In This Issue

A Test of the Integrity of Moderate Republicans

The upcoming vote in the House over "mandatory spending" cuts is being hailed as one of the most important votes this year -- as it rightly should be. The vote will indicate as much about the direction our country is headed as it will about Congress' spending priorities. And the outcome is likely to be shaped by the courage and integrity of moderate Republicans.

Conservatives see the House vote as an opportunity to blaze forward on the path to "starving the beast" -- dramatically downsizing the federal government. Progressives and some moderates see it, instead, as an opportunity to reject a radical agenda and begin to realign national policy with the values of the American people.

Until recently, with the Bush administration commanding high public approval, conservatives quietly complained as Congress accelerated spending for defense, homeland security, and new entitlements. Behind closed doors, however, they grew bitter that deep cuts to domestic spending had not been accomplished, despite Republican control of both chambers of Congress and the White House. At the same time, conservatives pursued reckless tax cuts, largely benefiting corporate elites and wealthy individuals. Their "have your cake and eat it too" policies have exacerbated a ballooning deficit and, along with major issues related to health care and pensions that loom unresolved, created an unsustainable long-term structural problem in the federal budget.

Now, with Bush's popularity tanking and the House leadership in disarray, conservatives have stood up and taken the gloves off. Shortly after Hurricane Katrina, the House Republican Study Committee, a group of roughly 100 Republican conservatives, launched "Operation Offset" -- a potpourri of proposals to de-fund the federal government by slashing budgets or completely removing programs, including such mainstays as subsidized student loans, NASA, Medicare, and food stamps. The far-right group claimed that any spending on Gulf Coast reconstruction needed to be offset with cuts in spending elsewhere.

This conservative assault came at a time when many believed Congress, faced with glaring domestic need, would suspend yet another set of new tax cuts, particularly those to the wealthy, in order to retain revenues and pay for Gulf Coast reconstruction. With President Clinton, in recent speeches and interviews, making a strong case for the difference between good deficits (created by investments in the infrastructure and people affecting by natural disasters) and bad deficits, (created by unlimited tax giveaways to corporations and the rich), the moderate Republicans who hold real sway in Congress appear poised to assert themselves.

These moderates certainly have public support. Various polls have repeatedly shown that the public believes hurricane recovery costs should be paid for by rolling back tax cuts for the wealthy. In one poll by Greenberg Quinlan Rosner Research for the Democracy Corps, 75 percent of respondents wanted planned tax cuts for those earning over $200,000 per year to be cancelled. The American people are clearly expressing their recognition of the need for more government now, not less.

It's not just polls where this message comes through loud and clear. In Colorado last week, the "starve the beast" coalition was soundly defeated by an alliance forged between a Republican governor and a Democratic House speaker. Fifty-three percent of Colorado voters supported Referendum C and agreed to give up $3.7 billion in automatic tax refunds over the next five years in order to ease strict limits on state spending on education, health care, and transportation.

The voters in Colorado implicitly acknowledged the importance of government services and the need for an adequate revenue base to support these services. This notion of shared sacrifice, a long-standing American value, has been all but absent from this Congress and the current administration. This absence is particularly glaring when you consider that households earning more than $1 million are expected to receive $103,000 in tax break windfalls this year, according to from the Tax Policy Center. Even more startling, starting Jan. 1, these millionaires will get an additional $20,000 with two more tax breaks kicking in that benefit only the top 4 percent of wage-earners. Incredibly, on top of all that, the House and Senate are now debating an additional $70 billion tax cut that primarily benefits the wealthy, leaving many to wonder how Congress and the president can be so woefully out of touch with the will of the American people.

Last Thursday, the day before Veterans Day, moderates in the House and Senate stepped up and exercised the power newly at their command. In the House, the vote on harsh spending cuts collapsed as the Republican leadership could not rally enough votes to pass the bill. This spending bill was one of two under the reconciliation process, making $35 billion in mandatory spending cuts (such as Medicaid), while the other cuts $70 billion in taxes. Despite its design as a deficit reduction tool, this reconciliation package actually *increases* deficits by at least $35 billion.

It was thought that, in light of Hurricane Katrina, Congress might choose to suspend these reconciliation bills. When Majority Leader Tom DeLay (R-TX) was indicted and forced to give up his leadership post, however, the conservative Republican Study Committee (RSC) saw an opportunity and leaped.

Instead of canceling reconciliation, RSC members decided to up the ante, calling for a 58 percent increase in spending cuts. At first it appeared that their plan was to enact spending cuts across the board, including for defense and homeland security. But quickly the conservative agenda shifted: the cuts would target programs serving low- and moderate-income families, with about one-third of the spending cuts coming from poverty programs. (See Service Cuts for the Poor to Finance Tax Cuts for the Rich for a description of the bill.) The moderates expressed concern over these cuts along with riders attached to the bill, including authorization of drilling in the Arctic National Wildlife Refuge (ANWR) - and their lack of support threatened the bill.

These conflicting pressures began to squeeze the options available to the House leadership team, and the action last week revealed the ugly inner workings of a Congress trying to ram through radically misguided and unpopular policies. The Republican leadership was willing to give up ANWR drilling to get the moderates votes, but conservatives threatened to vote against a bill without ANWR drilling. Then the Republican leadership agreed -- with a wink and a nod to conservatives -- that ANWR drilling would be removed for now, but reinserted later in conference. But the moderates continued to withhold their support for the bill because of the cuts to Medicaid, student loans, food stamps, and other low-income supports. With members anxious to return home for Veterans Day, the Republican leadership gave up and withdrew the bill, promising to take it up this week. It is scheduled to be voted on again this Thursday.

In the Senate, a similar principled stand by a moderate Republican derailed efforts to pass more tax cuts for the wealthy. Sen. Olympia Snowe (R-ME) said no to extending the tax cuts on capital gains and stock dividends at a time when the Congress is also enacting spending cuts affecting poor Americans. Senate Finance Committee Chair Charles Grassley (R-IA), moved to accommodate her concerns in order to get enough votes to get the tax cut bill out of committee, but the other Republicans reportedly went "ballistic" over dropping capital gains and dividends cuts from the package of tax cuts, especially since tax breaks on investments are the mainstay of the Bush tax cuts. With no possibility of getting enough votes to get the tax cut bill out of committee, Grassley postponed the committee markup. While Grassley could try to employ a similar wink and nod maneuver with conservatives on the Finance Committee to win passage and bring the bill to the Senate floor only to attempt to reinsert the capital gains and dividend cuts, other moderate Republicans such as Sens. George Voinovich (OH) and Lincoln Chafee (RI) have concerns similar to Snowe.

While success if not assured, these issues are not dead yet in either the House nor the Senate. Fierce negotiations are underway and enormous pressure is being applied to the moderates to cave. According to columnist Robert Novak, conservatives are "outraged" by the "coddling" of the moderates. "[W]istful Republicans [are] longing for the strong arm of suspended majority leader Tom DeLay." Conservatives have already made implicit threats of holding a vote for new House leadership in January or supporting more conservative Republicans against these moderates in the 2006 elections if spending reductions are not enacted this year.

With conservative Republicans increasingly advancing policy options outside the mainstream, moderate Republicans are left with the task of controlling the direction of future policy. It is clear that some combination of tax and spending cuts will continue to be pushed this year. The hope among those observing from the middle is that the moderates will stick with common sense and the will of the public and reject the radical minority's push to institute an ideological agenda of shrinking government.

Whatever the outcome, the House vote is sure to be just the tip of the iceberg. Calls for controlling spending will increasingly be heard emerging from Congress and the White House. The rhetoric will convey an out-of-control spending machine, but the evidence shows that domestic discretionary spending has steadily dropped as a percentage of the economy over the past 30 years and will decline precipitously in the next five.

By framing the issue as a spending problem, both Republicans and Democrats fail to address the real issue: the need for an adequate revenue base to meet the spending needs of the country. Supposedly "rational" members of Congress may claim we have a spending problem but disagree over where spending cuts should be made. While this may be an important theoretical debate, it is the wrong debate for the current times. Truly rational members of Congress should instead concern themselves with raising the resources that are clearly needed now.

