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Nonprofit Issues

Federal Budget

Regulatory Matters

Information & Access

Federal Court Rejects Challenge to Limitations on Grassroots Broadcasts

On May 9 a federal court denied the Christian Civic League of Maine's (CCLM) request for a preliminary injunction, allowing a Federal Election Commission (FEC) rule that bans "electioneering" broadcasts to be applied to the nonprofit group. The FEC prohibits broadcast references to federal candidates 30 days before a primary or 60 days before an election. Because the injunction was rejected, starting on May 14 and lasting until June 13 (when the senate primary in Maine takes place) CCLM will be barred from airing grassroots lobbying ads urging people in Maine to contact Sen. Olympia Snowe (R-ME) and ask her to support the constitutional amendment banning gay marriage. CCLM has appealed to the Supreme Court.

The case challenges the constitutionality of the "electioneering communications" provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), which is intended to stop sham issue ads funded with soft money. CCLM, a 501(c)(4) organization, filed the case on April 3, and the request for a preliminary injunction was argued before a special three-judge panel on April 24. The facts of the case are similar to those in *Wisconsin Right to Life*, which is pending in the lower court after the Supreme Court ordered it to consider whether the facts require an exemption from the rule on First Amendment grounds.

CCLM has a donor willing to pay $3,992 for a radio ad urging Maine's two U.S. Senators, Olympia Snowe and Susan Collins, to change their position on the Marriage Protection Amendment, which is expected to be debated in the Senate in June. The proposed text of the ad

states CCLM's position supporting the amendment, and goes on to say, "Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June." The ad then provides phone numbers to call.

The court rejected CCLM's request for a preliminary injunction, because other avenues for its message were available. CCLM could broadcast its ad if it was sponsored by an affiliated political action committee. CCLM could also publish it in a non-broadcast medium or delete the reference to Sen. Snowe.

The court's opinion raises troubling issues for groups that wish to use broadcast media for grassroots lobbying campaigns. First, the court acknowledges that the ad addresses an issue central to CCLM's mission, and "would address a legislative issue at a time when that issue is likely to be under consideration by the Senate," and that Snowe is unopposed in the election. Yet it claims the ad "appears to be functionally equivalent to the sham issue ads identified in *McConnell*." (In *McConnell v. FEC* 540 U.S. 94, the Supreme Court upheld the constitutionality of the "electioneering communications" rule. However, in the *WRTL* case the court ruled that the FEC rule could be challenged as it applies to specific fact situations.)

By applying the "electioneering communications" rule to grassroots lobbying, the CCLM court assumes that any criticism of an elected official can be regulated by campaign finance laws because it "may improperly influence the election."

The opinion says the ad might "have the effect of encouraging a new candidate to oppose Sen. Snowe, reduce the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermine her to gather such support..." It goes on to note that CCLM's newsletter comments favorably on a potential challenger to Sen. Snowe.

In all, the court finds that "the League's proposed 'grassroots lobbying' exception would seriously impair the government's compelling interest in protecting the integrity of the electoral process." As an example, the court says "candidates or their allies could easily schedule an issue for 'legislative consideration' during the run up to an election as a pretext for broadcasting a particular subliminal electoral advocacy advertisement." The argument ignores that fact that the same candidates and allies could schedule controversial legislation for votes during the 60/30 day blackout periods in order to avoid full public airing of the issues.

In addition, the court's ruling does not recognize that political committees are limited to contributions from individuals, and their primary purpose is to support or oppose candidates for office. Legitimate grassroots lobbying communications are lawful activities for civic leagues like CCLM, as well as public charities exempt under 501(c)(3) of the tax code, and can be paid for out their corporate treasury funds.

The debate on whether genuine grassroots lobbying broadcasts should be exempted from the "electioneering communications" rule is also pending in the FEC, where OMB Watch and five other groups have asked the commission to hold a rulemaking to consider the issue. The FEC has not yet decided whether it will conduct the rulemaking.

Lobby Reform Bill Squeaks Through House

A lobbying and ethics reform bill that barely passed the House last week is headed to what will likely be a contentious conference between the House and Senate, with lawmakers far from agreement on what to do about legislative earmarks, congressional travel paid by non-

governmental entities, and 527 organizations, among other issues.

H.R. 4975, the Lobbying Transparency and Accountability Act, narrowly passed on May 3 by a vote of 217-213. Eight Democrats voted for the bill despite an active whip effort by Democratic Leadership and criticism by government-watchdog groups, while 20 Republicans voted against the bill. Most of the dissenting Democrats were so-called "frontline" members--potentially vulnerable incumbents--wary that a "no" vote would be an effective element of campaign attack ads in the fall.

