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In This Issue

Commentary: Security Contracting and the Dilemma of Defining an Inherently Governmental Function

Later in March, the Obama administration plans to release new guidance to federal agencies on which jobs the government can and cannot outsource to the private sector. The federal government's latest effort to better define what qualifies as an inherently governmental function should theoretically have significant consequences for reconstruction efforts in Iraq and Afghanistan, specifically regarding security contracting. However, change is unlikely.

The Federal Acquisition Regulation, the body of rules that regulate government contracting, defines an inherently governmental function as one "that is so intimately related to the public interest as to mandate performance by Government employees." Application of the definition, however, is extremely complicated.

Introduced in 1992 and revised in 1998, the inherently governmental standards describe five broad areas where the government should not outsource its work. The law states that any function is inherently governmental if it involves "the interpretation and execution of laws of the [U.S.] so as to:

- "Bind the [U.S.] to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- "Determine, protect, and advance [U.S.] economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- "Significantly affect the life, liberty, or property of private persons;
- "Commission, appoint, direct, or control officers or employees of the [U.S.]; or
- "Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the [U.S.], including the collection, control, or disbursement of Federal funds."

The guidelines also describe what falls outside of the inherently governmental category. In addition to the general tasks of "gathering information for or providing advice, opinions, recommendations, or ideas to Government officials," the standards specifically delineate tasks such as "building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services."

These guidelines would seem to ban many of the jobs the federal government has controversially outsourced in Iraq and Afghanistan, including security detail work, military and police training, interrogation, and intelligence. A loophole in the standards that prevents them from applying to overseas conflicts, however, has allowed contingency contracting to become a morass of private military and security contractors handling everything from reconstruction to intelligence. Even if the standards were applicable, though, they would produce a "squishy" middle where one agency's inherently governmental task is another's viable option for outsourcing, just as they do domestically.

Recent reports have suggested the Obama administration intends to improve upon the current problematic guidelines by breaking down inherently governmental functions into three categories: those that are inherently governmental, those that are closely associated with inherently governmental, and those that are critical in nature. The reports also note that the White House will provide an expanded list of tasks that fall within the inherently governmental framework. These improvements, however, will likely not apply to contingency contracting, as the Office of Management and Budget (OMB) will probably not scrap the current loophole regarding overseas conflicts.

The government created the loophole to prevent the vast array of contracting bureaucracies from hindering the Department of Defense while utilizing the private sector to carry out military actions. The length and complexity of the wars in Iraq and Afghanistan, however, will necessitate for the foreseeable future a continued reliance on contractors for security and

reconstruction efforts. In the case of reconstruction, the government should continue to improve oversight and hold contractors accountable for their work. But there are some functions performed in overseas wars that the government must make a determined effort to move away from outsourcing entirely.

Companion bills recently reintroduced by Rep. Jan Schakowsky (D-IL) and Sen. Bernie Sanders (I-VT), entitled Stop Outsourcing Security, would address this issue. The legislation seeks to delineate "mission critical or emergency essential functions" performed in a war zone. The legislation defines "mission critical or emergency essential functions" as "activities for which continued performance is considered essential to support combat systems and operational activities," or "activities whose delay, absence, or failure of performance would significantly affect the broader success or failure of a military operation."

The bill's most valuable component is the list of specific tasks that the government would not be able to outsource, including "the provision of protective services; the provision of security advice and planning; military and police training; repair and maintenance for weapons systems; prison administration; interrogation; and intelligence." Without better guidance from the federal government, or even the determination to apply existing standards to overseas contingency contracting, the only option seems to be legislative.

Some analysts argue that the current mix of security contractors in overseas environments is here to stay and that any attempts to better define an inherently governmental function ignores "the far greater number of people and money in logistics or reconstruction efforts" compared to "the relatively minor number of security contractors." This seems to be a false dichotomy at best. The former demands increased oversight where the latter calls for a better attempt by government to control its resources. Neither of these has to be achieved at the expense of the other.

More Action Is Needed to Improve Recovery Act Data Quality

The Recovery Act may be a great step forward for spending transparency, but it is also exposing the problems of obtaining quality recipient reporting. Two new government reports show that recent revisions and additions to Office of Management and Budget (OMB) rules on recipient reporting are not necessarily "magic bullets" for addressing reporting errors. The reports also make clear that ensuring that recipients have a clear understanding of existing guidance is a crucial aspect of any data quality improvement effort.

The first report is from the Government Accountability Office (GAO) and comes in the form of one of its regular Recovery Act oversight reports. The report's main focus is on how a select group of states spent Recovery Act funds, but a significant portion is devoted to recipient report data quality.