It is clear that moderate Republicans in the House now have the power to make an important statement about our immediate needs and the proper priorities of the country by defeating the budget reconciliation bill this week. It remains to be seen if they will have the integrity or the courage to stand up to their far-right colleagues.

Senate Finance Committee Struggles with Tax Cuts, Addresses Charitable Giving

After postponing the markup three times and significantly modifying the contents of the bill, the Senate Finance Committee finally approved its version of the tax cut reconciliation bill this evening 14-6. The committee was originally scheduled to markup the bill last Thursday morning, but ran into opposition from Sen. Olympia Snowe (R-ME) to provisions to extend cuts to capital gains and dividend taxes, the heart of the Bush tax cut plan. As recently as this morning, Chairman Charles Grassley (R-IA) was unable to compile a package that would win the support of all Republicans on the committee but eventually convinced conservatives on the panel that removing the tax cuts for wealthy Americans would not put the issue to rest.

During the markup last Thursday morning, Grassley attempted to salvage his proposed tax reconciliation bill by removing provisions to extend the capital gains and dividend cuts to appease Snowe. Winning her support was essential to moving the bill out of committee, as the Democrats were prepared to vote against the package. With Snowe on their side, the vote would be even, resulting in the bill not being reported out. But removing those cuts caused a sharp backlash from the other conservative Republicans on the committee, particularly Sens. Trent Lott (R-MS) and Jon Kyl (R-AZ). The committee recessed to a members-only meeting in an attempt to find a compromise acceptable to all of the panel's Republican members.

Grassley and others were unable to find an acceptable compromise on Thursday, despite an hour and a half of discussion, and postponed the markup until Tuesday morning. After meeting with Majority Leader and committee member Bill Frist (R-TN) to find a compromise proposal, Grassley released a revised bill that removed the capital gains and dividend cuts completely, made numerous smaller modifications to the bill, and added a number of charitable giving incentives favored by committee member Sen. Rick Santorum (R-PA). The standstill in the markup was finally ended when Grassley convinced conservative Republicans on the Finance Committee, particularly Sens. Mike Crapo (R-ID), Kyl and Lott that removing the capital gains and dividend tax cuts from the bill to ensure its passage out of committee would not doom the prospects of including those very same cuts in the final version of the bill. In fact, it seems almost assured that those cuts will return, since they are already in the House version, and many Senate conservatives demanding they be included.

The opposition of committee Democrats and Snowe to the capital gains and dividend tax cuts is certainly understandable. First, the cuts do not even expire for another two full year at the end of 2008. Second, at a time when Congress is attempting to cut programs supporting low-income Americans, Snowe and others felt passing large and unnecessary tax giveaways to the super-rich to be questionable at best. The capital gains and dividend tax cuts would cost $12 billion to extend for one year, 80 percent of which would go to Americans with annual incomes over $200,000.

In addition to tax cuts and extension of certain expiring credits, the approved bill includes both charitable incentives and reforms. The incentives include five provisions previously included in S. 1780, the Charity Aid, Recovery and Empowerment Act (CARE), sponsored by Sen. Rick Santorum (R-PA). Santorum's negotiations with Grassley largely determined the CARE charitable incentives ultimately included in the bill:

- A deduction for a portion of charitable contributions made by individuals who do not itemize their tax returns, with a floor of $250 ($500 for joint filers) and no cap.
- Tax-free distributions from individual retirement arrangements (IRAs) for charitable contributions. This would allow individuals to exclude from their gross income other taxable IRA distributions for traditional or Roth IRA distributions made to a charity during the period between December 2005 and December 2007.
- Modification of charitable deduction for food inventories from the present law that enhanced deduction for eligible contributions of food inventory. (Congress has already addressed the size of deductions individuals can take on donated cars, which took effect this year.)
- Modifications to encourage contributions of capital gains real property made for conservation purposes.
- Increased incentive for S corporations to make charitable contributions.

The above incentives expire on Jan. 1, 2008.

Coupled with the expansion of charitable incentives are reforms to offset the costs. The reforms are for record keeping and substantiation of charitable donations for cash and non-cash items. Reforms include:

- Donor advised funds: imposing a 5 percent payout requirement, establishing requirements for payouts every three years and disallowing distributions to donors and advisors.
- Supporting organizations: imposing a payout of the greater of 85 percent of its income from the prior taxable year or 5 percent of the aggregate fair market value of all the assets of the organizations other than assets directly used for program support.
- Donative value of clothing and household items: imposes the creation of a standard for estimating the donative worth of clothing and household goods through a guide written and published by the Internal Revenue Service (in consultation with donee organizations).

There are a number of other anti-abuse provisions, including a provision that modifies the deduction for faÃ§ade easements. The Joint Committee on Taxation has published a more detailed description of the charitable reforms and incentives.

The narrative of the back-room dealings and private meetings of the Senate Finance committee markup is eerily similar to the actions undertaken by the House of Representatives last week as GOP leaders tried to pass an unpopular spending cut bill. Grassley was in a similar predicament to that of
In Shocking Development, Congress Contemplates Tax Increase

In other tax news, Congress has been wrestling over the past few weeks with a difficult reality. Due to the rise in oil and gas prices, oil companies are making record-breaking profits. For the last quarter, ExxonMobil, the world's largest oil company, reported soaring profits of almost $10 billion. At the same time, large expected increases in the cost of home heating this winter are threatening to harm millions of low-income Americans in the Northeast and Midwest who depend on already cash-strapped government programs to help pay heating bills. Many industry analysts are projecting a 30 to 50 percent increase over last year in home heating costs across the nation.

This stark dichotomy has led many in Congress, Democrats and even some Republicans, to break an unspoken taboo and call for an actual tax increase -- an excess oil profit tax -- the revenues of which could be dedicated to the Low-Income Home Energy Assistance Program (LIHEAP). The LIHEAP program, which currently provides assistance to 4.6 million low-income families around the country, serves less than one-in-five eligible households.

One of the strongest supporters of this proposal and certainly the most surprising has been Sen. Judd Gregg (R-NH). Gregg, the very conservative and business-friendly chairman of the Budget Committee, believes something must be done to reign in the "irresponsibility of Big Oil" and has recently commented that the actions of the major oil companies "infuriate" him. He was the first Republican committee chairman to go on record supporting the reinstatement of a windfall profit tax.

Other proposals have recently been introduced focusing on the extensive profits of oil companies. In addition to Gregg, Sen. John McCain (R-AZ) has proposed that 1 percent of all oil profits be dedicated to hurricane relief. Sen. Gordon Smith (R-OR) and Sen. Maria Cantwell (D-WA) have each introduced bills to combat gasoline price gouging during fuel supply emergencies. Even Sen. Charles Grassley (R-

IA), chairman of the Finance Committee has gone on record stating that "[oil companies] and Congress have a responsibility to help less fortunate Americans cope with the high costs of heating fuels."

In order to further explore the question, the Senate Commerce, Science, and Transportation Committee held a hearing last week, during which the heads of the five largest oil companies testified about record prices for oil, gasoline and natural gas, and the factors contributing those price increases, along with third-quarter 2005 corporate profits, global demand, resource development strategies, and windfall profits taxes. Not surprisingly, all five industry leaders opposed any increase in taxes on their corporate profits. Despite this, Committee Chairman Ted Stevens (R-AK) said afterwards he would craft a bill to give the federal government authority to combat gasoline price gouging, but that such legislation would not be considered until sometime next year.

Many Democrats have already introduced legislation to enact a windfall profit tax on American oil companies, including Senate Commerce Committee member Byron Dorgan (D-ND) and Sen. Hillary Clinton (D-NY). But the prospects for the tax being enacted anytime soon are slim. With most Republicans in Congress against the idea, citing a similar tax instituted during the oil crises in the late 1970s that had mixed results (a CRS report found domestic oil production dropped as much as 6 percent), and with the White House also opposed to the idea, its enactment still faces a long, uphill battle.

