though the statute directly contemplated only regulation.

In many ways, the decision directly steps into not only the narrowing doctrines of private enforcement of statutes but also the larger questions of litigating against the government in the era of the modern administrative state. Similar questions splintered the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), in which Justices Kennedy, Souter, and O'Connor disagreed in various ways with Justices Scalia and Thomas and Chief Justice Rehnquist over standing to pursue claims of procedural insufficiency in the regulatory process. Private enforcement of FACA, as with private enforcement of any statute, converts the citizenry into private attorneys general, holding the government itself accountable to its own laws. In times of one-party dominance, private enforcement is particularly important if the law will mean anything. As this administration has shown time and again with its biased advisory panels, private enforcement of

FACA is more important now than ever.

The decision — authored by a Reagan appointee and joined by a Reagan and a Clinton appointee — could still be subject to a petition for rehearing and, ultimately, Supreme Court review.

GOP Threatens to Turn 'Unfunded Mandates' Into Roadblock

Republican lawmakers in both the House and the Senate have fired the first shots in an upcoming battle to turn the Unfunded Mandates Reform Act into an insurmountable obstacle to legislation designed to address unmet needs.

House Republicans fired first by launching a series of hearings, and Senate Republicans followed up with an under-the-radar section in the budget resolution that uses UMRA to make it harder to pass laws such as an increase in minimum wage or improvements in civil rights protections.

The Government Accountability Office is expected to produce this month a report on its study of UMRA, requested by Sen. George Voinovich (R-OH) on the occasion of UMRA's 10-year anniversary. The request for the study has been interpreted as a warning sign that Republicans and state and local government groups will seek to realize the original vision of UMRA: a "no money, no mandate" policy making important federal safeguards contingent on federal funding. Fortunately, the final version of UMRA ultimately only called for cost estimates and a parliamentary procedure in Congress that is rarely used.

Two recent events in Congress confirm that suspicion: a hearing held March 8 before the House Government Reform Committee, and the passage on March 17 of the Senate budget resolution, which contains a measure that could be step one in the GOP's UMRA reform plan.

Government Reform Hearing

The focus of the hearing was on developing recommendations for "strengthening" UMRA. Suggestions included lowering the cost threshold for mandates that fall under UMRA, conducting more research on the burden of federal mandates on state and local governments, and expanding UMRA to include categories now considered exempt, such as civil rights mandates and entitlements.

The state and local governments who spoke at the hearing, all of whom were picked by Republican representatives, repeatedly demanded expansions of UMRA. They all reiterated the same point, that the states consider any federal mandate from the government that is not fully funded to be an unfunded mandate, whether or not it falls in the scope of UMRA.

Most laws that include mandates fall below the UMRA threshold. State officials brought up a broad array of mandates exempt from UMRA which they believed were nonetheless mandates and unduly burdensome:

- The Help America Vote Act
- Clean Air Act
- Clean Water Act
- Medicaid
- Individuals with Disabilities Education Act

In preparation for the hearing, Government Reform Committee Chairman Tom Davis (R-VA) asked the National Association of Counties to provide a "snapshot survey" of the local costs of unfunded mandates. The survey found that for 30 counties, the three-year total cost of an average of six mandates is $ 1.5 billion dollars. If all federal mandates were included, NACo claims nationwide the cost of unfunded mandates could reach in the hundreds of billions. The survey was not scientific; it did not discount the costs of programs that counties would undertake even without the federal mandates, nor did the survey identify the benefits counties receive by linking to the federal government.

Senate Budget Resolution

Senate Republicans launched their own initiative to inflate UMRA, not with a hearing but with a sneak legislative attack. The Senate budget resolution contained a section, reportedly inserted at the behest of Sen. Lamar Alexander (R-TN), that turns a relatively harmless procedural mechanism into an insurmountable roadblock. UMRA currently requires the Congressional Budget Office to estimate the costs to the states of complying with new legal mandates. For mandates on the states that reach a cost threshold ($ 50 million in the original text, which has been indexed for inflation to $ 62 million), a member of Congress can raise a point of order. The point of order can be waived by a simple majority vote under current law, but the Alexander provision of the Senate budget resolution increases the required vote count in the Senate to a 60-vote supermajority, which would make it much more difficult to pass mandates in the Senate. The section was never subjected to debate, and many senators on both sides of the aisle were too distracted by the draconian budget cuts for important programs that they did not focus attention on the UMRA provision.