With House passage, the Senate and House must now name conferees to work out differences between the House bill and S. 2349, the Legislative Transparency and Accountability Act, the Senate version that passed on Mar. 29. House Speaker Dennis Hastert (R-IL), who has yet to name conferees, has said he would like to complete a conference agreement before the Memorial Day recess. Senate Majority Leader Bill Frist (R-TN) has said he intends to name conferees early this week, but the House must appoint conferees before the Senate announces its conference members.

Although Rep. Chris Shays (R-CT) remains hopeful that the Senate would prevail on any contentious conference debates, saying, "It's going to be a stronger bill thanks to the Senate," the conferees will have an uphill battle. It is unclear what provisions will survive the potentially divisive conference. Contentious provisions include:

- **Grassroots Lobbying**: In the Senate, the bill currently includes a provision that changes the trigger for registering from $24,500 in a 6-month period to $10,000 in a 3-month period. The bill also requires quarterly, electronic reporting by registered lobbyists, including disclosure of campaign contributions, gifts, and lobbyists' past congressional and executive branch employment, but does not include disclosure of expenditures for grassroots lobbying or coalitions. There is no similar provision in the House bill.
- **527 organizations**: The House package incorporates H.R. 513, which applies Federal Election Campaign Act (FECA) restrictions to independent 527 organizations so that they can no longer raise unlimited amounts of money, and eliminates restrictions on party-coordinated expenditures. There is no comparable language in the Senate bill.
- **Revolving Door**: In the House, the one year "cooling off period" remains intact; however, the Senate bill lengthens the ban to two years.
- **Gifts, Meals and Drinks**: In the House, the current $50-per-item and $100-per-year limits on gifts and meals that a member can receive from each lobbyist or organization would remain in place but would be re-evaluated by the Committee on Standards of Official Conduct. In the Senate bill, senators and aides would be barred from accepting meals or drinks from registered lobbyists, but they would be able to accept meals valued up to $50 from others.
- **Privately Funded Travel**: The House bill requires the Committee on Standards of Official Conduct to recommend new trip guidelines by June 15. Until then, travel itineraries are to be submitted to the committee for pre-approval under a two-thirds vote. After the guidelines are in place, the committee would certify trips under its standard procedures. The Senate legislation bars lobbyists from all trips. The Ethics Committee must certify that the trip was for primarily educational purposes, and the senator must submit and post a report on his or her website detailing meetings and events of the trip.
- **Earmarks**: The House would require conference reports for appropriations bills to list all earmarks and identify their sponsors, and would make any earmark not properly disclosed subject to a point of order. In the Senate bill, all bills, amendments and conference reports--whether for appropriations, tax bills, or authorizations--would have to identify the lawmaker responsible for each earmark and its purpose. The legislation would make subject to a point of order any earmark added by a conference committee to

any bill. Conference reports would be posted on the Internet at least 48 hours before a Senate vote. Both measures exempt earmarks to federal entities.

Rules Committee Chairman David Dreier will likely be on the conference committee, as he is charged with making good on a promise made to appropriators by Hastert and Majority Leader John Boehner (R-OH) that no bill will come out of conference unless it extends earmark overhaul measures beyond the annual spending bills to tax and authorizing legislation.

There is little support on the House side for a complete gift ban. In addition, extending the revolving door ban gained little traction after facing opposition from senior members, including Judiciary Committee Chairman James Sensenbrenner (R-WI), who voted against final passage of the bill. Senate Democrats are expected to fight the House-passed language that curbs 527 organizations.

The Office of Management and Budget released a Statement of Administration Policy in support of the House bill. "Strengthening the ethical standards that govern lobbying activities is a necessary step to enhance that trust and provide the public with a more transparent lawmaking process," the statement said. It went on to state the provisions in the bill addressing earmarks were necessary to help "improve the budget process and reduce wasteful and unnecessary spending."

Federal Grant Rules in the Courts

Decision Favors Charity, Another Case Challenges OMB Favoritism for Faith-Based Groups

In a victory for nonprofit advocacy rights, a sweeping restriction on the privately-funded speech of nonprofits that participate in the U.S. government's international HIV/AIDS program has been held in violation of the First Amendment. Meanwhile, a challenge is being mounted against an OMB grading system allegedly used to encourage an increase in government funding to religious charities.

Federal Court Holds "Pledge Requirement" Violates First Amendment

On May 9, a federal judge ruled that the United States Agency for International Development (USAID) violated the First Amendment by requiring public health groups to pledge their "opposition to prostitution" in order to continue receiving federal funds for their HIV prevention work. Under the USAID requirement, recipients of federal funds were forced to censor even their speech funded with privately raised dollars when discussing the most effective ways to engage high-risk groups in HIV prevention. While the court's decision applies directly only to the two organizations involved in the litigation, it could have a broad impact on many other organizations also forced to sacrifice their privately funded speech in order to receive government funds.