Tax Panel Offers "Tough Love" Tax Reform Recommendations

On November 1, the President's Advisory Panel on Tax Reform submitted its report to Treasury Secretary John Snow recommending ways to make the tax code simpler, fairer, and more pro-growth. The panel has been working on these recommendations since January, when President Bush issued an executive order establishing it. Its long-awaited recommendations turned out not to be the rubber stamp for conservative regressive tax policies many observers expected, but instead represent a mix of ideas that confront the difficulty of enacting tax reform, not only in a harshly divided political environment, but also with a deeply unhealthy federal budget.

Despite recommendations avoiding blatantly regressive proposals, such as those advocated by many anti-tax groups, the panel's work should not be blindly accepted. The proposals, overall, continue the trend toward lower revenues and instituting massive structural deficits, while maintaining a steady, albeit slight shift in the tax burden away from the wealthy and toward working families. Perhaps most importantly, because the proposal are only the initial recommendations for Secretary Snow and not the final package, it is highly likely many of the recommendations will be cherry-picked, modified, or outright rejected by an administration which has not demonstrated a previous commitment to pursuing a tax code that is either fair or progressive.

After holding 12 public meetings over a span of nine months, the panel outlined a number of themes reoccurred within public comments and testimony. From these themes, the panel developed two separate proposals, the Simplified Income Tax Plan (SITP), which according to panel members "dramatically simplifies our tax code," and the Growth and Investment Tax Plan (GITP), which moves "the tax code closer to a system that would not tax families or businesses on their savings or investments." Despite the panel's claims, both plans would vastly favor savings and investment, thereby giving preference to high-income, wealthy Americans over those with less disposable income to invest in the stock market or retirement, health care, or education savings plans.

The two plans have many common features:

- Simplify the tax system and streamline tax filing for families and businesses;
- Lower tax rates on families and businesses;
- Extend tax benefits for home ownership and charitable giving to all taxpayers, not just the 35 percent who itemize;
- Extend tax-free health insurance to all taxpayers, not just those who receive insurance from employers;
- Remove impediments to saving and investing; and
- Eliminate the Alternative Minimum Tax (AMT), of which full repeal is estimated to cost a staggering $1.3 trillion over a 10-year period.

Two Plans Handle Exemptions, Credits, and Deductions in Similar Ways
Under both of these plans, the personal exemption, standard deduction, child tax credit, and Additional Child Credit would be consolidated into a "family credit" that would increase with the number dependents claimed. The earned income tax credit (EITC) would be transformed into a "work credit" with a maximum of $5,800 for families with more than one child. Besides simplifying taxes for working Americans, this consolidation would eliminate marriage penalties since the credits could be claimed regardless of the taxpayer's marital status.

In addition to these consolidations, the panel proposed to cap or end a number of popular deductions in order to pay for the repeal of the Alternative Minimum Tax. The first and most controversial recommendation involves capping the home mortgage interest deduction at 15 percent of mortgage interest paid. While this deduction would be available to all taxpayers, it would be limited to an amount based on the average regional price of housing, currently between $227,000 and $412,000. Housing developers and realtor associations have been at the forefront of opposition to the proposed cap.

Also of note is the panel's recommendation to replace the tax-free status currently enjoyed by the self-employed and employers who pay health insurance premiums with a system that allows all taxpayers to use pre-tax dollars to purchase health insurance up to the amount of the average premium. The average premiums are currently estimated at $5,000 for individuals and $11,500 for families.

Finally, the panel would end the deductibility of state and local taxes, a provision opposed by many from states with high state and/or local income and sales taxes.

Differences Between Plans
While the two plans largely treat reform of personal income tax similarly, they differ substantially in their taxation of business and capital income. Under the GITP, companies would be allowed to immediately write off the cost of all capital investment, but they would lose the ability to deduct interest costs on the money they borrow. Under the SITP, companies could keep their valuable interest deduction, but would have to write off the costs of facilities and equipment over time, as is currently the case. Additionally, the SITP would:

- Establish four income tax brackets at 15, 25, 30 and 33 percent;
- Exclude 100 percent of dividends and 75 percent of capital gains from any tax, and tax long-term capital gains at rates ranging from 3.75 percent to 8.25 percent;
- Tax small business income at rates equal to individual income tax rates, and large business income at a 31.5 percent rate.

The GITP would:

- Establish three income tax brackets at 15, 25, and 35 percent;
- Tax all dividends, capital gains and interest at a 15 percent rate;
- Tax sole proprietor businesses at individual rates, and tax other types of small businesses at 30 percent. Large businesses would be taxed at 30 percent, although all new investment would be expensed, and -- except for financial institutions -- interest paid would not be deductible and interest received would not be taxable.

Reactions Mixed, Urge Cautious Approach
Reaction to the panel's recommendations has been mixed so far. Many analysts, experts, and observers have praised certain aspects of the proposals and commended the panel for developing reform plans that are realistic in light of the currently unfriendly political and fiscal environments. Overall, however, reactions have urged caution in evaluating the panel's recommendations until after Snow develops his own proposal to give to the president, with many speculating that Snow's proposals will be drastically different than those of the panel.

White House Press Secretary Scott McClellan commended the tax reform panel for completing its work. He did not, however, offer a specific timetable for the unveiling of the president's tax proposals, saying President Bush would "make decisions in due course." Snow, for his part, told reporters that the tax panel's report would serve as a "starting place" for his own recommendations. He is expect by the end of the year to offer recommendations to the president, which Bush then may use in his January 2006 State of the Union Address.

Yet, as was the case with reactions from many analysts and insiders, who separated the proposals into sections, showering praise on some while criticized others, Secretary Snow may pick and choose only those recommendations of the panel that he finds suitable as he develop his own recommendations for President Bush. Unfortunately, for both proponents of the panel's recommendations and those favoring a broad approach to tax reform, what comes out of Treasury will likely be markedly different than the panel's recommendations.

Instead, the administration is expected to keep the recommendations it wants to pursue and leave out those recommendations that do not fit its economic agenda. In particular, the White House plan will likely include the more popular tax breaks and leave out the tax hikes that are necessary to pay for them. As the Center for American Progress states, "It is likely that the final report and the panel's recommendations will be cherry-picked by the Bush administration to fit its prior ideological agenda."

The prospect of administration cherry-picking, however, is hardly a surprise. Senate Finance Committee Chairman Charles Grassley (R-IA) noted that the proposals, while potentially serving as a good starting point are "bound to be politically unpopular." He pointed in particular to the reduction in the home mortgage interest deduction, which he believes the White House will not support. On the other side of the aisle, Senate Finance Committee member John Kerry (D-MA) labeled the advisory panel "doomed" from the start thanks to Bush's insistence on making permanent $1.3 trillion in tax cuts "skewed to the wealthiest Americans."

Democratic counsel for the House Ways and Means Committee, John Buckley, predicted that the panel's recommendations have little chance of being enacted as a whole but said the process is far from over. While neither plan is likely to pass in its current form, Buckley believes the package under construction at the Treasury Department will be taken seriously by Congress.

Rep. Charles Rangel (D-NY), ranking member on the Ways and Means Committee, issued a statement on the recommendations criticizing them as "unfair and unwise." He also discussed the elimination of deductions important to the middle class, but pointed out that tax cuts for the very rich are not only being preserved, but increased. House Minority Whip Steny Hoyer (D-MD) also criticized the panel's recommendations for increasing the burden on the middle class while doing nothing to address the structural federal budget deficit.

The tax panel likely avoided the messy business of structural deficits, because addressing them would mean rolling back some of the president's first-term tax cuts. Even though the president instructed the panel to make "revenue-neutral" recommendations, the panel was supposed to assume the Bush tax changes would be extended beyond their current expiration dates, thus locking in inadequately low revenue levels and continuing structural deficits. The panel's attempt at "revenue neutrality" is thus misleading, as it started from a point of drastically insufficient federal revenues.