If there is a final budget resolution that contains this provision, the measure will effectively alter Senate rules with this supermajority requirement through 2010. Immediately at stake would be new environmental protections, which typically

either rely on state and local governments as partners in enforcement activities or call on the local governments to modify their own behaviors (as polluters, as managers of water systems, sewers, and waste facilities, etc.). Also at stake would be any improvements for workers, such as a real increase in the minimum wage, if the costs to states for applying new safeguards for their own employees reached $ 62 million or more. (One of the few statutes ultimately enacted that met the UMRA threshold was, in fact, the minimum wage increase from the mid-1990s.)

One-Two Punch

The hearing and the Senate budget resolution suggest a two-pronged approach for transforming UMRA into the envisioned "no money, no mandate" reform: erect a supermajority roadblock for UMRA with its current, limited definition, to be followed up with an expansion of UMRA's coverage so that it reaches the entitlement and other Spending Clause programs that establish important public protections.

Alexander's role in particular suggests a larger scheme at play. Alexander has also introduced legislation that would give extraordinary support to state and local governments by forcing sunset periods onto consent decrees and settlement agreements that resolve civil rights cases. Alexander has apparently set about building up a states' rights portfolio that would sacrifice public protections, whether won in the courts or in the halls of Congress, as a sop to the states.

His focus on federalism suggests that there may be another, even larger two-pronged plan. This administration's budgets have been devastating to the states, and the administration has also shown no compunctions against trampling over the states' power to protect their citizens with safeguards that are stronger than the federal government's anemic safeguards. This year's budget is shaping up to be just as harmful to the states. A high-profile effort to strengthen UMRA could be a ploy to rehabilitate the GOP's weakened states' rights credentials while continuing to starve the states of needed resources, with the added benefit of weakening public protections and thus benefiting the GOP's sponsors in corporate America.

White House Endorses Parts of Anti-Regulatory Hit List

The White House released the final version of its 2004-05 anti-regulatory hit list, with a report detailing 76 out of 189 items from the industry-nominated list that received the endorsement of the White House and agencies.

The report, released March 9, is the culmination of a process that began last spring when the White House Office of Information and Regulatory Affairs invited suggestions from the public for a hit list of regulations to be weakened or eliminated in order to benefit the manufacturing sector. OIRA followed up in December 2004 by summarizing the suggestions from the public, appending its own suggestions for anti-regulatory changes, and instructed the agencies to submit their reactions to OIRA.

The new report lists suggestions from the public that are endorsed by the agencies and OIRA as the administration's regulatory "reform" priorities. It reiterates each of the endorsed hit list items with a brief summary of the protections targeted for weakening and a series of deadlines for agency follow-up actions.

The White House declined, however, to release any similar follow-up for the two other lists in the December report: the White House's own hit list, and the White House's fast-track list of items in early stages of the rulemaking process which OIRA pushed the agencies to propel to the top of their agendas.

The vast majority of the items endorsed for the final hit list would weaken environmental protections. These hit-listed protections include weakening standards for safely disposing of PCBs and reducing the amount of information that companies are required to report under the Toxics Release Inventory, a database that enables communities to know what toxic substances have been released in their own backyards.

Workers' rights under the Family and Medical Leave Act were also attacked from multiple fronts. Other protections on the final hit list include weakening of safeguards against Listeria in ready-to-eat meat products and a rule change to increase the maximum number of hours that truck drivers can be forced to work without rest and without overtime pay.

In order to secure some positive spin for an otherwise completely anti-regulatory hit list, the White House included two items suggested by Public Citizen. One, regarding protections against passengers being ejected from vehicles in accidents, is already underway in part at the National Highway Traffic Safety Administration. The other, addressing vehicle compatibility problems (or the problem posed by aggressively designed SUVs when they collide with smaller passenger cars with different bumper heights, etc.), was not even given a deadline for real action — only a promise from NHTSA to report to the White House on the status of research in the area.

House Committee Approves Government Performance Rating Bill

The House Government Reform Committee favorably reported out of committee the Program Assessment and Results Act, a bill that would have the effect of codifying the administration's controversial tool for rating program effectiveness. The bill is expected to move to the House floor this spring.

The committee voted 18-14 to send the bill to the House floor during a March 10 markup session, after rejecting every amendment offered by committee Democrats.