In December 2009, only a month before the second recipient reporting cycle began, OMB, which is responsible for writing the rules for the recipient reporting process, published a new Recovery

Act guidance document. The new guidance addressed data quality issues and tried to simplify some reporting processes. The GAO report found that there are far fewer recipient reporting errors following the release of this guidance, but there are still many problems.

According to GAO, "The second round of reporting appears to have gone more smoothly as recipients have become more familiar with the reporting system and requirements." At the same time, GAO noted, "Data errors, reporting inconsistencies, and decisions by some recipients not to use the new job reporting guidance for this round compromise data quality and the ability to aggregate the data."

The new jobs reporting guidance GAO refers to was published by OMB and says that any work paid for with Recovery Act dollars should be reported. Yet only 56 percent of prime recipients reported paying anyone with Recovery Act funds. Sixteen percent of the prime recipient reports showed jobs created or saved despite having received no funding from the government. The GAO report does note that some of these unusual numbers could be explained by the time lag involved in the reimbursement of government funding.

In trying to ascertain how these recipient errors arose, the GAO found a disturbing trend. Some recipients, according to the GAO, did not use the new formula for reporting FTEs, which OMB outlined in the December guidance. Instead, these recipients used the old formula, which was used in the first reporting quarter. Under the old formula, recipients were to identify the full-time equivalents that they created or saved, which left some ambiguity of what a "saved" job was. GAO noted that without interviewing every single recipient, there is no way to tell which method each recipient used in his or her report. However, when it came to education, which was the largest category of jobs reported, GAO found that a number of states reported job numbers using the old methodology.

This means that analysts and policymakers will not be able to rely on the numbers from this last quarter because of a lack of consistency in what is being reported. Additionally, the change in defining jobs between the first and second quarters means it will be impossible to compare data over the two quarters or to get cumulative data. GAO remains hopeful that the changes that have been made in the jobs reporting guidance and other reporting system enhancements will "ultimately result in improved data quality and reliability."

The second report further emphasizes how the current reporting problems cannot be simply solved with new guidance. The report came from the Recovery Accountability and Transparency Board (Recovery Board), which is tasked under the Recovery Act with overseeing recipient reporting and Recovery.gov. As part of its one-year assessment, one of the Recovery Board's members, the inspector general of the Department of Transportation, led a study on Recovery Act data quality. While the Board's report has substantially fewer specific examples and figures than GAO's voluminous publication, the Board's report does efficiently analyze types of recipient errors. The Board categorized the errors it found into four distinct groups:

- Recipients misinterpreting OMB and agency guidance
- Technical challenges
- Recipients not knowing or having incorrect codes or numbers
- Human error

Unfortunately, the report does not provide a detailed definition of these various error types. For instance, one Department of Justice office the Board contacted found that 31 percent of its data inaccuracies came from incorrect DUNS numbers, which are company identifiers provided by Dun & Bradstreet. This could either be the result of human error (e.g., typing errors) or recipients having the wrong DUNS numbers. Nevertheless, having these categories allows the government to begin to identify possible data quality solutions, and they indicate that more guidance from OMB may not prevent future recipient errors.

The Recovery Board indicates that rather than a dearth of OMB guidance, recipients are having difficulty understanding what exactly the existing guidance requires. To mitigate the rate of those errors falling under the first three categories, the Recovery Board recommends OMB and the agencies should increase communication between themselves and recipients. Similarly, addressing errors described by the fourth category – human error – requires tighter coordination among the Recovery Board, OMB, and the agencies. While the agencies could catch project-specific errors, limiting the number of human errors soon after they are reported by recipients, the Recovery Board can also work to limit these errors from even being entered.

Indeed, the Board is already implementing solutions that do just that, with so-called "hard checks." These checks prevent recipients from inputting clearly erroneous information. For example, by checking to see if the "Amount Received" field is larger than the "Award Amount" field, and by preventing recipients from filing if the numbers don't add up, recipients are prevented from entering incorrect data. In fact, by using these kinds of checks, the Board completely eliminated the "phantom" congressional district problem from the first cycle. Similarly, the GAO found that while 133 records in first quarter reported receiving more than the award amount, none in second quarter did so.

The nature of the problems found by both the GAO and the Recovery Board indicate that more recipient guidance won't necessarily help improve data quality. What does seem to help, as the success of the Recovery Board's hard checks shows, is increased attention by federal agencies and the implementation of mechanized data validation. Whether it is external efforts, such as agencies helping recipients understand the existing reporting rules, or internal efforts, such as hard checks, more action is needed to improve recipient report data quality.