Given the current federal budget morass, it would seem that responsible tax reform would comprehensively address the nation's current deficit, not simply achieving a phony revenue neutrality, but actually increasing revenue levels while maintaining a progressive structure. Such reform could realistically close the deficit in an equitable way, and the creation of such policies is certainly possible. The recommendation of the tax panel, however, do not come close to addressing broader budget concerns in any meaningful way.

Unfortunately, even if the panel had addressed those concerns, its recommendations would be certain to encounter widespread opposition from the Bush administration and Congressional leadership, both of which have vowed not to raise taxes regardless of the consequences. As we have seen this year, those consequences include spending cuts for services on which millions of Americans depend.

PAY-GO Narrowly Defeated in Senate Reconciliation Bill

While the House spent last week fighting to a draw over its spending reconciliation bill, the Senate passed its version the evening of Nov. 3, including a provision that would allow drilling in Alaska's Arctic National Wildlife Refuge. The Senate reconciliation bill cuts $39.1 billion from entitlement programs over a five-year period. While these cuts are not nearly as contentious or damaging to low-income beneficiaries as those being considered on the other side of Capitol Hill, the bill could drastically change during a conference with the House.

The bill passed 52 - 47, after members considered 20 amendments. Two Democrats, Sens. Ben Nelson (NE) and Mary Landrieu (LA), voted for the final bill while five Republicans--Sens. Lincoln Chafee (RI), Susan Collins (ME), Norman Coleman (MN), Mike DeWine (OH), and Olympia Snowe (ME)--voted against it. Out of the 20 amendments offered, just three were adopted.

Perhaps most noteworthy, however, was a vote on an amendment that was not adopted to the bill--a pay-as-you-go (PAY-GO) amendment offered by Sen. Kent Conrad (D-ND), and cosponsored by Sens. Russ Feingold (D-WI) and Bill Nelson (D-FL). The PAY-GO amendment, a necessary step towards legislative fiscal responsibility, failed to pass by only one vote, with Senator Jon Corzine (D-NJ), a supporter of PAY-GO, absent from voting.

The PAY-GO vote is significant because Republican Tom Coburn (OK) voted in favor of the amendment, shifting positions from his previous vote on this issue. If Coburn continues to vote with the handful of other fiscally responsible Republicans in the Senate, a PAY-GO amendment stands a strong chance of passing as part of next year's budget resolution. Such an amendment would require both new entitlement spending and any additional tax cuts to be fully offset in the budget. The inclusion of a true PAY-GO rule was instrumental in the success of the deficit reduction plan enacted in 1997 and will be crucial in forcing Congress to enact fiscally responsible budgets in the future as well.

Open Government at Stake in Patriot Act Negotiations

Lawmakers in the House and Senate began negotiations last week on renewing 16 provisions of the USA PATRIOT Act, set to expire this year. Several important differences exist between the House and Senate bills that affect the government's transparency in its exercise of powers to clandestinely search, seize, and collect information. How these differences are resolved with have broad implications for civil liberties and government surveillance powers.

A recent *Washington Post* story reported that the Justice Department used a USA PATRIOT Act power to secretly issue 30,000 mandatory requests for information during the last year alone. The report has raised calls for the need to revise this USA PATRIOT Act power, an issue not previously a part of the Congressional agenda. This is just one of several information access and open government issues at stake in the committee negotiations.

Access to Business Records - Section 215

A controversial provision of the USA PATRIOT Act, Section 215, allows the government to access library records and other business records with little or no oversight. The section allows the FBI to order the disclosure of business records that are certified to be "for an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities." The FBI merely has to make this claim before the Foreign Intelligence Surveillance Act (FISA) Court, which meets in secret and whose opinions are not publicly disclosed, and the FISA Court must grant the order. The USA PATRIOT Act leaves the FISA Court with no discretion to reject the order. The order is automatically accompanied with a gag provision that prohibits the recipient from disclosing to any third parties that the order was received.

One of the most significant differences between the bills passed by the House and Senate on the USA PATRIOT Act powers concerns Section 215. The Senate bill would require the government to link the requested records to a suspected terrorist subject, whereas the House bill merely requires the FBI to demonstrate that the records are "relevant" to a terrorist investigation. By requiring the connection to a suspected terrorist, the Senate revision would prevent the FBI from engaging in "fishing expeditions," capricious exercises of the power. Moreover, the Senate bill schedules the provision to sunset, or expire, in four years, while the House bill establishes a 10-year sunset.

Sneak and Peek - Section 213

Section 213 of the USA PATRIOT Act gives the government the power to conduct searches and seizures without notifying the target. The section allows law enforcement agencies to delay notifying the subject of such a "sneak and peek" search for a "reasonable period" if the agency believes that such notification will have "an adverse effect." While such searches are not new, the lack of a definition for "reasonable period" in Section 213 creates a troubling loophole for government disclosure. Moreover, under this provision, the government can seize, as well as search, property without giving notice.

The Senate bill would modify this section to require the government to give notification within seven days, with the ability to receive extensions. The House bill would allow the government to wait up to 6 months before giving notification.

Reporting Requirements

The requirement to report on the use of USA PATRIOT Act powers promotes the openness and transparency of government necessary to ensure that the Justice Department, as well as other departments and agencies, does not abuse these powers. Currently the USA PATRIOT Act contains few such reporting requirements for any law enforcement agencies.

The Senate bill includes important reporting requirements relating to the use of, among other things, "sneak and peek" searches and Section 215 business records orders. The House bill contains a provision requiring the Attorney General to issue a report on the use of data mining technology by each federal agency and department. Data mining is increasingly utilized in anti-terrorism efforts. Such reporting requirements could help curtail another Total Information Awareness program that would collect the personal information (e.g., buying habits, medical records, traveling habits) of innocent Americans. The House bill would also require reporting on the use of National Security Letters (NSL), which could in and of itself reduce the Justice Department's reliance on this secret tool.

National Security Letters - Section 505

One section of the USA PATRIOT Act that has recently raised controversy but that is not subject to a sunset is the NSL power of Section 505. Thanks to a recent Washington Post article, this provision has become a focus of attention among members of the House and Senate and could potentially be revised in committee.

Without court approval, the FBI can issue an NSL that requires an Internet Service Provider (ISP) or telephone company to disclose all information (e.g., web history, email addresses, telephone use) relating to a person. Similar to Section 215, the NSL is issued with a gag order that prohibits the recipient from discussing it with a third party. Previously restricted to suspected terrorists or spies, the USA PATRIOT Act revised the standard to cover any information that is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." In other words, NSLs can be used to collect information about almost anyone.

The Washington Post story found that in the last year alone the government has issued 30,000 NSLs. The government stores the collected information in databases that are shared across government agencies. Additionally, President Bush's Executive Order 13388, expanded access to these records to state and local governments and "appropriate private sector entities."

The NSL provision has been declared unconstitutional in two cases. The U.S. District Court in Manhattan ruled in *John Doe v. Ashcroft* that an NSL to an ISP was unconstitutional, because it violated the right to free speech and the protection against unreasonable searches and seizures. More recently, the U.S. District Court in Bridgeport, CT ruled in *John Doe v. Gonzales* that an NSL to a library consortium violated the right to free speech. Both decisions were stayed pending a Nov. 2 appeal before the U.S. Court of Appeals for the Second Circuit.

Currently, the language of the USA PATRIOT Act does not specify that the recipients can challenge NSLs in a court of law, and the sweeping language of the gag provision prohibits recipients from discussing NSLs with a lawyer. Both the House and Senate bills would clarify that the NSL recipients have the right to challenge such orders in court and to consult with an attorney.

Last week, Sen. Pat Roberts (R-KS), chairman of the Senate Intelligence Committee, expressed his hopes that the subpoena powers of the FBI would be strengthened, giving the government even more powers than the NSL provision currently allows. Having failed to get this provision included in the House or Senate bills, however, Roberts is now trying to influence the committee. But many legislators seem hesitant to support the provision. A bi-partisan group of five senators -- Dick Durbin (D-IL), Russ Feingold (D-WI), Ken Salazar (D-CO), Larry Craig (R-ID), and John Sununu (R-NH) -- sent a letter to Attorney General Alberto Gonzalez and Inspector General Glenn A. Fine, requesting that the Justice Department disclose more information regarding the use of NSLs, and a host of senators recently spoke out against the powers currently granted to the FBI. To alleviate concerns relating to Section 505, some have suggested that a sunset be placed on the NSL provision and that NSLs be restricted to terrorist suspects (similar to the restriction the Senate bill places on Section 215).