The bill requires the Office of Management and Budget, working with federal agencies, to assess programs at least every five years. OMB is to develop the criteria for assessing programs as well as which programs to evaluate. At least three months before completing the assessments, OMB is to post to its website and send to Congress a list of the programs to be reviewed and the criteria to be used in assessing the program. OMB is to establish a process for allowing the public to comment on the OMB list and criteria. The results of the performance review are to be published in the president's annual budget submission to Congress.

The bill largely codifies a controversial procedure OMB started a few years ago, called the Program Assessment Rating Tool (PART). The PART has proven to be a controversial tool. The OMB budget "desk officers" have too much authority and too little experience to properly evaluate a program, and they often judge programs based on criteria that directly contravene the statutory basis for the programs. For example, OMB budget officers criticized the Occupational Safety and Health Administration for failing to use cost-benefit analysis when crafting regulatory protections for workers' health and safety, even though the Occupational Safety and Health Act and Supreme Court precedent have forbidden the use of cost-benefit analysis. Block grants in particular have suffered from PART, even though the fundamental idea of block granting — sending funds to the states with no strings attached — is incompatible with PART's use of uniform federal criteria for assessing the effectiveness of the states' use of block grants.

In a lengthy statement at the markup, Rep. Henry Waxman (D-CA) described the failures of the White House's PART, which purports to measure agency effectiveness but often uses measures that directly contradict the law governing an agency's work. Waxman offered an amendment to address the gap between measures and purpose and to harmonize the Program Assessment and Results Act (PARA) with the Government Performance and Results Act, the underlying statute that the PARA will amend, by having agencies rather than OMB determine the measures to be used for assessing performance. The amendment failed, 15 to 16.

Rep. Edolphus Towns (D-NY) offered an amendment to have OMB put public notice in the Federal Register, rather than just a posting on the OMB website, soliciting comment on the programs to be measured and the criteria to be used. The Towns amendment would also have inserted a sunset clause, so that later there can be an assessment of the results from the results measurement initiative itself. The Towns amendment failed on a 15-17 vote, but Rep. Todd Platts (R-PA), the sponsor of the bill, indicated his willingness to work on a sunset clause, possibly for a manager's amendment when the bill goes to the House floor.

The bill is expected to go to a floor vote in the first week of April.

See more information on the PARA and PART.

Bill for DHS to Waive All Law Rides on Iraq War Supplemental

The House of Representatives voted to attach H.R. 418, the REAL ID Act — a bill that includes a dangerous provision empowering the Secretary of Homeland Security to waive all law when securing the nation's borders — as a rider to the Iraq war supplemental, which passed the House and now is moving to the Senate.

The House decided on March 16 to attach H.R. 418 as a rider by voice vote and subsequently voted out the must-pass supplemental with a vote of 388-43.

Some in the Senate had expressed skepticism about the REAL ID Act, which includes not only the controversial proposal empowering DHS to waive all law but also establishes nationwide driver's license standards and makes asylum claims more difficult to pursue. By attaching the REAL ID Act to this must-pass spending bill, the House Republicans are attempting to avoid a heated debate on the REAL ID Act itself.

The REAL ID Act already passed the House on Feb. 10, in a 261-161 vote.

Get more information about the significant threat to the public interest from the REAL ID Act, and take action.

Is Cost-Benefit Analysis Needed?

Cost-benefit analysis (CBA) is often touted by the administration and conservative think tanks as a neutral tool in policymaking, but recent studies by legal scholars show that CBA is inherently political and may even advise against what we consider our most immutable public protections.

CBA is a policymaking tool by which the costs of imposing a regulation are weighed against the potential benefits of reducing the harm. For example, in the case of pollution regulation, cost is generally construed as the cost of implementing technology to comply with regulation. These costs are more easily quantifiable than other factors, although some evidence exists that costs are often inflated.

The benefits of a regulation require two separate analyses: an assessment of the risk posed by the harm in question as well as a monetization of the potential benefits. Both factors prove to be difficult to calculate; many benefits resist monetization, and risk assessments can be hindered either through incomplete datasets or a large degree of indeterminable factors. In order to estimate the health effects of a regulation, for example, agencies generally must rely on laboratory data on other species or on human experience with much higher levels of exposure. To extrapolate from this data the potential benefits of a regulation requires a large degree of guesswork, and agencies often come up with wide ranging numbers on the potential health benefits.