In his opinion, Judge Victor Marrero of the U.S. District Court for the Southern District of New York found that the Supreme Court "has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program." The court found that the pledge requirement violates the First Amendment rights of two plaintiff organizations, Alliance for Open Society International (AOSI) and Pathfinder International, by restricting their privately-funded speech and by forcing them to adopt the government's viewpoint in order to remain eligible for funds.

Marrero determined that a preliminary injunction against the enforcement of the pledge requirement was necessary to prevent AOSI and Pathfinder from suffering irreparable harm,

and asked both sides to propose the terms of the specific injunctive relief within two weeks in conformity with the ruling. The injunction will block the government from demanding the groups take the pledge while the legal case continues.

The ruling stems from a Sept. 2005 lawsuit challenging a provision in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 that required organizations to pledge their opposition to sex trafficking and prostitution or lose federal funding. The pledge was immediately applied to foreign aid recipients, and now also affects private U.S. organizations conducting AIDS programs overseas. The plaintiffs have adopted policies acknowledging prostitution's harms but object to being told how to execute them.

A Challenge to OMB's Faith-Based "Report Card"

In related news, a lawsuit brought by the Freedom From Religion Foundation challenges the intrusion of OMB's influence in government grants. On May 4, Freedom From Religion Foundation (FFRF) filed a lawsuit charging the Office of Management and Budget with violating constitutional provisions separating church and state by using government funds to promote religion.

OMB gives a "report card" to each major federal agency--such as the Department of Education--in which OMB grades the agencies on the extent to which they have disbursed and/or increased their appropriations to faith-based organizations. It is unclear whether OMB gives report cards for secular groups applying for the same funds.

The lawsuit alleges that OMB's actions are tantamount to official support for and advocacy of religion, because they are intended to cause increased disbursements to organizations merely because they are faith-based. Report cards, by definition, measure success against a standard that agencies are expected to achieve, and according to FFRF, the grading system creates "an atmosphere intended to cause federal agencies to increase their contracting with faith-based organizations merely because the organizations are faith-based."

Closing of Muslim Charity Bank Account Causes Tension

On May 8, the Council on American-Islamic Relations (CAIR) and the Muslim American Society's (MAS) Freedom Foundation held a news conference in front of a Wachovia bank in Washington, DC, urging community members to speak out against the recent closing of a Muslim charity's accounts. The Wachovia Corporation closed the accounts of the Foundation for Appropriate and Immediate Temporary Help (FAITH) in January of 2006, despite the organization having been charged with no crime and having not even been informed of any federal investigation into its activities.

In response to the closure of the group's accounts without warning or explanation, CAIR and the MAS Freedom Foundation had planned a campaign against Wachovia that was to include protests and boycotts. According to CAIR officials, however, Wachovia recently contacted FAITH and CAIR directly to inform them that the case was being re-examined. Muslim community leaders welcomed this development, as months of discussions with Wachovia representatives had up to that point failed to change the bank's position. The campaign is on hold for the time being, as the charity and community await the outcome of this internal investigation.

FAITH is a social service organization based in Herndon, Virginia, that provides emergency aid and crisis counseling to Northern Virginia residents of all faiths. In November of last year, the group received a letter informing them that its Wachovia accounts would be closed effective

January 2006 despite its good standing as a customer. According to CAIR, bank officials failed to sufficiently explain the decision, instead writing the decision was in line with "the Bank's contract with FAITH [which] provides that the Bank can close any customer's account at any time..." (Muslims Urge Wachovia to Explain Account Closures, CAIR Press Release, May 8, 2006).

Today, leaders of the Muslim community are calling the bank's actions "heavy handed" and discriminatory. CAIR Executive Director Nihad Awad points out that "since 9/11, the American Muslim community has noticed disturbing trends within the national banking community where law-abiding American Muslims are seemingly and summarily being denied service based solely on their name, religion or ethnicity" (Muslims Urge Wachovia to Explain Account Closures, CAIR Press Release, May 8, 2006).

Jeraldine B. Davis, Wachovia senior vice president and assistant general counsel, denies that discrimination drove the decision to close the account, citing instead certain account activity that "was significantly different from that which Wachovia would expect to see in an account established for a charity" (Wachovia Bank Action Riles Muslim Activists, *The Washington Post*, May 6, 2006). However, the bank has not elaborated on what it expects to see and what the unexpected account activities were.

Current anti-terror financing legislation requires financial institutions to report suspicious activity to the Treasury Department. FAITH Treasurer Margaret Farchtchi told the *Washington Post* that a recent donation to the charity may have spark suspicion. In April 2005, the charity received $150,000, intended as an endowment, from M. Yaqub Mirza, a Northern Virginia resident. Although Mirza's home and offices were raided by federal officers in 2002, he has not been officially charged with any crime. Farchtchi argues that the "origin and purpose of the money could have been easily explained if bank officials had asked" (Wachovia Bank Action Riles Muslim Activists, *The Washington Post*, May 6, 2006). Since the bank has provided no additional information, FAITH is left to wonder what prompted the situation and what resolution if any it will find.

