****Special Supreme Court Addition****

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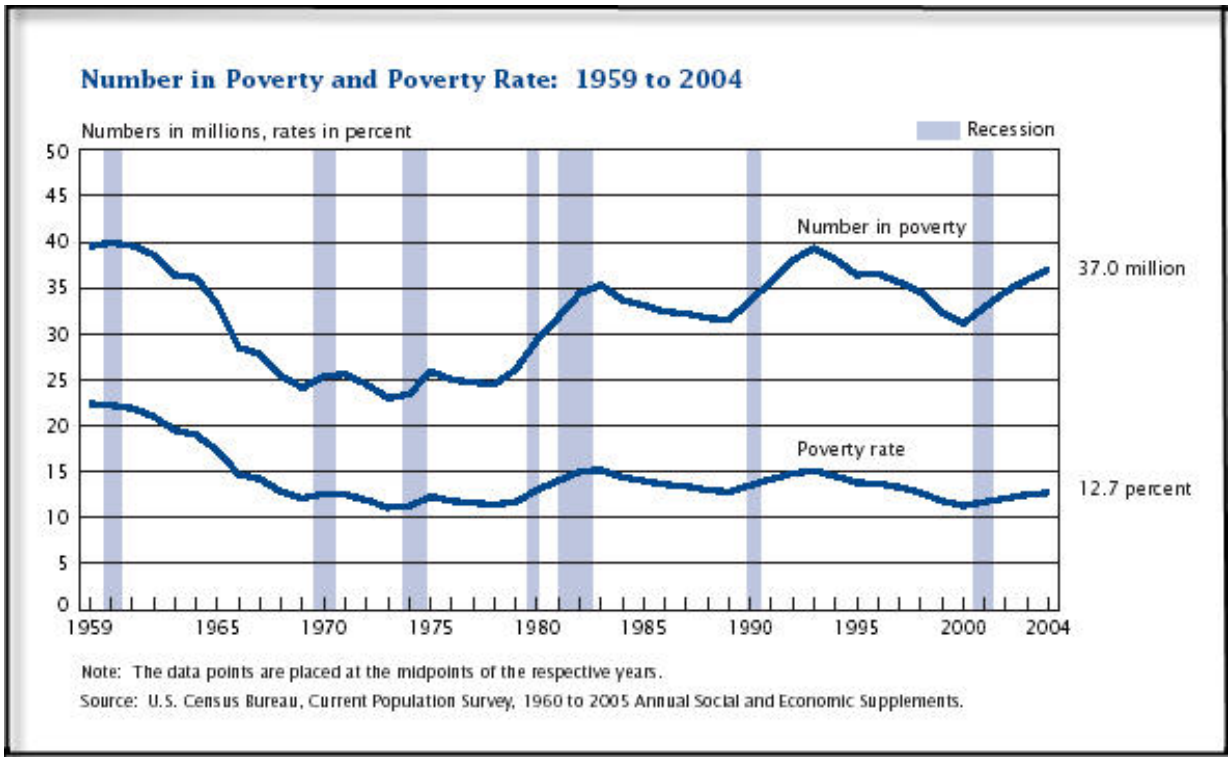
Despite Recovering Economy, Poverty On the Rise for Fourth Straight Year

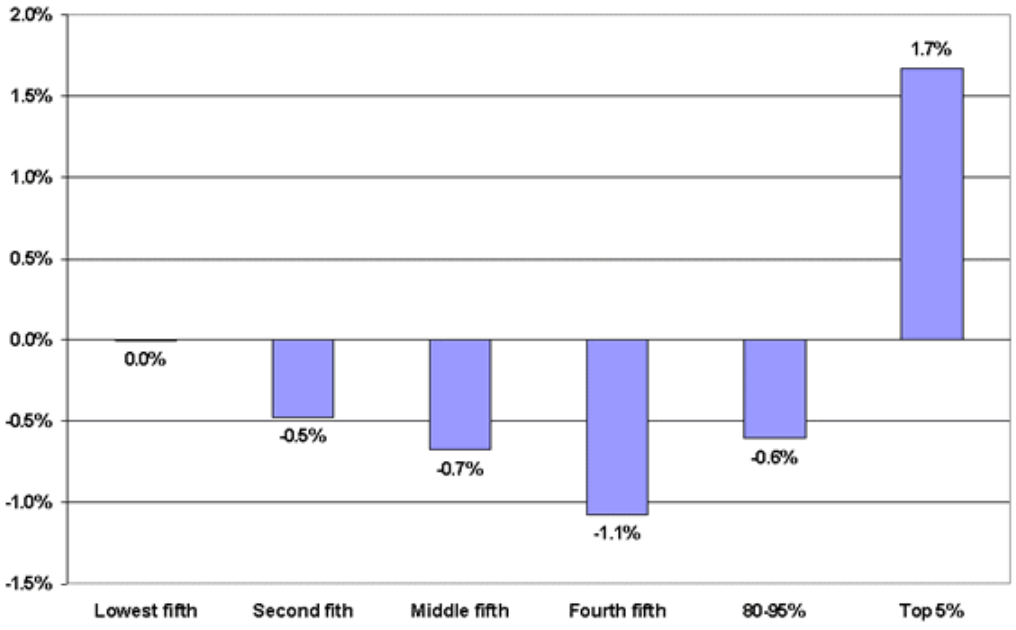
This year's Census Bureau report on nation-wide levels of poverty, income, and health insurance made clear that, although the U.S. economy expanded in 2004, the expansion did not extend to all Americans, in particular missing households most in need of a boast. The real income of a typical household has fallen for the past five years, despite steady economic expansion over the last three years. At the same time, the number of Americans living in poverty and lacking health insurance has increased steadily.