Proponents of CBA believe that regulators are irrational in their policy decisions and that CBA is necessary in developing regulations because it acts as a neutral, rational tool, evenly weighing all considerations, but many public interest advocates have argued that cost-benefit analysis unfairly targets environmental, health, safety and other social regulation and will always favor lowering costs rather than creating more stringent protections. If cost-benefit analysis really is a neutral tool, then it must be equally capable of siding with more stringent regulation as it does weaker regulation. Three recent articles examine the neutrality of CBA both in theory and in practice and analyze the arguments of CBA's greatest proponents. Lisa Heinzerling, Frank Ackerman and Rachel Massey's "Applying Cost Benefit Analysis to Past Decisions: Was Environmental Protection Ever a Good Idea?," David Driesen's "Is Cost-Benefit Analysis Neutral?," and Richard Parker's "Is Government Regulation Irrational? A Reply to Morall and Hahn" all find that neither in theory nor in application is cost-benefit analysis a neutral tool. Moreover, this "simplistic scorecard" fails to embody our national regulatory priorities.

The "Simplistic Scorecard"

Advocates of cost-benefit analysis claim that regulation is irrational and that cost-benefit analysis is necessary to rein in costly, burdensome measures. Yet as Richard Parker points out in "Is Cost Benefit Analysis Irrational?," the arguments of CBA's biggest supporters are themselves irrational, relying on fuzzy numbers and misguided assumptions to prove the case for this weak policy tool.

Some of the most compelling cases for the necessity of cost-benefit analysis is necessary in policy-making have come from John Morrall, an economist at the Office of Management and Budget (OMB), and Robert Hahn, of AEI-Brookings Joint Center for Regulatory Studies. Both have argued, after applying cost-benefit analysis to the totality of government regulation, that the costs of federal regulation far outweigh the benefits, proving, they assert, that government regulation is fundamentally irrational and overzealous. They point to what appear to be egregious examples of overly-cautious regulations, citing cases in which regulation costs up to $72 billion for every life saved. Yet, as Parker easily points out, their arguments are based on shaky assumptions that fail to take into account the full range of considerations necessary for an agency to make a rational policy decision.

Irreproducible Results

For all the lip service on hard numbers, both Morrall and Hahn's data contained many undisclosed assumptions, and calculations and methodologies were often not revealed. Parker observes that Hahn's gaps are particularly noteworthy: "Hahn's original studies do not so much as *list* the rules in his database." Hahn also offers no documentation of his calculations. After soliciting Hahn, Parker finally received Hahn's data, but his Excel spreadsheet only gave a tally of costs and benefits and his final calculation, without indicating any of the assumptions Hahn made to arrive at numbers he used.

Even without being able to reproduce the results, it is clear that Morrall and Hahn make assumptions that are biased against regulation. In fact, as Parker points out, the data set that Morrall chooses to work with focuses on some of the most extreme cases of costly regulation. Morrall chooses an arbitrary set of 16 highly costly regulations in order to make his claim that regulators make irrational choices. Most of these regulations have to do with just a handful of pollutants, which have, as Parker notes, "generated some of the most heated and heavily litigated controversies in all of environmental law." Clearly Morrall's case examples do not represent a neutral dataset.

Shaky Numbers

Morrall and Hahn also choose to use a very high discount rate, which discounts the future costs and benefits of a regulation using a constant exponential rate. Though many scholars disagree on the practice of discounting benefits at all, there is little consensus on a discount rate higher than three percent. Yet Morrall chooses a discount rate of 10 percent and Hahn uses discount rates at three, five and seven percent. Such rates can dramatically reduce the potential benefit of a regulation. As Parker points out, "discounting a constant stream of benefits over 25 years will reduce its present value by 30 percent at a three percent discount rate, or 50 percent at a seven percent discount rate."

Morall and Hahn also assume a latency period in the calculation of certain benefits. For risks such as cancer which may not manifest themselves for a number of years, they add in a latency period to their calculation of benefits, which greatly reduces the present benefit of avoiding a future harm. As Parker points out, if one assumes "that the stream of cancer risk reduction benefits (which dominate many of the health and environmental rule benefit numbers) only begins to accrue after a latency period of some 15-35 years, the impact of discounting can become truly enormous. Discounting a constant dollar annual benefit accruing over 25 years -- beginning 35 years out -- will effectively shrink benefits by a factor of four at a three percent discount rate, and a factor of twenty at . . . [a] seven percent rate." This assumption distorts their calculation of benefits, and once again, the distortion favors the regulated community.