Conclusion

The negotiations between the House and Senate on the bills could be completed as early as this week. The new powers given to the government in the USA PATRIOT Act could prove potent weapons in the war on terror; but if misused these powers pose a significant threat to open government and civil liberties. It is vitally important that the committee preserve the Senate bill, which establishes better safeguards against abuse and stronger mechanisms for accountability. Such safeguards ensure the USA PATRIOT Act will help protect against terrorist attacks, while also protecting the public against government abuses of power.

Infrastructure Protection Plan Fast-tracked Right Past the Public

The Department of Homeland Security (DHS) released a Nov. 2 draft of its National Infrastructure Protection Plan (NIPP) and only provided a two-week window for requesting a copy of the plan and a 30-day public comment period. According to its authors, the report offers a "comprehensive, integrated national plan for the protection of critical infrastructures and key resources." Yet, the time constraints on viewing and commenting on it do not allow for substantive public review or response. The NIPP Program Management Office rejected a request by OMB Watch to extend the comment period by 60 days with no explanation for its decision.

In a federal register notice, without an accompanying press release, DHS informed the public of the availability of the draft NIPP along with instructions for obtaining a copy for review. The agency announced in the notice that the draft plan would only be available to the public for 15 days by formal request and established a Dec. 5 deadline for public comment on the 175-page NIPP.

These tight timeframes severely limit the ability of groups and concerned citizens to access and provide input on the report. Given the extensive nature of the report, as well as the importance of the subject matter, it seems clear that additional time should be allotted to allow for greater public input.

President Bush commissioned the plan in December of 2003, and DHS has been sharply criticized for its delayed release. It would seem now that, in an effort to save time late in the process, DHS is sacrificing the comment period.

The plan proposes partnerships between private industry and government agencies and identifies 17 infrastructure sectors in need of protection. While the plan has already been criticized as overly vague, the department has announced it will offer a sector-specific set of plans 180 days after the approval of the national plan. "In order to adequately assess such criticisms and examine the intricacies involved in a broad plan to protect the critical infrastructure in the United States, DHS should have extended its shortened schedule for accepting public comments," Sean Moulton, senior policy analyst with OMB Watch explains. "An additional 30 to 60 days to improve the plan for secure some of our most troubling potential targets seems well worth the delay."

Groups Build Support for the Toxics Release Inventory

The many public interest groups that oppose EPA's recent proposals to gut the Toxics Release Inventory (TRI) are now working in concert to produce materials and resources that support the environmental right-to-know program. OMB Watch is hosting an Online Resource Center, developed with participating organizations to act as a clearinghouse for concerned groups and individuals to learn about the program and to take action to defend it.

The anti-right-to-know proposals have caused wide-spread concern among state officials, labor unions, firefighters, and members of Congress. Officially announced on Sept. 21, the proposals would allow polluting facilities to withhold critical details about their toxic emissions and, notably, releases of persistent bio-accumulative toxins (PBTs), like lead and mercury. A second proposal, which was announced as a rulemaking one year from now, would cut TRI reporting in half, requiring facilities to report every other year, instead of annually, as is currently the case. Critics of the proposals are creating the Resource Center to inform parents, teachers, community leaders and other concerned citizens that their right to know about pollution is in jeopardy if these proposals move forward.

The Resource Center is a repository for:

- Background materials and supporting data on the TRI from EPA and public interest groups;
- Full text of EPA's anti-right-to-know proposals;
- Numerous press stories and editorials critical of the proposals;
- Success stories of community groups, companies, enforcement officers, and others that have used the TRI to reduce pollution in their neighborhoods; and
- Action alerts that enable concerned citizens to call on EPA and Congress directly to preserve the public's right-to-know about toxic pollution.

In a related development, Sens. Jim Jeffords (I-VT), Barbara Boxer (D-CA), Ron Wyden (D-OR), Hillary Clinton (D-NY), Barack Obama (D-IL), and John McCain (R-AZ), recently sent a letter to EPA Administrator Stephen L. Johnson to express concern about EPA's proposal to weaken the TRI program.

Several groups also joined in a request that EPA extend the deadline for public comments on the proposed rulemaking by 60 days. The deadline is currently Dec. 5. These groups believe the extra time is necessary to allow groups to fully educate themselves on the EPA proposals and their impacts. Several environmental organizations have expressed the need for extra time to produce community-specific analysis that will reveal the amount of pollution information that will disappear at the community level were the proposals to be adopted. EPA has yet to respond to the request.

Individuals and groups are encouraged to visit the new Online Resource Center, learn more and take action to save this essential resource.

New CFC Rule Does Not Mandate List Checking or Compliance with Treasury Guidelines

On November 7, the Office of Personnel Management (OPM) withdrew a regulation that required all nonprofits participating in the Combined Federal Campaign (CFC), the federal government's workplace charitable giving program, to screen employees and donation recipients for possible terrorist ties. The new final rule, which applies to 2006 CFC applicants, requires participating charities instead to certify that they are in compliance with existing anti-terrorist financing laws. OPM's explanation of the new rule notes that "OPM does not mandate that applicants check the Specially Designated Nationals (SDN) list or the Terrorist Exclusion List (TEL)."

In 2004 the CFC added language to its funding agreement that participating organizations must certify that they do not "knowingly employ individuals or contribute funds to organizations" designated by the U.S. government to be involved in terrorist activities. Through the certification, CFC imposed an affirmative obligation on organizations to check the terrorist watch lists.

In Nov. 2004 OMB Watch, along with 12 other nonprofits, led by the American Civil Liberties Union, filed suit against the OPM. The suit, filed in the federal district court for the District of Columbia, charged the policy violates the First Amendment rights of participating charities and was implemented without the required open rulemaking process.

In March OPM proposed a new regulation that shifted its position away from the list-checking requirement and toward certification of compliance with existing law. Groups filing public comments, including OMB Watch, generally supported the new approach but suggested clarifications and some revisions. OMB Watch's comments noted that the new approach recognizes the variety of ways different types of organizations can comply with anti-terrorist financing laws, citing the Principles of International Charity developed by the nonprofit sector as a resource for charities to ensure their funds are not diverted to terrorist organizations.

The supplementary information in the final rule suggests following - but does not require compliance with -- the highly controversial Voluntary Best Practices for U.S. Based Charities, published by the U. S. Treasury Department in 2002. The Treasury Department has acknowledged that these guidelines - again, which are not requirements -- are seriously flawed, and Treasury officials are in the process of revising them.

The new certification states,

"I certify that the organization named in this application is in compliance with all statutes, Executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities, or individuals subject to economic sanctions administered by the U. S. Department of the Treasury's Office of Foreign Assets Control. The organization named in this application is aware that a list of countries subject to such sanctions, a list of Specially Designated Nationals and Blocked Persons subject to such sanctions, and overviews and guidelines for each such sanctions program can be found at http://www.treas.gov/ofac. Should any change in circumstances pertaining to this certification occur at any tie, the organization will notify OPM's Office of CFC Operations immediately."

The new OPM rules are a substantial shift in policy and send a signal to the nonprofit community that list-checking is not synonymous with due diligence in addressing terrorism financing concerns. Prior to this rule, many workplace charitable giving programs and foundations embraced certifications and list-checking requirements modeled after CFC's 2004 effort. The current action by OPM should assuage these groups that list-checking should not be required.

While the OPM rules will likely have a significant impact, they remain troublingly ambiguous. OPM specifically indicates that list-checking is not required, yet the new rule does indicate that participants in the CFC should not engage in transactions and dealings with countries, entities, or individuals subject to economic sanctions. How a nonprofit organization is to know whether individuals or entities are subject to economic sanctions without list-checking is unclear.