White House Seeks More Transparent Environmental Reviews

The Obama administration has proposed new guidance intended to increase transparency and public involvement in the implementation of one of the nation's oldest and most important environmental laws. The 40-year-old National Environmental Policy Act (NEPA) creates a

process where federal agencies must review the environmental impacts of their actions and evaluate alternatives while working to include public participation in the process.

Recognizing the 40th anniversary of NEPA, the Council on Environmental Quality (CEQ) – the White House office in charge of monitoring federal NEPA compliance – issued draft guidance in February to all federal departments and agencies. The guidance is designed to ensure transparency and openness as agencies evaluate ways to mitigate the environmental impact of their proposed actions. The new guidance is available for public comment.

For many federal activities, the NEPA process provides for public participation in identifying potential alternative actions and commenting on environmental impacts. Under certain circumstances, agencies may proceed with their actions if they commit to steps that "minimize, rectify, reduce, or compensate" the adverse impacts resulting from their actions. However, in the past, these mitigation efforts have often lacked monitoring and frequently failed.

The CEQ draft guidance sets three goals for improving transparency: 1) consideration of mitigation efforts throughout the NEPA process and clear documentation of the mitigation commitments; 2) creation of monitoring plans for the mitigation actions; and 3) greater public participation through "proactive disclosure" of NEPA records.

Although these actions do not create any new regulations and the language still grants agencies much discretion, they regardless represent the first major enhancements of the NEPA process in years. As the office in charge of NEPA, CEQ wields considerable sway in determining how other agencies comply with the law and regulations. Increasing transparency and chipping away at the culture of government secrecy that has flourished over the years requires, among other actions, the reaffirmation of existing openness policies and commitment from the top to enforce these measures.

The draft guidance makes several valuable recommendations for transparency. It recognizes that public engagement is a key feature of NEPA and "should be fully integrated into agencies' mitigation and monitoring processes." While recognizing the importance of the Freedom of Information Act (FOIA), the CEQ calls on agencies to make NEPA reports, documents, and responses to public questions "readily available to the public through online or print media, as opposed to being limited to [FOIA] requests made directly to the agency." The CEQ stresses the need to document important aspects of the NEPA process, such as goals, timelines, and funding, which improves accountability. Moreover, the draft guidance endorses the fundament that citizens have vital, substantive contributions to make to government decisions: "In addition to advancing accountability and transparency, public interest and input may also provide insight or perspective for improving any mitigation activities as well as providing actual monitoring assistance."

The new draft guidance from CEQ also includes a case study from the Department of the Army that showcases robust public involvement and monitoring in the NEPA process. By providing this example, CEQ shows other agencies that the goals they have set for NEPA can be achieved and highlights one way to do so.

Ensuring transparency is especially crucial in the NEPA process. NEPA places agencies in charge of preparing an impact assessment that could challenge their own proposed actions, creating strong potential for conflicts of interest that only transparency can counter. By forcing agencies into a transparent assessment process, the law empowers the public and the courts to demand sufficient environmental protections.

Other New Draft Guidance

In addition to the draft guidance on mitigation measures, CEQ also released draft guidance on how agencies should consider the impacts of climate change in their environmental assessments and on the use of "categorical exclusions." Categorical exclusions cover types of federal actions that are generally considered to "not individually or cumulatively have a significant effect on the human environment," and therefore, agencies need not assess their environmental impacts.

According to CEQ, "An inappropriate reliance on categorical exclusions may thwart the purposes of NEPA, compromising the quality and transparency of agency decisionmaking as well as the opportunity for meaningful public participation and review." Categorical exclusions are the most frequently employed method of complying with NEPA.

The draft guidance on categorical exclusions emphasizes the requirement to involve the public in the process, and although it creates no new requirements, the guidance encourages agencies to go beyond the customary *Federal Register* public-notice-and-comment practice. The CEQ suggests agencies use "public involvement techniques such as focus groups, e-mail exchanges, conference calls, and web-based forums [to] stimulate public involvement." Agency websites should be used to communicate proposed changes to the agency's NEPA process because, according to CEQ, "Not only is this another method for involving the public, an agency website can serve as the centralized location for informing the public about agency NEPA implementing procedures and their use, and provide access to updates and supporting information."

Granddaddy of Environmental Laws

Before the law was signed by President Richard Nixon in 1970, the Senate passed NEPA on a unanimous vote, and the House of Representatives passed the bill by a wide and bipartisan margin of 372-15. The Clinton White House examined the effectiveness of NEPA in 1997 and concluded that:

> Partly as a result of NEPA, public knowledge of and sophistication on environmental issues have significantly increased over the last 25 years. So too have public demands for effective and timely involvement in the agency decision-making processes. The success of a NEPA process heavily depends on whether an agency has systematically reached out to those who will be most affected by a proposal, gathered information and ideas from them, and responded to the input by modifying or adding alternatives, throughout the entire course of a planning process.