Morrall also arbitrarily chooses to reduce benefits. Rather than relying on agency calculations to calculate benefits, Morrall chooses numbers from published studies that significantly reduce benefits. When agencies present a range of possible benefits, he arbitrarily chooses from the bottom of the range, without explaining his methodology. Morrall adjusts agency numbers on health effects, risk assessments, and effectiveness, in each case swaying the balance in favor of less regulation. That Morrall should do independent analysis of factors is not the issue, but Morrall's choice to manipulate the equation without an explanation or rationale leaves observers guessing as to how the numbers were attained.

Ignoring Unquantified or Non-Life-Saving Benefits

Morrall and Hahn also choose to ignore benefits that agencies did not quantify or benefits that can be quantified but not given a dollar value. For instance, Morrall gives OSHA's formaldehyde rule a price tag of $72 billion per life saved. Though the formaldehyde rule may only save one life a year, it has many other significant benefits that are not included in Morrall's calculation, including, according to Parker, "reduced or avoided burning eyes or noses, sore or burning throats, asthma attacks, chronic bronchitis, allergic reactions, dermatitis and skin sensitization. OSHA notes that over 500,000 American workers are regularly exposed to formaldehyde at concentrations that have been found to cause one or more of these illnesses or discomforts." By focusing only on lives saved, Morrall's calculations miss the harm that a regulation is actually averting, one that resists his simplistic calculations.

Hahn ascribes "a zero value to any benefit which the government's regulatory impact assessment did not quantify and monetize." Hahn also ignores benefits that were quantified and monetized by agencies "but which failed to fit within his Procrustean categories of recognized benefit -- reduction of cancer, heart disease, lead poisoning and accidents, and benefits of reduction a handful of air pollutants -- even as he insisted that he was using the government's numbers." Hahn wrongly asserts that leaving out these "non-standard" benefits will have no impact on his calculations.

Parker gives the example of EPA's *Great Lakes Water Quality Guidance*, which reduces "the discharge of persistent, toxic and bio-accumulative pollutants" in the Great Lakes. The compounds reduced by the regulation are associated with very serious risks, including "neurotoxicity, fetotoxicity, endocrine disruption, hematological impairment, reproductive dysfunction, sensory and equilibrium disturbances," among others. Despite the clear benefits of such regulation, this measure fails cost-benefit analysis because a great many of its benefits cannot be monetized. These non-cancerous risks are difficult to quantify:

> Unlike cancer, which is widely assumed to have a linear dose-response down to a zero exposure level (making the calculation of population risk from aggregate exposure data relatively simple), non-cancer endpoints generally have non-linear risk thresholds -- which means that, to calculate a population risk from any given discharge, you have to know not only the exposure of the population to the pollutants issuing from the sources targeted by the particular regulation. You also have to know the cumulative exposure to individuals in the population to these and other interacting pollutants from other sources.

According to Hahn, the only benefit from this regulation is the reduction of fatal cancer to sports anglers and Native American subsistence fisherman.

Looking just at the cost-benefit analysis, the cost of the regulation would seem to far outweigh the benefit. An entirely different picture emerges with knowledge of the health effects of the hazards the guidance addresses. Fortunately, EPA's consideration of the rule was not limited to quantified benefits.

Accounting for such benefits requires a more in-depth dynamic analysis, which cost-benefit analysis cannot capture, leading Parker to refer to the methodologies of CBA's greatest proponents as a "simplistic scorecard."

Not a Neutral Tool

Even given the many uncertainties of cost-benefit analysis, proponents still argue that it acts as a neutral tool. Yet, as David Driesen points out, "if CBA only makes regulation weaker, and never strengthens overly weak regulation, it cannot improve priority setting and consistency in the manner its proponents envision." Driesen lays to rest the argument of CBA's neutrality by dissecting the use of CBA both in practice and theory. Driesen finds that both in OMB's implementation of cost-benefit analysis as well as in the assumptions of the cost-benefit analysis itself, CBA is weighted in favor of the regulated industry and against health, safety and environmental protections.

In Practice

Driesen focuses his look at cost-benefit analysis on the role of the Office of Information and Regulatory Affairs (OIRA), a subagency of the Office of Management and Budget (OMB) charged with carrying out cost-benefit analysis through Executive Order 12866. According to a Government Accountability Office (GAO) report, between June of 2001 and July of

2002, OMB "significantly affected 25" environmental, health and safety regulations. If cost-benefit analysis is in practice a neutral tool, then OIRA's use of cost-benefit analysis to review regulation would sometimes strengthen protections and sometimes weaken them. Driesen found that none of OIRA's changes made environmental, health or safety protections more stringent, and 24 out of the 25 weakened protections. Even if cost-benefit analysis is theoretically a neutral tool, in the hands of this administration, it is certainly biased against strong public protections.