Ultimately, foundations and nonprofits have called for, and continue to request, clarification on what actions they can take to protect them from investigation and seizure or freezing of assets. Such clarification will require changes in underlying laws or regulations to provide safeguards or safe harbors to protect nonprofits. It will also require due process procedures to protect their rights.

IRS Audits Church for Anti-War Sermon

The pastor of All Saints Episcopal Church in Pasadena, CA announced earlier this week that the Internal Revenue Service (IRS) is conducting a formal examination of the church's tax-exempt status, due to an anti-war, anti-poverty sermon delivered two days before the 2004 presidential election. Conservative and liberal religious organizations alike have criticized the IRS action, which they see as further evidence of an emerging trend -- beginning with last year's audit of the NAACP -- to treat criticism of incumbents on issues as partisan electoral activity.

On Oct. 31, 2004 Rev. George F. Regas delivered a guest sermon at All Saints, beginning with the disclaimer, "I don't intend to tell you how to vote" and noting that, "Good people of profound faith will be for both George Bush and John Kerry..." The sermon then went on to envision what Jesus would say to both candidates about the issues of peace, poverty and the impact of poverty on abortion choices. Regas closed his sermon by urging the congregants to "bring a sensitive conscience to the ballot box," and "vote your deepest values." The imagined statements of Jesus sharply criticized the war in Iraq, nuclear weapons and noted both candidates "failure and the failure of so many political leaders to help uplift those in poverty..."

The IRS initiated its audit as part of its 2004 Political Intervention Program (PIP), a process for reviewing referrals alleging illegal political campaign intervention by charities. The Treasury Inspector General for Tax Administration (TIGTA) issued an evaluation of the PIP program in February, after the IRS audit of the NAACP sparked charges of political motivation. TIGTA found no indications that the random sample of cases it reviewed was handled inappropriately. Of the 131 cases reviewed, 80 were found to warrant further investigation, 34 of which involved religious organizations.

On June 9 the IRS sent All Saints a letter notifying them that "a reasonable belief exists that you may not be tax-exempt as a church..." citing a Nov. 1 article in the *Los Angeles Times* that characterized the sermon as a "searing indictment of the Bush administration's policies in Iraq." The letter requested information about church operations and notified them of their right to discuss the case with the IRS before the examination began. All Saints hired as counsel the former director of the IRS Exempt Organizations Division, Marcus Owens of Caplan and Drysdale.

A Sept. 22 conference call was held to allow IRS representatives, church officials and their counsel to discuss the allegations. In a follow-up letter Owens wrote that the IRS action was unsupported by the facts and threatened the church's core values. Addressing the difference between issue advocacy and partisan electioneering, Owens wrote, "the church takes issue with your suggestion that the mere mention of candidates' names, coupled with statements regarding the speaker's personal values, is sufficient to constitute prohibited campaign intervention."

The letter held that the IRS told All Saints that the sermon may be an implicit intervention in the election, despite the fact that Regas explicitly said he was not telling people how to vote and that criticism was directed at both candidates.

Following the meeting the IRS offered a deal: if the church would admit wrongdoing and agree not to hold similar sermons in the future, the IRS would not pursue the case further. All Saints rejected the offer, with Rector J. Edwin Bacon explaining, "We have a responsibility to articulate our core values... The IRS is arguing implicit endorsement, and that's a slippery slope that could do away with the freedom of speech and freedom of religion."

Leaders in the faith community, from all points on the ideological spectrum, have spoken out against the IRS action. Ted Haggard, president of the conservative National Association of Evangelicals told the *Los Angeles Times* that his group will work with other church organizations "in doing whatever it takes to get the IRS to stop." Robert Edgar, general secretary of the National Council of Churches said the IRS action "appeared to be a political witch hunt on George Regas and progressive ideology. It's got to stop." A statement from Progressive Christians Uniting said the case "raises important questions about how much latitude IRS field offices have been given to initiate these cases based on murky criteria and no clear understanding of what does or does not constitute impermissible electioneering."

A statement by Americans United for Separation of Church and State questioned the impartiality of the IRS in its enforcement efforts. Executive Director Rev. Barry Lynn said that while he could understand why the IRS might question the All Saints sermon, he cannot understand "why the tax agency did not take the same view about an even more partisan sermon by a Baptist pastor in Arkansas who preached on the successes of George Bush." A report in the *Arkansas Democrat-Gazette* said the IRS had declined to pursue an investigation of that church, even though the sermon praised Bush and criticized Kerry.

The IRS currently lacks a clear set of rules defining prohibited intervention in elections, instead it considers each case individually based on the facts and circumstances. The IRS would not comment on the case because of privacy laws, but it has made public its intention to continue the PIP program in the 2006 election cycle.

"Nonprofits should insist," explained Kay Guinane, council for OMB Watch, "that the IRS make it clear that the right of charities and religious organizations to criticize elected officials is not suspended just because an election is taking place."

House Rejects Bi-Partisan Effort to Shield Internet from Campaign Finance Laws

In a surprising vote, the House rejected a bipartisan effort to shield online communications from the strictures of campaign finance reform laws.

H.R. 1606, the Online Freedom of Speech Act, sponsored by Rep. Jeb Hensarling (R-TX), would have codified the current Federal Election Commission (FEC) regulation that exempts the Internet from campaign finance regulations, including the soft money provisions of the Bi-Partisan Campaign Reform Act (BCRA). The current exemption was struck down by a federal court, and the FEC is now considering a new rule. On November 2, the bill failed (225-182) to get the 2/3 vote it needed to pass the House on the suspension calendar. (Under suspension rules, debate is limited to 40 minutes and no amendments are allowed. The process is generally used for non-controversial bills.)

Increased Regulation Coming if Congress Does Not Act

The Hensarling bill would have modified the definition of "public communications" in the Federal Election Campaign Act (FECA) to exempt communications over the Internet. BCRA amended FECA to prohibit political parties, federal candidate campaign committees, and other regulated political committees from using soft money to finance "public communications." Instead, these communications must be paid for with funds raised under the restrictions of campaign finance rules, which prohibit corporate contributions and limit individual contributions.

"Public communications," under FECA, include those made via broadcast, cable, satellite, newspapers, mass mailings and phone banks. Groups other than parties or regulated political committees, such as corporations, nonprofits and unions, are also subject to the rule if their public communications "refer" to a federal candidate and are "coordinated" with parties or campaigns. Since the definition of coordination is broad, nonprofit Internet postings that link to candidate websites or forward material from campaigns are potentially subject to FEC rules.

However, the FEC exempted the Internet from BCRA regulation because it felt that the omission of the Internet from the legislative definition of "public communications" indicated Congress' intent not to subject the Internet to the same restrictions applied to other mass communications. However, a federal court, in a challenge by BCRA co-sponsors Reps. Marty Meehan (D-MA) and Chris Shays (R-CT), found the exemption was not adequately explained by the FEC and sent it back for further consideration. In April the FEC proposed a new, more restrictive rule. Many public comments supported a hands-off approach to the Internet. A final rule is not expected until February 2006.

The Supreme Court set high constitutional standards for Internet-based speech in its 1997 landmark decision *Reno v. ACLU*. Writing for the Court, Justice Stevens approved the lower court finding "that the Internet- as 'the most participatory form of mass speech yet developed' ...is entitled to the highest protection from government intrusion." The conclusion states, "The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."

Opponents of the Hensarling bill, led by Shays and Meehan, argued that the bill would open the floodgates to unlimited corporate and union money being spent on Internet activities, such as blogging or advertisements. According to Democracy 21, a campaign finance group, "The blanket Internet exemption...would wrongly allow federal candidates to coordinate...the unlimited amounts of soft money to purchase Internet banner and video ads supporting their federal campaigns or attacking their opponents."

Proponents of the Hensarling bill, however, held that this charge is unfounded. They argued that regulation of the Internet will have negative consequences for political speech and civic engagement. In addition, they pointed out that the general ban on corporate spending to influence federal elections would prohibit spending for advertising on the Internet.