Dishonest Budget Gimmick Enables Passage of Irresponsible Tax Cuts

One day after the House passed the $70 billion tax reconciliation measure, the Senate passed it as well, sending the bill to President Bush for his signature. With these tax cuts, this Congress has once again proven itself to be a body determined to shirk fiscal responsibility and kowtow to the regressive, revenue-draining tax policies of this administration. And it was all made possible by a dishonest budget gimmick.

The House easily passed the bill on May 10 by a vote of 224-185 with 15 Democrats joining all but two Republicans. The House long ago approved a version of the tax reconciliation bill centered on extending lower rates of capital gains and dividends.

The extension of these rate reductions that largely benefit the wealthy has been far less popular in the Senate, which even initially passed its version of the tax cut bill without including the capital gains and dividend rate cut extensions. Instead, the Senate focused on tax cuts that primarily benefit upper-middle income Americans, such as adjusting the Alternative Minimum Tax.

When it came time to actually pass the measure, however, the senators caved on the capital gains and dividends issue, appearing to conveniently forget their original misgivings. Three Democrats - Sens. Bill Nelson (D-FL), Ben Nelson (D-NE), and Mark Pryor (D-AR) - voted along

with most Republicans for the bill. Three Republicans - Sens. Olympia Snowe (R-ME), Lincoln Chafee (R-RI), and George Voinovich (R-OH) - crossed the aisle to vote with Democrats.

Voinovich expressed his dissatisfaction with current fiscal policy as embodied by the reconciliation bill during a May 3 floor speech, reported on by the *Washington Post*. Voinovich told colleagues,

> "Some members believe that the solution is to grow the economy out of the problem, that by cutting taxes permanently, the economy will eventually raise enough revenue to offset any current losses to the U.S. Treasury. I respectfully disagree with that assertion... In November 2005 former Federal Reserve chairman Alan Greenspan testified before the Joint Economic Committee and told Congress: 'We should not be cutting taxes by borrowing'... Instead of making the tax cuts permanent, we should be leveling with the American people about the fiscally shaky ground we are on."

Voinovich finished with a bold call to action following an astute characterization of our current fiscal challenges: "I have to say this, and I know it is controversial, but if you look at the extraordinary costs that we had with the war and homeland security and Katrina, the logical thing that one would think about is to ask for a temporary tax increase to pay for them. Did you hear that? Ask for a temporary tax to pay for it, instead of saying we will let our kids take care of it; we will let our grandchildren take care of it."

Unfortunately, this entire bill was enabled to pass because Republicans allowed the use of an egregious gimmick used to circumvent Senate budget enforcement rules. Under the rules of the reconciliation bill, lawmakers could not reduce federal tax revenues by more than $70 billion, if the measure were to receive expedited consideration. In order to meet the revenue target while including the full scope of desired tax cuts, senior Republican tax writers included a provision that unnaturally inflates short-term revenue, by allowing taxpayers to convert an unlimited amount of money from an IRA to a Roth IRAs starting in 2010.

Howard Gleckman summarized this provision on BusinessWeek.com, saying it "promises wealthy people that they'll be able to convert their standard Individual Retirement Accounts into Roth-type IRAs. This would be an incredibly sweet deal, since retirees can withdraw money from a Roth IRA entirely tax-free. That can be much better than regular IRAs, where investors must pay tax on distributions, even after retirement."

The Joint Committee on Taxation has estimated that this provision will raise $6.4 billion during a 10-year budget window. The real problem, however, as the independent Tax Policy Center recently pointed out, is that "the Treasury starts losing revenue in fiscal year 2014," and "the revenue loss grows in nominal terms until 2046. In present value, the government loses over $14 billion over the long term due to the conversions from existing IRAs, even though the provision *appears* to raise $8.6 billion in the budget window."

This budgeting gimmick is little more than smoke and mirrors. The "revenue raiser" is in fact a long-term revenue loser for the government.

The overall result is a tax reconciliation bill, as the Center on Budget and Policy Priorities succinctly stated, that "relies in large part on budget gimmicks and timing shifts to create the appearance that it is complying with a key Senate budget rule that bars the reconciliation bill from increasing the deficit in any year after 2010."

These tax cuts - made possible only through shady budget maneuvering and compromising politicians - are clearly not in the best interest of the nation or of the average American taxpayer. Unfortunately, Congress has chosen to embrace fiscally-reckless policies that will increase

deficits substantially, benefit the very wealthy almost exclusively, and continue to force the nation down a dangerous fiscal path.