Further evidence comes from the records of agencies whose statutes demand the use of cost-benefit analysis. Courts have interpreted the Toxic Substance Control Act (TSCA) and the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) to require CBA. The result has been a nearly complete halt on regulatory activity. According to Driesen, "EPA has not banned a single chemical under TSCA since the United States Court of appeals for the Fifth Circuit interpreted the statute as requiring that bans pass a cost-benefit test." FIFRA has suffered much the same fate. Cost-benefit analysis has put the breaks on needed regulatory protections.

For other statutes governing EPA, including the Clean Air Act and the Resources Conservation and Recovery Act, cost-benefit analysis is used in an "indeterminate position," meaning it is considered when forming regulation but does not serve as a specified criterion. For regulations promulgated under these statutes, OMB historically has applied cost-benefit analysis unevenly, providing lengthy analysis when considering a new regulation but quickly approving deregulatory actions. Driesen uses the example of regulating particulate matter. For example, notes Driesen, "OMB engaged in protracted argument with EPA in the early 1980s over whether EPA must prepare a CBA of a possible tightening of the particulate matter National Ambient Air Quality Standard (NAAQS), but it cleared EPA revocation of the hydrocarbon NAAQS in two days with no formal CBA."

Though overall OMB generally approves agency rules without changes, when it comes to reviewing EPA rules, "OMB often significantly changes between 45 and 75 percent of the rules it reviews." This high rate shows that at least in practice OMB is hostile to environmental protections.

Driesen was able to find only one case in which cost-benefit analysis has led to increased regulation: the reduction of lead in gasoline. Yet in this case, the initial implementation of the regulation occurred without performing cost-benefit analysis. CBA was only applied after the regulation had been in place for a number of years in order to support a more stringent standard. Heinzerling, Ackerman and Massey have shown that if the regulation had not already been in place, the empirical evidence would not have existed to justify the further reduction of lead in gasoline.

In Theory

Cost-benefit analysis can be used in a variety of ways by regulators. Some agencies use cost-benefit analysis in what Driesen calls an "indeterminate position," meaning the agency considers cost-benefit analysis but does not use it as a criterion for determining regulation. OMB tends to see cost-benefit analysis as a criterion under which the cost of implementing a regulation can never exceed the benefit. Another option is that cost-benefit analysis is used as a criterion under which cost must always equal benefit, optimizing the efficiency of the regulation. Driesen shows that in each case cost-benefit is not a neutral tool and will always favor the regulated community over the health, safety and environmental regulation.

The Indeterminate Position: Even if cost-benefit analysis is used in an "indeterminate position," weighed equally with other factors, it will still side against health, safety and the environment because cost-benefit analysis requires a greater expenditure of government resources and a delay in implementation of important safeguards. In lieu of cost-benefit analysis, agencies consider regulation based on the technological feasibility of implementing a regulation (including the cost of compliance) or an assessment of the health effects of a given regulation. "Cost benefit analysis combines all of the difficulties of both of these forms of analysis and creates an additional complication -- it requires quantification of benefits and, whenever possible, the assignment of monetary values to each of those benefits," according to Driesen. This method is inevitably more costly and time-consuming for the agencies and delays enforcement.

Delays in regulation are not neutral. They always benefit the regulated community at the expense of those exposed to the potential hazards by increasing the amount of time individuals are exposed to adverse conditions while giving the regulated community a longer time to avoid compliance.

Benefit Cannot Outweigh Cost Criterion: The criterion that benefit cannot outweigh cost is inherently not neutral. It acts as a one way ratchet, reducing benefit when cost is too great but never demanding an increase in benefit. If cost falls below benefit, this criterion does not require a more stringent standard. But if cost outweighs benefit, agencies are forced to weaken their standard in order to comply. This understanding of cost benefit is the one generally employed by OMB and the administration.