About the Vote

The Rules Committee placed the bill on the calendar for floor consideration in the House at the suggestion of Rep. Zoe Lofgren (D-CA), who believed the bill, which had received considerable bi-partisan support, would be non-controversial.

Surprisingly, many members rushed to the floor to object to the bill, both on its merits and the process. Rep. Barney Frank (D-MA) opposed the suspension process for the bill, maintaining,"[W]e have people here defending vigorous open debate and free speech by invoking one of the most restrictive procedures of the House of Representatives." He later stated that he would not vote for the bill because it had been offered under suspension rules.

Hensarling argued that the federal government should encourage a medium that is bringing more Americans into the political process. "The newest battlefield in the fight to protect the First Amendment is the Internet," he said. "The Internet is the new town square, and campaign finance regulations are not appropriate there." He added, "I fear that bloggers one day could be fined for improperly linking to a campaign Web site, or merely forwarding a candidate's press release to an e-mail list."

Next Steps

If the FEC proceeds with new, more restrictive rules, it will establish grounds for continuing regulation of speech on the Internet. Hensarling has intimated that he will re-introduce the bill this session, which would allow for special review by the Rules Committee that could then consider it a "major bill" and create a rule which allows it to be placed on the House calendar.

A companion bill in the Senate, S. 678, was introduced by Sen. Harry Reid (D-NV) in March and has been sent to the Senate Committee on Rules and Administration, but the Senate has yet to take it up.

Oral Arguments Held in Case Challenging Advocacy Restrictions on Legal Services Programs

Litigation challenging the constitutionality of limitations on the advocacy rights of government-funded nonprofit legal services groups advanced recently with oral arguments before a federal appeals court.

On Nov. 2, the U.S. Court of Appeals for the Second Circuit heard oral argument in *Velazquez v. Legal Services Corporation* (LSC), a lawsuit brought on behalf of a coalition of lawyers, indigent clients and New York City officeholders, arguing the government has no business regulating the privately funded, constitutionally protected activities of legal service programs.

The current challenge, also known as the *Dobbins* case, addresses the constitutionality of two key provisions of LSC regulations: (1) the restrictions prohibiting LSC grantees from using their non-federal dollars for class action litigation, legislative advocacy and community education; and (2) the "program integrity regulation," which requires physical separation between LSC grant recipients and any organization that engages in these restricted activities. In Dec. 2004, a federal district judge ordered LSC to cease enforcing the separation rule in the case of the three programs in question because it "unduly burdened" their First Amendment rights.

At the oral argument the Brennan Center for Justice, represented by Burt Neuborne, argued for the legal services organizations. He urged the court to uphold the lower court ruling that found government-imposed restrictions on the ability of the organizations to use their own non-federal funds to be unconstitutional. Neuborne said the district court correctly applied an undue burden standard to the facts, and that this standard was established by the Supreme Court's decisions in several cases, including *Regan v. Taxation With Representation, FCC v. League of Women Voters,* and *United States v. American Library Association*. Applying these standards, according to Neuborne, leads to the conclusion that the government has no business regulating constitutionally protected activities by legal services programs.

Stephen Ascher, of Kronish, Lieb, Weiner and Hellman LLP, arguing for LSC, contended that the plaintiff's case was not yet ripe for judicial determination. Because federal courts only have constitutional authority to resolve actual disputes, legal actions cannot be brought before the challenged law or government action has produced a direct threat to the party suing, when the matter is said to be "ripe" for judicial resolution. He insisted that the plaintiffs should have either submitted a proposal to LSC or set up an affiliate and waited for LSC to conduct an audit, before pursuing the case.

Ascher also argued that the plaintiffs were calculating the costs of LSC's separation rule too strictly. He stated that the plaintiffs had wrongly assumed that LSC permits no sharing between LSC grantees and other non-LSC programs that engage in restricted activities. He stated that it would be constitutionally acceptable for LSC and non-LSC programs to share all employees, space and equipment - according to the level of separation required by LSC's rule. However, it is the extreme level of separation required that is at issue in the case.

Matthew Collette, arguing for the Department of Justice, focused on the proper test the court should use to determine whether the LSC's separation requirement violates the Constitution. He argued that the court should examine whether the requirement "effectively prohibits" the plaintiffs from using their private funds to engage in the activities. In response to Judge Richard Cardamone's questioning as to whether the LSC would inevitably lose under the "undue burden" test applied by the district court, Collette stated that the "district court had failed to acknowledge an important government interest underlying the separation requirement: **the interest in having legal services programs focus exclusively on the categories of case the government chooses to fund**."

Collette's statement cuts to the heart of why the outcome of this case is important to the nonprofit sector. If the federal court upholds the LSC restrictions on the use of the private funds of nonprofit legal services programs, the *Velazquez* case could open the door for an attempt by Congress to limit the use of the private funds of a wide variety of federal grantees, restricting whatever it deems threatening or out of line with its intentions.

The suit, far from being solely concerned with legal services or access to the courts, seeks to protect the broad array of public-private partnerships. Public-private partnerships work, at least in part, because of the many advantages of collaboration. The rule and the possibility that it will be upheld pose a significant threat to the viability of these partnerships in a wide variety of settings and across the full political spectrum. When government seeks to limit free expression under the very programs it deems beneficial to underserved communities and individuals -- whether it involves legal representation for the poor or civic engagement for affordable housing recipients -- government exerts a level of control antithetic to our democracy. Whether government can exert this questionable form of control by proxy in public-private partnerships is at the heart of what the case will decide.

Industry Costs Pitted Against Public Needs in Homeland Security Policy

How much is a human life worth when it comes to a terrorist attack? Should the public be involved in setting the nation's safety priorities? The Bush administration is offering surprising answers to these questions and more as it develops the general framework for homeland security policy.

The administration has aggressively used cost-benefit analysis, risk-based approaches, and market-style mechanisms to benefit corporate special interests by blocking effective regulation for public health, safety, and the environment. The rigid analytical tests that are the cornerstone of these approaches, however, are proving difficult to implement in the context of homeland security. According to BNA's *Daily Report for Executives*, John Graham, outgoing administrator of the White House's Office of Information and Regulatory Affairs, told a gathering of former OIRA administrators at the industry-funded, conservative think tank AEI-Brookings Joint Center for Regulatory Studies earlier this month that "a more practical and 'soft' test" than standard cost-benefit and risk assessment will apply to homeland security rules.

Even if the White House's stringently anti-regulatory analytical policies do not apply to homeland security rules, the Bush administration is nonetheless making sure that corporate special interests will receive special favors in the regulatory process:

- For example, the Department of Homeland Security's draft National Infrastructure Protection Plan (NIPP), which "outlines the core processes and mechanisms DHS and its security partners will use to implement key protection initiatives" (2), insists that a hallmark of protective policy must be "cost effectiveness," meaning that homeland security policies should not be rigorous across-the-board standards but, instead, should contain "market systems," offer industry the option "to select the measure best suited to the particular need," and "[r]ely on self-assessments, where appropriate" (38-39).

- Industry compliance costs are so important in the NIPP that they are repeatedly mentioned as equivalent to government expenditures. One telling line repeated several times in the NIPP was parroted recently by Brigham A. McCown, deputy administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), who told a Dangerous Goods Advisory Council conference that PHMSA "strive[s] to regulate in a way that maximizes the return and minimizes costs to the economy and the industries we regulate." According to BNA's *Daily Report for Executives*, McCown added that PHMSA is exploring ways to weaken the USA PATRIOT Act's requirement that companies conduct background checks for truck drivers transporting hazardous materials.

- Costs apparently can trump public health when it comes to determining safe levels of exposure to radiation in the wake of a nuclear or radiological terrorist attack. According to the *New York Times*, a leaked copy of upcoming DHS guidance for state and local governments advises that they "should take into account the cost of abandoning or cleaning up contaminated areas when deciding how much exposure to radiation is acceptable." Nuclear Regulatory Commission member Edward McGaffigan, Jr., who participated in drafting the guidance, added that developing strict protective standards "only aids and abets Al Qaeda or any other terrorists."