Fed. Board Report Underscores Estate Tax's Importance

Congressional Republicans are preparing to add to the federal debt by pushing through more tax cuts for the super-rich after just pushing through a $70 billion tax cut that mostly benefits the wealthy. When the Senate resumes work after Memorial Day, Senate Republicans will once again take up their assault on the estate tax, a tax levied solely on the wealthiest Americans. Senate Majority Leader Bill Frist (R-TN) remains committed to repealing the dynasty tax despite mounting evidence against repeal, the most recently of which being a report by the Federal Reserve Board (FRB) finding that during a 15-year period ending in 2004 "there was a shift in favor of the top of the [wealth] distribution."

The report traces the distribution of wealth among Americans from 1989 to 2004 and shows that over that time the rich have become richer while the poor have lost ground. As the wealthiest 1 percent of Americans saw their share of the country's wealth increase from 30.1 percent to 33.4 percent over the time period, the poorest 50 percent watched their share of wealth decline from 3.0 percent to 2.5 percent. In addition to the troubling wealth trend, the FRB report indicates that a staggeringly large majority of business assets (88.7 percent), bonds (93.7 percent), and nonresidential real estate (71.7 percent) are owned by the wealthiest 5 percent of Americans.

Repeal of the estate tax would further skew wealth accumulation toward the richest Americans allowing even more accumulated wealth to pass within the same families from generation to generation, out of reach of the 90 percent of Americans who collectively own less than the wealthiest 1 percent.

A repeal of the estate tax would be an enormous windfall for the richest families in America. Indeed, Public Citizen and United for a Fair Economy in the recent report entitled *Spending Millions to Save Billions* reported that those who would gain the most from an estate tax repeal have funded, from behind the scenes, the campaign for repeal. Since 1998, a "handful of super-wealthy families" have spent some $400 million on lobbying efforts to repeal of the estate tax.

As reported in March in *The Watcher*, income inequality is on the rise even in the midst of strong GDP growth. The repeal of the estate tax is just another wedge to further separate the super-rich from the middle class.

At the same time repeal of the estate tax would continue to widen America's enormous wealth gap and drastically reduce government revenue, further hampering its efforts to maintain and expand an American middle class. A recent commentary by Sebastian Mallaby in the *Washington Post* makes a powerful argument that extreme tax cut policies, such as repealing the estate tax, amount to nothing more than "voodoo economics" and are incredibly dangerous to our nation's fiscal health.

Mallaby points out that former Bush administration chair of the Council of Economic Advisors, N. Gregory Mankiw and Douglas Holtz-Eakin, a former Bush administration economist and head of the Congressional Budget Office, along with a number of other economists, have repeatedly averred that tax cuts do not pay for themselves. "Ignoring their solutions is like ignoring the judgment of medical science in favor of faith healers and quacks," according to Mallaby.

House Fails to Pass Budget Again--Approps Move Forward Just the Same

House Majority Leader John Boehner (R-OH) once again failed to bring the budget resolution to the floor last week despite rumors and rumblings from the GOP leadership that passage of the bill was imminent. Having reached a compromise with Appropriations Committee Chairman Jerry Lewis (R-CA), Boehner was still unable to garner enough support from within the Republican caucus to hold a vote. Considering the difficulty of finding agreement in conference with the Senate at this late date, passing the resolution is now bordering on pointless anyway.

Boehner and House Speaker Dennis Hastert (R-IL) spent much of last week in private meetings with moderate Republicans building support for the resolution. The ad-hoc group of about 15 moderates led by Reps. Mike Castle (R-DE) and Nancy Johnson (R-CT), have pushed for an increase of around $7 billion in funding for education and health programs from discretionary spending capped at $873 billion. Such an increase would put the House budget resolution spending levels more in line with a Senate-passed version and would be the minimum increase needed to hold even with inflation.

In order to win the moderates' support for the budget, Boehner and Lewis agreed last week to shift $4.1 billion from defense accounts to the Labor-Health and Human Services appropriations subcommittee total, thereby keeping the overall discretionary spending cap in place. The moderates, however, refused to back down from the $7 billion increase. So ongoing debate is now focused on where the other $3.1 billion called for by the moderates will come from. If the GOP leadership will not increase the discretionary spending ceiling and will not increase taxes, it will have to play a shell game of moving money from other spending categories. Various budget gimmicks have also been suggested to alleviate the spending crunch - such as an option used by the Senate called "forward funding programs," but such gimmicks are apparently unacceptable to the moderates, as well as many conservatives.

"We just haven't gotten to a point of agreement," commented Castle.

Yet Boehner and other GOP leaders remain committed to passing the budget. "We're still working on it," said House Budget Committee Chairman Jim Nussle (R-IA). "We want a good, strong budget, and are willing to be patient to get it."