During the administration of George W. Bush, NEPA came under increasing attack by the White House, Congress, and even the courts. The current administration has presented a very different take on the law.

In a New Year's Eve proclamation recognizing the 40th anniversary of NEPA's enactment, President Obama affirmed that, "my Administration will recognize NEPA's enactment by recommitting to environmental quality through open, accountable, and responsible decision making that involves the American public." The president also called upon executive branch agencies "to promote public involvement and transparency in their implementation of the National Environmental Policy Act. I also encourage every American to learn more about the National Environmental Policy Act and how we can all contribute to protecting and enhancing our environment."

The People Speak

As part of the Obama administration's Open Government Directive, agencies are accepting public comments through website forums dedicated to generating ideas for increasing government openness. A number of individuals have suggested ways to improve the NEPA process, including calls to address the monitoring of mitigation efforts. Other ideas from the public include using new technology to improve public participation and making the scientific data mappable.

The public may comment on the draft guidance until May 24.

Plans for National Broadband Access May Be in Danger

The Federal Communications Commission (FCC) is gearing up to release its plan for national broadband access on March 17. The FCC is required under the American Recovery and Reinvestment Act to develop a plan to connect an estimated 93 million Americans and present it to Congress. Early releases of the plan indicate a broad vision, but problems concerning funding and net neutrality threaten its success.

On Feb. 18, the FCC gave the public an idea of what will be in the plan by releasing its national purposes update, which outlines what the commission will present to Congress. The plan embraces a broad vision of public connectivity that some public interest groups consider long overdue. The vision includes increased public education programs to bridge the digital divide, efforts to utilize broadband to improve energy and health care efficiency, and plans to provide first responders with radio interoperability.

Open government advocates have hailed the plan's prerogative to increase civic participation in government policymaking. John Wonderlich of the Sunlight Foundation wrote that the FCC seems "committed to the sort of government policies that can help turn Internet access into a transformative tool for citizenship." If, to paraphrase Thomas Jefferson, a democracy requires an informed citizenry, then broadband enables the masses to reach government information

faster with fewer barriers to access. Further, national broadband access increases the capacity for tools that enable citizens to better interact with government information.

A major part of the plan seeks to use broadband to improve government efficiency, to enable citizen-centric online services, and to utilize existing government assets to improve broadband deployment. According to the Feb. 18 document, existing social media and cloud computing can be used to reduce costs, and services such as enabling citizens to access personal data held by government agencies can be better centralized. The blog on FCC's Broadband.gov approaches the question of citizen engagement in five primary areas:

- Transparent government information
- Increased access to media and journalism
- The use of social media to communicate with the public
- Developing innovation in communal digital space that advances government
- Digitizing democracy by enabling such things as online voter registration and enabling overseas members of the military to vote online

Further, there have also been reports that the federal government may also look into creating an online archive of agencies' web content and recommend that Congress change the Copyright Act to allow media companies to contribute their archival content to this national archive.

Presently, federal broadband policies that encourage citizen interaction with their government are almost nonexistent or poorly implemented. The executive branch has made some recent inroads to civic engagement by launching online forums to solicit public input in policymaking, but these efforts have been limited. The federal government's efforts to get public input on the Open Government Directive is a prime example, and its subsequent efforts to encourage such engagement on individual agency openness plans was a further step in that direction. However, the E-Government Act of 2002 has never been fully implemented in such basic areas as agency website standards; thus, it is unknown whether such an ambitious plan can be fully realized.

Funding for the FCC's plan is a potential roadblock for the effort. Currently, the FCC subsidizes telephone services to poor and rural areas through its Universal Service Fund and plans to establish its broadband-focused Connect America Fund within the existing program. The $8 billion Universal Service Fund is paid for out of surcharges affixed to consumer and business long-distance bills. To pay for extended broadband services, the FCC plans to propose several options to Congress, including a gradual phase-out of the Universal Service Fund telephone service to a focus entirely on broadband. However, the FCC is expected to request another $9 billion from Congress in addition to the $7.2 billion that legislators already provided for broadband lines in the economic stimulus package.

Another potential problem is that cost cuts may give an advantage to big business that could then undermine competition. Blogs on both Verizon's and AT&T's websites praised the agency's efforts. Verizon's vice president for regulatory affairs even called the FCC's plan "bold and practical." However, corporate support may stem from FCC not requiring companies to share

broadband lines with rivals, thus favoring big companies and violating the principles of net neutrality. Both companies have ardently opposed any regulation related to net neutrality.