- Who gets to participate in decisions this important? The draft NIPP emphasizes the close cooperation of government and the corporate special interests that own and operate critical infrastructure, but the NIPP makes no mention of the participation of the public, including those who live in the communities at risk of suffering the consequences from an attack.

These weaknesses in the Bush administration's basic approach to homeland security policy reflect the prevailing trends in the administration's approach to public protections. Years after 9/11, there are still many unmet needs for protection in such basic infrastructure sectors as the water supply, the food supply, and facility security -- safety gaps that match, with discomforting regularity, the special interests that donated to the Bush/Cheney campaign coffers. Even the White House's recent about-face on chemical security was qualified: the administration reversed position from its insistence on voluntary self-regulation by the chemical industry, but it nonetheless expressed support only for *risk-based* regulation and "flexible" approaches instead of across-the-board requirements.

By avoiding setting stringent safety requirements, the federal government is failing to create incentives for owners and operators of critical infrastructure to invest in research that could lead to innovative ways of doing business and achieving the requisite levels of safety. Contrary to the free-market fundamentalist arguments for market-style mechanisms in regulatory policy, the real driver of innovation in industry response is not market-style approaches but, instead, the stringency of the underlying standard. Moreover, calls for site-specific flexibility could mask efforts to set weak and unenforceable standards and could, by failing to create a level playing field through an even-handed, across-the-board standard, disadvantage firms that desire to achieve the highest level of safety possible.

Administration Ignores Scientific Evidence and Pushes Forward with Mountaintop Removal

A long-anticipated Environmental Impact Statement (EIS) on the mountaintop mining waste disposal process ignores scientific evidence in order to validate the waste disposal method preferred by industry and the administration.

Mountaintop mining uses explosives to expose coal seams for mining, resulting in waste dumped in nearby valleys, often burying streams and disrupting local ecosystems.

Federal Protections Undermined

The potential harm to waterways from mountaintop mining triggers the federal government's duties under environmental law. Under the Clean Water Act, the Army Corps of Engineers and EPA are required to prevent serious degradation of waterways. Under current regulation, the act is interpreted as keeping mine waste from being dumped within 100 feet of streams. The National Environmental Policy Act (NEPA) also requires agencies to assess the environmental impact of projects that may have significant environmental effects.

Despite these provisions, the Army Corps of Engineers has issued nationwide general permits for mountaintop waste disposal that do not require prior scrutiny of the environmental impact. Section 404 of the Clean Water Act allows the government to bypass the requirement of detailed, individualized permits for pollution discharges when the discharge in question is "dredged or fill material." In such cases the Clean Water Act permits agencies to issue general permits good on a state, regional, or even nationwide basis. "Fill material" generally refers to material deposited for a beneficial primary purpose, such as development or construction, but a 2002 rule change expanded the definition to include mine waste. In the wake of that rule change, federal agencies are now streamlining the permit process, thus paving the way for more mountaintop mining.

Citizens and environmental groups have been forced to take federal agencies to court in a series of cases aimed at requiring these agencies to comply with CWA and NEPA and protect streams from mountaintop waste. In July 2004, the courts handed environmental groups a victory by determining that 11 mining waste disposal permits required environmental impact statements. The case is currently under appeal, and a final decision could determine if the Army Corps of Engineers may use the streamlined permits for mountaintop mining waste disposal or if the corps must use individual permits that consider environmental impacts prior to mining.

Federal agencies have also failed to enforce the 100-foot buffer zone provision. And in another gift to the mining industry, a 2004 proposed rule would revise the mining standards to allow the Office of Surface Mining to waive the buffer zone requirement for streams as it sees fit. Companies could receive permits to conduct surface mining activities near streams provided that they, "to the extent possible," "prevent additional contributions of suspended solids," and "minimize disturbances and adverse impacts."

Agencies Ignore Their Own Findings

Released Oct. 29, the Environmental Impact Statement (EIS), which was required of the agencies in a settlement agreement with citizens groups, validates both the administration's approach of using the general permit as well as the relaxation of the buffer zone requirements, despite scientific evidence of irreversible damage to streams and the wildlife dependent on them.

The EIS includes more than 30 scientific and technological studies, many of which point to serious environmental harm if the current course is not reversed. One such study found that 2,200 square miles of land will be damaged by 2010 without stronger environmental controls. Rather than developing alternatives that would mitigate the impacts of mountaintop mining, the agencies instead claimed that while the studies used "were useful in identifying data gaps and needs for further study," they could not be used to determine "a bright-line threshold of minimal impacts." Further, the agencies deemed that conducting more studies would be too costly, effectively burying the chance for more stringent regulations under exhaustive analytical requirements.

Citizen action groups have met with limited success at the state level, but without an overarching federal policy, their efforts leave only patchworks of protection for mountains, valleys and streams in Ohio, West Virginia, Kentucky, Tennessee and Virginia.

Timeline

December 23, 1998: Settlement with West Virginia citizens group requires the federal government to halt the routine issuance of nationwide mining waste permits until Environmental Impact Statement (EIS) on the mountaintop mining process could be completed. Instead, the Army Corps of

Engineers would be required to issue a greater number of individual permits with greater scrutiny of the environmental impact. *Bragg v. Robertson* (S.D. W.Va.)

February 5, 1999: The Environmental Protection Agency, the U.S. Army Corps of Engineers, the Office of Surface Mining, and the Fish and Wildlife Service issue a notice of intent in the *Federal Register* to do an EIS. 64 Fed. Reg. 5,778

October 25, 1999: U.S. District Court for the Southern District of West Virginia rules that state and federal agencies overseeing mountaintop mining permits violated the Clean Water Act by failing to enforce a 100-foot buffer zone meant to keep mine waste from disturbing streams.

April 24, 2001: A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit reverses the lower court's decision, claiming that the suit was barred under the sovereign immunity clause of the Eleventh Amendment. *Bragg v. Robertson*, 248 F.3d 275 (4th. Cir. 2001)

May 8, 2002: District Court rules that mining waste cannot be fill material and any rule issued that says otherwise is illegal. *Kentuckians for the Commonwealth v. Corps of Engineers*, 204 F.R.D. 301 (S. D. W. Va. 2002). See Court Rejects Move to Dump from Mountaintop Mining (5/13/2002)

May 9, 2002: New rule relaxes mountaintop mining dumping requirements under the auspices of harmonizing the definition of "fill material." New rule opens the door for greater dumping of rock waste and dirt as well as trash in streams and also grants the Army Corps of Engineers greater discretion in deciding when dumping can be permitted. 67 Fed. Reg. 31,129 See Administration Clears Way for Dumping, Mountaintop Mining (4/29/2002)

January 29, 2003: Fourth Circuit Court rejects the lower court decision restricting mountaintop mining and invalidating the fill material rule, paving the way for further mountaintop removal. *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) See Court Ruling Overturned: Mining Companies Free to Bury Streams Once Again (2/10/2003)

February 12, 2003: House bill introduced to reinstate original definition of "fill material." See Clean Water Protection Act of 2003.

January 7, 2004: Proposed rule would gut prohibition on dumping mine waste within 100 feet of streams and ease the way for new mountaintop mining. 69 FR 1,035 See Administration Moves to Allow Dumping of Mining Waste into Streams (1/12/2004)

July 8, 2004: Court rules that 11 general nationwide permits for mountaintop mining waste disposal violate the Clean Water Act because they take into consideration the environmental impact only after the fact. The case is now under appeal. *Ohio Valley Environmental Coalition v. Bulen*, No. 3:03-2281 (S.D. W. Va. filed July 8, 2004), *available at* http://www.wvsd.uscourts.gov/district/opinions/pdf/BULEN_FINAL.pdf.

October 28, 2005: Agencies issue a final Environmental Impact Analysis, as required under the 1999 settlement agreement with the West Virginian citizen's group (*Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999)). The EIA does propose alternatives to the streamlined general grant. None of the alternatives, however, seeks to limit damage to mountaintops, and all ignore incontrovertible scientific evidence of long-term environmental damage of mine waste dumping.

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