During his announcement last week that consideration of the resolution would be postponed again, Boehner told fellow representatives, "there's a lot of goodwill in the [negotiation] room. When we think we have the votes, we'll bring it up." As previously reported, attempts to pass a budget at this stage are motivated more by political survival instincts than anything else. The House has succeed in passing its budget resolution every year since the Congressional Budget Act was enacted in 1974 and failing to so this year would add to ammunition to the arsenals of challengers to Republican incumbents.

Appropriations Move Ahead Quickly Despite No Budget

Even as budget negotiations remain stymied, the House Appropriations Committee has quickly moved forward with the appropriations process, making passage of the resolution an afterthought. On May 9, the Appropriations Committee approved total spending targets, also called 302(b) allocations, for each of the appropriations subcommittees. These allocations were originally sketched out by Chairman Lewis on May 4, allowing appropriations subcommittees to begin work on their respective bills. Three subcommittees - Agriculture, Interior-EPA, and Military Construction-VA - held markups of their appropriations bills last week, and Lewis

hopes to bring all three of the bills to the House floor this week for consideration.

Update: Boehner Makes Sunset Commission Proposal Legislative Priority

House of Representatives Majority Leader John Boehner (R-OH) has begun work behind the scenes to draft new sunset commission legislation and has signaled to his party that the sunset commission will be a legislative priority.

In conjunction with House Republicans agreeing to a broad "vision" statement on May 10, Boehner released a list of legislative priorities, including passing legislation to create a sunset commission, according to *The Hill*. The sunset commission proposals seek to create a single unelected commission to review federal programs and recommend which should be axed. (Read more about sunset commission proposals.)

At the same time, BNA's *Daily Report for Executives* (subscription-only) reports that Boehner has been working with House Republicans to craft new sunset commission legislation, combining elements from the three sunset commission proposals that have been put forward in the 109th Congress. Elements likely to end up in the final bill include the following:

- Forcing programs back on the sunset commission treadmill every 10 years -- thus reopening debates about the continued necessity of long-standing, successful government programs, including those protecting civil rights, the environment, auto safety and more;
- Fast-tracking commission recommendations for program termination and reorganization through Congress with constrained debate and no opportunity for amendment; and
- Exempting the unelected commission from open government law.

Proposals creating a commission to review and sunset federal programs have circulated in the past but never seriously advanced. In the 109th Congress, the concept gained some steam after the White House released its own proposal for sunsets and reorganization authority. The issue accelerated during negotiations over the House budget resolution. The Republican Study Committee demanded, and House leaders conceded to, guaranteed floor consideration of sunsets as one of the conditions for securing its members' votes on the budget.

While the budget resolution has stalled, this new intelligence indicates that passing a sunset commission proposal remains a legislative priority for House leaders, and a floor vote on sunsets is still expected in June.

Read OMB Watch's latest analyses of sunset commissions:

- The sunset commission would promote more cronyism in Washington.
- The sunset commission threatens the constitutional separation of powers.

Congress Could Save TRI from EPA's Chopping Block

Congress is expected to vote on an amendment this week that would save the Toxics Release Inventory (TRI) from changes the Environmental Protection Agency (EPA) proposed in September 2005 and expects to finalize this December. The Pallone-Solis Toxics Right to Know Amendment to the Interior Appropriations Bill would prevent the EPA from spending money to

finalize the proposals. The amendment is welcome news to environmental, public health, first responder, and labor groups, who have mounted a campaign to compel the EPA to drop its plans to reduce information on toxic pollution.

Reps. Frank Pallone (D-NJ) and Hilda Solis (D-CA) will introduce the Toxic Right-to-Know amendment to prevent the EPA from spending money on implementing the changes. The agency has proposed rules that would change the reporting frequency and increase the threshold amount of TRI chemical releases under which industry need not submit detailed reportd to the EPA. The agency has also proposed collecting TRI pollution reports every other year, instead of the annual submissions that have occurred for nearly 20 years. The Pallone-Solis amendment would essentially force the process of implementing the proposed changes to grind to a halt, at least until the next budget cycle.

Stakeholders across the country use TRI data to monitor the storage, release, transfer, and disposal of toxic chemicals. First responders use the TRI to plan for emergencies and disasters. Public health officials rely on TRI data in their research on cancer, Parkinson's disease, respiratory diseases, and other ailments associated with chemical exposures.

Just last week, the Political Economy Research Institute at the University of Massachusetts used data drawn from sources including the TRI to identify the top one hundred corporate polluters in the United States in its *Toxic 100.* The study goes beyond exclusively analyzing TRI data that reveals total pounds of pollution released by a facility and totals for geographic areas. The study seeks answers to the larger question of 'which company's pollution contributes most to harming people and the environment?' The report also analyzes census and toxicity weight data, and matches individual facilities to their corporate parent.