The pricey and expansive vision is what critics contend will be the plan's failure. Most reports indicate that without being broken up, the plan is too large to make it into an omnibus bill. Currently, there are fears that the plan is so big that Congress is unlikely to do anything with it at all.

Regulatory Lapses Inflate Health Care Costs, Reports Find

A new report has found that foodborne illnesses take a $152 billion toll on the American economy each year. Other hazards that regulators keep tabs on, such as air pollution, can increase medical costs if the public is not adequately protected.

A portion of the economic impact of foodborne illnesses, more than $9 billion, takes the form of health care costs, the report finds. The nation sees almost 82 million cases of foodborne illness annually, and the average cost of each case is $112, the report says. The report counts physician services, pharmaceutical costs, and costs associated with hospitalization.

The March 3 report, *Health-Related Costs from Foodborne Illness in the United States*, was sponsored by the Produce Safety Project at Georgetown University, an initiative of the Pew Charitable Trusts.

The remainder of the $152 billion economic impact is attributable to deaths and losses in quality of life. The report's author, former Food and Drug Administration (FDA) economist and current Ohio State University professor Robert L. Sharff, used typical cost-benefit analysis methods to determine these values. The Make Our Food Safe Coalition, of which Pew Charitable Trusts is a member, said it "does not necessarily endorse any single method to develop such estimates, [but] coalition members agree that this study highlights the magnitude of the problem and the need for action to reduce foodborne disease."

Major food recalls have raised public awareness of food safety and foodborne illness risk. Peanuts, peppers, and ground beef are among the many foods that producers have recalled in recent months after consumers became ill. The Centers for Disease Control and Prevention (CDC) estimates that foodborne illnesses hospitalize more than 300,000 people every year and kill 5,000. An ongoing salmonella outbreak, traced back to a line of meats seasoned with red and black pepper, has sickened 245 people in 44 states and the District of Columbia, according to the CDC.

Calls for reform have grown louder, too, as the public has lost confidence in the ability of regulators, especially those at the FDA, to detect and solve foodborne illness outbreaks or prevent them in the first place. A December 2009 CBS News poll asked more than 1,000 Americans, "How would you grade the U.S. on ensuring the safety of the food supply in the

U.S.?" 34 percent of respondents said "C." 33 percent said "B" while only seven percent said "A." 18 percent said "D" while six percent gave the U.S. an "F."

Pew Charitable Trusts seized on the findings of Sharff's report to renew calls for reform. "This report makes it clear that the gaps in our food-safety system are causing significant health and economic impacts," Erik Olson, Pew's director of food and consumer product safety, said in a statement. "Especially in challenging economic times we cannot afford to waste billions of dollars fighting preventable diseases after it is too late."

Olson called on the Senate to quickly consider and pass a food safety bill. In November 2009, a Senate panel approved the FDA Food Safety Modernization Act (S. 510), but the bill has yet to be taken up on the Senate floor. A similar bill passed the House in July 2009, 283 to 142.

In another study released March 2, the Rand Corporation determined that air pollution can have a significant impact on health care and health insurance industries, particularly when air pollution exceeds levels deemed safe by regulators.

"Meeting federal clean air standards would have prevented an estimated 29,808 hospital admissions and ER [emergency room] visits throughout California over 2005-2007," the report says. The admissions cost almost $200 million, leading Rand to conclude that "improved air quality would have reduced total spending on hospital care by $193,100,184 in total."

Rand studied air pollution and hospital admissions trends in California from 2005-2007. The report links air pollution levels that exceeded federal standards to hospital admissions for problems such as asthma attacks, pneumonia, and bronchitis. The admissions included in the report are attributable to violations of the U.S. Environmental Protection Agency's (EPA) standards for particulate matter and ozone. The report acknowledges that exposure to particulate matter and ozone can also lead to heart attacks and premature mortality, but those health endpoints were not included in the study.

The majority of air pollution's health effects are indirectly paid for by taxpayers, the report emphasizes. Medicare covered more than $100 million of the hospital care costs included in the report, and government-provided health care for low-income individuals (Medicaid at the federal level and Medi-Cal in California) covered more than $27 million, Rand said. Private insurers spent almost $56 million, according to the report.

Like the report on the costs of foodborne illness, the Rand report adds yet another dimension to the debate over health care policy and President Obama's desire to reform the system. "Dirty air is the forgotten topic when it comes to health care reform," Clean Air Watch's Frank O'Donnell told the EPA in 2009.