Cost Equals Benefit Criterion: If benefits are optimized, then cost should always equal benefit. CBA using this criterion at first appears to be a neutral tool. It could create either more or less stringent standards based on the conditions. If marginal benefit is greater than the marginal cost, it could recommend a stronger, more costly standard. Optimizing benefit may be more neutral overall, but it is not neutral compared to existing standards. Key provisions in the law require full protection of public health and the environment. In comparison to this standard, optimizing benefit is not a neutral theory because, as Driesen says, "this optimization criterion would not make regulation that already fully protects human health and the environment more stringent, but it would sometimes make it less stringent, so it is certainly not neutral relative to a health-protective standard." By maximizing efficiency, this criterion could also allow for the death of innocent life or allow harms to go unabated.

Even if cost-benefit analysis is applied in a relatively neutral way, the underlying methodology involves value choices that cannot be neutral. A cost-benefit analysis requires choosing a specific methodology to make a comparison of benefits and

costs. Various ways of calculating benefits can have drastically different outcomes. Driesen explains:

> For example, CBA proponents do not ask how much would a company have to pay a victim to get her to agree to die of cancer contracted after breathing in the fumes from the company's plant. Rather, they asked how much would a potential victim pay the factory to avoid a risk.

Choosing a methodology involves a non-neutral value judgment.

Misguiding Our Priorities

Not only is cost-benefit analysis not a neutral tool; it fundamentally gets it wrong. Cost-benefit analysis does not reflect our country's values or priorities. In Lisa Heinzerling, Frank Ackerman and Rachel Massey's "Applying Cost-Benefit Analysis to Past Decisions," the authors seek to show what would have happened if cost-benefit analysis had been applied to some of our landmark environmental, health and safety regulations. They investigate the reduction of lead in gasoline, a proposed regulation that would have allowed damming in the Grand Canyon, and the regulation of occupational exposure to vinyl chloride, a chemical used in producing PVC. Their conclusion in all three cases is that cost-benefit analysis would have gotten it wrong, depriving us of some of our most important health, safety and environmental protections.

One of their most compelling examples is that of vinyl chloride. Vinyl chloride is a known carcinogen used in making PVC. In 1974, when OSHA sought to regulate vinyl chloride, substantial evidence existed about vinyl chlorides toxicity, especially its link to a rare form of liver cancer, angiosarcoma, but little was known about the safe level of exposure or how many people had or would die from angiosarcoma through exposure to vinyl chloride. At the time, there were only 13 known cases of angiosarcoma deaths from vinyl chloride exposure. Still, OSHA chose to take a precautionary stance and sought to lower the allowable exposure level to 1 ppm over an eight-hour period. Previously, industry had allowed an exposure of 200 ppm "time-weighted average" with a maximum allowable exposure of 500 ppm.

By statute, OSHA does not perform cost-benefit analysis and must enforce the most stringent policy "feasible." If it had performed CBA when determining an exposure limit for vinyl chloride with the knowledge they had at the time, CBA would have come out in favor of a much weaker standard. Heinzerling, Ackerman and Massey compared the estimated cost of compliance at the time with the estimated value of a life in order to determine how many lives OSHA would have needed to think it was saving to justify the stringent regulatory standard.

The estimated cost of compliance with the vinyl chloride regulation was thought to be $200 million per year (though it turned out to be much lower). For the value of a human life, the authors used two different estimates: the highest value of a life based on current EPA calculations and adjusted for inflation, which is $1.81 million, and the much lower value of life used in the Ford Pinto controversy that occurred around the same time, which estimated the value of a statistical life at $200,000.

Only 7,000 people worked in the vinyl chloride industry. Using the Ford Pinto value, one out of every seven workers would have had to die to justify the stringent standard. That means that 1,000 people would have had to die each year to justify OSHA's regulation. If you take into account discount rates, the picture becomes even more dismal. At a 3 percent discount rate, 200 people using the high estimate for life value or 2,000 people using the lower estimate would have had to die each year for OSHA to justify the costs. At a 10 percent discount rate, 700 people would have had to die using the former estimate and 7,000 using the lower. Thus they conclude, "using a 10 percent discount rate and the value of life estimated in the 1970s, it would be necessary to show that every worker in the industry, every year, would have died in the absence of the standard, in order to justify the regulation in cost-benefit terms."

This dramatic example adds to the overwhelming evidence that cost-benefit analysis is not only a weak tool for determining public protections, but its "impartial" calculations can have severe and damaging impacts. In no way is it a blind arbitrator, equally weighing both sides of an issue. Rather it is a political tool, weighted to favor the regulated community that does not adequately address our regulatory priorities.

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