The top ten corporate air polluters according to the study are:

1. E. I. Du Pont de Nemours & Co.
2. United States Steel Corp.
3. ConocoPhillips
4. General Electric Co.
5. Eastman Kodak Co.
6. Exxon Mobil Corp.
7. Ford Motor Co.
8. Tyson Foods Inc.
9. Alcoa Inc.
10. Archer Daniels Midland Co. (ADM).

Table of all 100 companies

According to the report, while providing vital data, TRI also has several limitations:

- The data for each chemical release is reported in total pounds without taking into account differences in toxicity. Some chemicals are much more hazardous than others.
- Neither does it include information on the number of people affected.
- The data is reported on a facility-by-facility basis, without combining data for plants owned by one corporation in order to get a picture of overall corporate performance.

The Toxic 100 index analyzes TRI data along side other information to overcome these three limitations.

If the EPA implements the changes it proposed last year, reports like the Toxic 100 will become more difficult to produce and less reliable. The Pallone-Solis Toxics Right to Know Amendment,

by stopping these changes in their tracks, will help preserve the TRI program and this important informational resource it provides.

OMB Watch has an online action alert that allows users to send messages to their Representatives on this issue.

Playing Politics with Government Contracts

Secretary of Housing and Urban Development (HUD) Alphonso Jackson suggested at a forum in Dallas that federal contracts would not be awarded to those who have political disagreements with President Bush. He described a meeting with a contractor that was about to receive federal money until the contractor expressed his disapproval of the president. Jackson has since told reporters that he made the story up and that federal contracts are not awarded on the basis of political ideology. Regardless of the veracity of the anecdote, however, it highlights the lack of transparency around the connections between politics and government contracts.

The *Dallas Business Journal* reported that on April 28,at a meeting of the Real Estate Executive Council, a national minority real estate consortium, Jackson told of an advertising contractor that was on the verge of receiving a federal contract from HUD. Jackson said the contractor was trying to get a HUD contract for 10 years, that he "made a heck of a proposal," and the company was on the approved list of contractors with the General Services Administration. "So we selected him."

But during a meeting planned in order to thank Jackson, the prospective contractor commented on his disagreement with President Bush's politics. According to Jackson: "I said, 'What do you mean?' He said, 'I don't like President Bush.' I thought to myself, 'Brother, you have a disconnect -- the president is elected, I was selected. You wouldn't be getting the contract unless I was sitting here. If you have a problem with the president, don't tell the secretary.'"

According to Jackson, the contract was rescinded, putting his explanation to the audience, "Why should I reward someone who doesn't like the president, so they can use funds to try to campaign against the president? Logic says they don't get the contract. That's the way I believe."

Following up with a reporter from the *Dallas Business Journal*, Jackson's spokesperson, Dustee Tucker, added that the contract Jackson was referring to in Dallas was "an advertising contract with a minority publication," though she could not provide the contract's value. In other reports, Tucker indicated that the contractor had been rude and that had been the main reason for denying the contract. For instance, she told the Dallas Morning News that the contractor had been "trashing, in a very aggressive way," the HUD secretary and the president.

Several legal experts immediately noted that Jackson's actions may have violated federal law. Under the Federal Acquisition Regulations, "Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none." The meeting itself is questionable, as it is highly unusual for political appointees to be meeting with contractors during the reviewing process.

Reactions to Jackson's cautionary tale were swift and severe. House Government Reform Committee Ranking Member Henry Waxman (D-CA) and Financial Services Committee Ranking Member Barney Frank (D-MA) immediately wrote to Jackson, requesting all documents relating to the contract and meeting in question, as well as documents related to any contracts personally overseen or reviewed by Jackson. A follow-up letter has since been sent by the representatives to Jackson, questioning the veracity of his statements and reiterating their

request for documents. Sen. Frank Lautenberg (D-NJ) has called for Jackson's resignation.

HUD Inspector General Kenneth M. Donohue is apparently investigating Jackson's comments. "We have received a number of complaints from the public as well as from members of Congress," Michael Zerega, spokesperson for Donohue, told reporters. The spokesperson indicated, however, that "[t]here is no timetable for the inquiry."

Then, to the surprise of many, Jackson apologized for his comments and stated that he made the story up, and Bush has since given Jackson his full support. "Alphonso Jackson has admitted that what he said earlier was improper, that it was a mistake, and the president accepts that and still supports a man with whom he's had a long and close relationship," according to White House press secretary Tony Snow.

Not only is Jackson now claiming he made the story up, but Tucker, who seemed to know details about the incident, now claimes the story in the Dallas speech was purely "anecdotal."

"He was merely trying to explain to the audience how people in D.C., will say critical things about the secretary, will unfairly characterize the president and then turn around and ask you for money," Tucker told reporters. "He did not actually meet with someone and turn down a contract. He's not part of the contracting process."