While the health care costs associated with regulatory failures are likely a small fraction of the more than $2 trillion spent on health care in the U.S., they remain significant. Preventable workplace injuries and illnesses, injuries and illnesses associated with consumer products, automobile crashes, and water quality degradation, to name a few, can lead to both short-term and long-term health care costs.

Scientists Recommend Ways to Restore Scientific Integrity to Government

On March 3, the Project on Scientific Knowledge and Public Policy (SKAPP) released the results of a two-year research effort to explore the working environment of federal scientists in the public health and environmental fields. The results showed that not only is there political interference in their work, but that scientists also faced a series of obstacles that delay the study and dissemination of scientific information that affects the public every day.

SKAPP is a project of the George Washington University's School of Public Health and Health Services. The researchers at SKAPP interviewed 37 scientists representing 13 federal agencies from May 2008 through January 2009 to discern the issues of most importance to scientists. SKAPP then conducted an online follow-up survey in July and August 2009 to see what effects, if any, the Obama administration had on agencies' work environments.

The report, *Strengthening Science in Government: Advancing Science in the Public Interest*, contains recommendations in eight topic areas plus one overarching recommendation. The study describes details of many agencies' policies and practices regarding how scientists get approval for research topics and communicate among themselves and with the public, as well as the extent of political interference by executive branch employees and members of Congress.

The recommendations address topics such as improving the management of science within agencies, opportunities for scientists to provide feedback on policies, interagency data sharing and communication, and opportunities for professional development. Many recommendations focus on two broad issues: bureaucratic delay in approving proposed research studies, and disseminating research results through cumbersome approval processes.

For example, the authors of the report note, "Many of the scientists interviewed felt that the time and effort required to obtain agency approval for research projects is excessive—and these resources could be better spent on conducting the research, rather than writing lengthy research proposals."

In addition to internal agency processes, the need for White House Office of Management and Budget (OMB) approval also delays research. Scientists who want to survey the public must have their information collection requests approved by OMB's Office of Information and Regulatory Affairs (OIRA) under the Paperwork Reduction Act. Many scientists in the study considered this step to be "excessively burdensome." This criticism of OMB's information collection review

process is consistent with other scientists' experiences. OMB's review can require scientists to revise and resubmit their research proposals, causing further delay.

The report recommends both agencies and OMB streamline their respective approval processes so that research can be conducted in a more timely manner.

Once research is completed, scientists are often frustrated by the processes for clearing the results for publication or other dissemination methods. "Some scientists suggested that their agencies have used the clearance process to delay or even prevent the publication of findings that could ignite controversy," according to SKAPP's report. Many agencies have written policies that outline procedures for information dissemination, but the scientists participating in this study often said that there was a difference in what those policies required and what actually happens within an agency. Managerial, procedural, and political considerations can affect not just when but whether some research results are released.

OMB also can play a role in hindering the release of scientific information. Agencies were required to establish information quality guidelines under the 2001 Data Quality Act. OMB added to this requirement additional scientific peer review requirements (even if the research may have already been peer reviewed) for "influential" and "highly influential" scientific assessments. According to the SKAPP report, "When the OMB regulations were first developed, many agencies were concerned that they introduced additional, time-consuming layers of review. In addition to the bureaucratic requirements, these regulations were potentially a means to challenge or delay findings that had regulatory implications."

The recommendations about disseminating scientific work call for an end to using the clearance process to slow or stop the dissemination of scientific information, for consistent and timely application of the review policies, and for agencies to "have processes for expedited clearance of time-sensitive materials."

One overarching recommendation applies to all the recommendations in the report. The White House Office of Science and Technology Policy (OSTP) and OMB "should ensure that agencies adopt the policies described in this report's recommendations, and that the policies are generally consistent across agencies and appropriate within each agency's mission and scope. These policies should be clearly and actively communicated to agency leadership, scientific managers, and the federal scientific workforce." These two White House offices can help ensure that scientific integrity policies are adopted and implemented within agencies.

On March 9, 2009, President Barack Obama issued a memo aimed at restoring scientific integrity in the federal government. The memo stated, "Science and the scientific process must inform and guide decisions of my Administration on a wide range of issues ... The public must be able to trust the science and the scientific process informing public policy decisions." Obama assigned to the director of OSTP "the responsibility for ensuring the highest level of integrity in all aspects of the executive branch's involvement with scientific and technological processes." The memo identified six principles OSTP should consider when producing recommendations to

the president. To date, these recommendations, which OSTP was to produce in 120 days from the date of the memo, have not been publicly released.

In SKAPP's follow-up survey of scientists, the majority of the respondents perceived no change in the way their agencies dealt with the issues raised in the report. Although there were a few bright spots in scientists' views of the changes that had occurred in some agencies, most believed that change would be hard to achieve. Entrenched managers, processes, and cultures and funding concerns led few scientists to expect significant change. The follow-up interviews were conducted six months after Obama had taken office, and many agency heads were not yet in place.

In the report's conclusion, the authors note that the concerns over political interference and the politicization of science reached its peak during the administration of George W. Bush. The pessimism expressed by most of the scientists in the follow-up survey about their agencies' ability to change presents the Obama administration with considerable challenges if it is to meet the scientific integrity goals the president outlined.

Supreme Court Hears Charities' First Amendment Challenge to Patriot Act

On Feb. 23, the U.S. Supreme Court heard arguments in *Humanitarian Law Project v. Holder*, a case challenging parts of the USA PATRIOT Act (Patriot Act). The Humanitarian Law Project (HLP) and other charities allege that sections of the law violate the First Amendment.

Under federal law, it is a crime to provide money and weapons to an organization designated as a terrorist group by the United States, but the definition of such "material support" is broad enough to include activities such as providing advice on fostering peace. HLP and others argue that the material support statute is unconstitutionally vague and that American citizens or nonprofit organizations can be convicted of crimes for engaging in lawful activity.

The law barring material support to designated terrorist organizations was first adopted in 1996 and was subsequently strengthened by the Patriot Act. It prohibits providing money and weapons to designated terrorist groups, and it also bans U.S. organizations from providing any "training," "personnel," "service," or "expert advice or assistance," including advice on facilitating peace-building programs. The only exemptions are for medicine and religious materials.

HLP works to mediate international conflicts. Specifically, HLP wanted to provide human rights and conflict resolution training to the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both designated terrorist organizations. The Patriot Act's broadening of the definition of material support significantly expanded prospects to prosecute anyone deemed to have provided assistance to a designated organization. Subsequently, HLP stopped working with these groups out of fear it would be considered criminal under the material support statute.

Georgetown University professor David Cole, the attorney representing HLP, argues that the human rights advocates are only interested in supporting lawful activities, urging foreign groups to avoid violence and to take their disputes to the United Nations. Cole's brief states that the material support statute "imposes criminal liability on speech and association without any showing that the speaker intended to incite or promote terrorist activity in any way." He argued that the First Amendment protects those who speak out on behalf of or advise foreign terrorist organizations, as long as they advocate only peace and nonviolence. Cole makes a distinction between aid that is intended to further lawful activity and aid that is intended to further illegal activity.

Meanwhile, during oral argument at the Supreme Court, Solicitor General Elena Kagan stressed that the material support statute is one of the most valuable tools in the fight against international terrorism. Kagan gave examples of prohibited conduct, including helping designated groups by petitioning international bodies or filing a friend-of-the-court brief.

Advocates for change note that the legal regime is broader than Kagan made it sound, allowing prosecutors to target individuals and charities for doing nothing more than providing humanitarian assistance in an area where a designated terrorist organization operates. Ahilan Arulanantham of the American Civil Liberties Union (ACLU) has first-hand knowledge of how the law affects human rights activity. He worked in Sri Lanka after the 2004 tsunami and witnessed humanitarian organizations that could not help victims because they lived in areas controlled by the LTTE.

The ACLU filed an amicus brief on behalf of nine humanitarian groups who teach conflict resolution, provide aid, and engage in various activities that require them to work with designated groups or in areas controlled by such groups. The brief explained that they may be forced to severely limit their nonviolent work because of the material support law.

The Court could either rule to uphold the law or create an exception for peaceful activity. A decision is expected by June or July.

Prior to the oral argument, the Charity and Security Network, along with the Constitution Project, held an informative briefing on the case; the event can be viewed online.

For more on the case, including briefs and information on the issue of material support, visit the Charity and Security Network's website.

Nonprofits Are Making a Major Impact on Redistricting Reform

Redistricting reform efforts have emerged as a key issue that could significantly impact our democracy in 2010 and beyond. While it does not appear that there will be nationwide redistricting reform, efforts are moving forward in several states. Nonprofits have taken a lead role in advocating for a process that is independent, nonpartisan, and fair while also ensuring that their constituencies' interests are represented.

Americans for Redistricting Reform (ARR) is a nonpartisan, nonprofit organization that bills itself as "committed to raising public awareness of redistricting abuses and promoting solutions that benefit voters and strengthen our democracy." Its website allows visitors to learn about redistricting reform efforts in jurisdictions across the country. The site also contains fact sheets, court cases, research studies, and state and federal legislation on redistricting reform efforts.