The Washington Post summed up the concerns of many in a hard-hitting editorial on May 12, asking, "Which is worse, violating the law or pretending to have done so?"

Even if the story was made up, the Post went on to criticize the "veiled threats" it contained: "Either Mr. Jackson broke the law and then lied about it, or he lied that he had broken the law. Which of those actions makes him fit to be secretary of housing and urban development?"

Sunlight Foundation senior fellow Bill Allison went still further, pointing out Jackson's questionable behavior as a Texas state official and the role he played in the awarding of financial assistance.

Regardless of whether Jackson should resign or be fired for either his violation of contract awards rules or lying about it, the incident demonstrates the need for public interest groups and journalists to track connections between government contracts and political decisions. In theory, if contractors follow the same rules, all will have the same chance to prevail. By refusing to award contacts or grants based on political leanings or position, the administration appears to be attempting to silence public debate on important issues and ultimately chill the speech of its opposition.

One important step toward ensuring a level playing field for all contractors and grantees is through increased transparency. As previously reported in *The Watcher*, an amendment co-sponsored by Sens. Tom Coburn (R-OK) and Barack Obama (D-IL) would require the Office of Management and Budget to create a free online database that the public could search for contracts and grants by a number of criteria, including company, agency, dollar amount, and geographic region.

The Coburn-Obama amendment represents a comprehensive, uniform approach toward opening the spending habits of our government to public scrutiny. Given the recent HUD debacle, such oversight is long overdue.

NSA Caught Spying Again

The National Security Agency (NSA), it was recently revealed, has been secretly amassing the largest database ever created on the telephone calling habits of millions of Americans. News of the data mining program comes as the NSA program of eavesdropping on international telephone calls without warrants remains unresolved, continuing to draw consternation and at times furor from both Congress and the public.

USA Today reported on May 11 that the NSA is collecting call records from the databases of Verizon, AT&T, and BellSouth through established agreements with the telecommunications companies. Information collected includes call records, which is to say every number dialed and the time and duration of each call, but apparently not the content of the calls. The program's scope far exceeds that of the NSA spying program previously disclosed by *The New York Times*, which supposedly only includes U.S. calls made to and from foreign countries.

President Bush immediately defended the program and maintains that the government "isn't mining or trolling through the personal lives of millions of Americans." The information in the NSA database does not concern the content of the phone conversations nor does it contain personally identifiable information, but experts note that match identifying information to the calling data would not be difficult.

Congress will have its first opportunity to ask tough questions about the program during General Michael Hayden's confirmation hearing before the Senate Intelligence Committee on Thursday. The president has picked Hayden, who headed the NSA from 1999 to 2005, to be the next director of the Central Intelligence Agency (CIA).

Meanwhile Sen. Arlen Specter (R-PA), chairman of the Senate Judiciary Committee, promised to hold hearings on the secret program. Specter stated his intention to "call executives from the telephone companies to testify before Congress about the relationship with the NSA and what sort of data was provided."

The House of Representatives has also responded to the news. House Democrats introduced the Lawful Intelligence and Surveillance of Terrorists in an Emergency by the NSA (Listen Act) that would require the NSA to comply with the Fourth Amendment and the Foreign Intelligence Surveillance Act (FISA). The Listen Act mandates that any covert spying program, including those that collect the telephone or email records of Americans, must receive formal approval from the FISA Court--a secret court that regularly meets in Washington to issue warrants related to national security.

At the moment, the legality of the newly revealed NSA program remains a matter of great controversy. One of the major telecommunications companies approached by the NSA refused to participate in the spying program, underscoring questions of its legality. Qwest Communications refused to cooperate with the data mining program due to concerns it had about the program's legality and about how widely the information would be shared. According to *USA Today*, Qwest was told that the NSA regularly shares its information with the Federal Bureau of Investigation, the Central Intelligence Agency, and the Drug Enforcement Agency.

The NSA program is assumed not to be in violation of the Fourth Amendment's protection against unreasonable searches and seizures due to a Supreme Court precedent that no reasonable expectation of privacy for call detail records exists. According to legal experts, however, the program may violate communications statutes that govern the release of such records. A lawsuit was brought against Verizon on Friday for $5 billion, claiming that Verizon violated the Telecommunications Act. Other lawsuits are expected to be filed against the other

telecommunications companies who shared call information with the NSA.

On May 14, *USA Today* also released a poll of 809 adults taken May 12-13 that indicates a 51 percent disapproval rating of the program, with 62 percent of those polled supporting immediate congressional hearings into the matter. Accoring to the poll, two-thirds of Americans are concerned that the government would misidentify innocent people as terrorist suspects (65%), that the government will listen in on telephone calls without a warrant (63% with 41% very concerned), and that the government is gathering information on the general public, such as bank records or Internet usage (67% with 45% very concerned).