ARR was launched by the Campaign Legal Center and includes major nonprofit organizations as advisory committee members, including the Brennan Center for Justice, the Campaign Legal Center, the Committee for Economic Development, Common Cause, Fair Vote, the League of Women Voters, the Reform Institute, the Republican Main Street Partnership, and U.S. PIRG.

According to the nonprofit Campaign Legal Center (CLC), ARR and its advisory committee members believe that there are two key elements necessary for redistricting reform. "The first is changing the procedures that states use to draw legislative districts, including the establishment of independent commissions, transparency and effective opportunity for participation by all segments of the general public. The second is establishing uniformly accepted standards for how to draw and evaluate districts, including adherence to the commands of the Constitution and the Voting Rights Act, respect for political subdivisions and communities of interest, competitiveness, partisan fairness, and compactness."

ARR has created several fact sheets on redistricting reform efforts, including one titled "Notable Redistricting Efforts in the States." This fact sheet focuses on efforts in Florida, Pennsylvania, New Mexico, Kansas, and Texas.

In Florida, the state legislature controls both congressional and state redistricting decisions. These decisions usually result in the creation or maintenance of districts that avoid competition for incumbents.

A set of state constitutional amendments, proposed by FairDistrictsFlorida.org, would prevent legislative districts from being "drawn to favor or disfavor an incumbent or political party" or to "deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice." The amendments would also require legislative districts to be "contiguous" and "compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries." The slate of proposed amendments will be on the November 2010 ballot in Florida.

ARR has created a separate fact sheet on Proposition 11, which in 2008 "amended the California Constitution to transfer responsibility for drawing district lines for legislative seats from the Legislature to a new 14 member Citizens Redistricting Commission," according to ARR. Nonprofit organizations were on both sides of the Proposition 11 debate, and many of the organizations that took opposite views on the ballot measure are traditional allies.

"Supporters say the proposition's purpose was to create a more transparent, inclusive and representative process that would be responsive to the testimony of communities and neighborhoods," according to ARR. Supporters include California Common Cause, AARP, the

Los Angeles Chamber of Commerce, the League of Women Voters of California, the California Chamber of Commerce, the California NAACP, the California Police Chiefs Association, and the ACLU of Southern California.

Opponents of Proposition 11 believe that it "will give power to bureaucrats who will select the redistricting commission based on a partisan agenda. Opponents also have expressed concern that this measure does not ensure that the 14 member independent commission will reflect the gender, racial, or geographic diversity of the state's 36 million people, or of the current legislative body." Opponents include the California Correctional Peace Officers Association, the National Association of Latino Elected and Appointed Officials, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense Fund, and the Asian Pacific American Legal Center.

The redistricting commission will "begin drawing lines after the 2010 Census is conducted. The first election under a reformed system of drawing legislative districts in California will be held in 2012," according to ARR. The initiative also "applies new standards to congressional redistricting, but the power to draw congressional lines will remain with the legislature."

The League of Women Voters (LWV) has also played a major role in redistricting reform efforts and raising awareness of the issue in the states. In New York, LWV hosted a forum on redistricting with the Nelson A. Rockefeller Institute of Government. During the forum, one of the panelists, Gerald Benjamin, a political science professor and director of the SUNY New Paltz Center for Regional Research, Education and Outreach, stated that an independent panel should handle redistricting, according to the *Jamestown Post-Journal.*

New York State Assemblyman Bill Parment (D-North Harmony), who was also a panelist, told the *Post-Journal* that "[o]bviously, the legislature is suspect because we have an interest in the outcome, and so people like the League of Women Voters and others who, I guess, would probably not object to being called good government groups, favor a panel being independent from the legislature."

Parment, however, expressed why he believes that the legislature, not an independent panel, is the body best suited to handle redistricting issues. The "people who know the most about their communities and have been chosen by their communities to represent them are the same ones that are best positioned to create a plan for redistricting that reflects community interests and concerns. If we didn't fight for our communities in redistricting, we would be held in very low esteem, I think, by the public," Parment said.

LWV has also been active in other states. "In Ohio, the league worked with Democratic Secretary of State and Senate candidate Jennifer Brunner to run a contest last year allowing citizens to submit redistricting plans," according to *CongressDaily*. In Illinois, LWV "has teamed with good government groups to attempt to place the question of creating an independent redistricting commission" on the ballot in November, the subscription-only publication noted. According to the same article, LWV's referendum in Illinois "would only apply to state legislative districts, not congressional seats."