The number of Americans living in poverty rose to 37 million in 2004, up 1.1 million from 2003, according to the report. The income of the median household, adjusted for inflation, remained 3.8 percent - or a whopping $1,700 - below its most recent peak in 1999. This ongoing decline in income is in part due to the faltering level of real annual earnings, which fell 2.3 percent for men and 1.0 percent for women. Health care coverage for Americans grew spottier as well, with one million more Americans going without health insurance in 2004. In 2003, 45 million Americans lacked health insurance; that number has since grown to 45.8 million.



Besides revealing growth in the ranks of America's poor and uninsured, the latest Census release highlights the unbalanced nature of the economic recovery from 2002-2004. From the Census numbers, the Economic Policy Institute noted that "while the share of total national income flowing to the bottom 60% of households was essentially unchanged, the share going to the top 5 percent was up 0.4 percentage points."

Figure 2: Change in real average income by quintile, 2003-04



Source: Economic Policy Institute: Income Picture: August 31, 2005

While the economic recovery is not benefiting Americans equally, our economic outlook will likely worsen with the anticipated fallout from Hurricane Katrina, leading to a jump in unemployment and lower economic growth across the board. Payrolls may very well shrink and the unemployment rate could rise significantly in the months ahead. Many

economists believe the hurricane's fallout will slow overall economic growth, as higher energy prices provide a disincentive for consumers and businesses to spend. The *Washington Post* reports, some predict the aftershocks of the hurricane could drag down economic growth across the country, with the final quarter of this year slowing to an anemic 2 percent.

The latest Census report underscores the failure of current economic policies to improve conditions for most Americans. There has been some economic growth and expansion over the last few years, but the benefits have flowed primarily to corporations and those individuals who already have achieved economic stability, leaving the rest of the country to continue to struggle. As the Center on Budget and Policy Priorities found, at no other time in the past 45 years has U.S. poverty increase between the second and third years of an economic recovery.

The impact of stagnating incomes, increasing poverty, and the growing roster of uninsured Americans is felt most acutely by the most vulnerable. Almost one in five American children lives in poverty according to the new data, yet Congress is planning to make deep cuts to Medicaid and the federal food stamp program as part of the budget reconciliation process this month. Such cuts will only worsen the situation for poor families, who are already struggling to provide for their children's most basic needs.

Given the rise in poverty, slashing the safety net will only add to the pain of millions of Americans. CBPP Executive Director Robert Greenstein encapsulating progressive arguments against such cuts maintains that "Congress should not be pursuing policies that take these adverse trends in poverty income, and health insurance and make them worse." Our elected officials would better serve the American people by focusing on policies that realistically address the growing problems of poverty and inequity in our nation and that satisfy the need for long-term investment in our country, rather than by cutting our budget at the expense of those in need, to finance tax cuts for the wealthy.

Frist Has Change of Heart, Postpones Estate Tax Repeal Vote

Senate Majority Leader Bill Frist (R-TN) experienced a change of heart over the Labor Day weekend and decided late Monday evening to postpone a vote on repeal of the estate tax, which he had scheduled to be the first item of business when Congress returned to Washington today. That it took Frist so long to postpone the vote typifies the misguided priorities of the entire movement for repeal of the estate tax -- an effort to reward the privileged few at the expense of millions of Americans who struggle to get by from day-to-day.

The repeal vote had been scheduled for Tuesday, September 6 before the Senate left town at the end of July for its month-long recess. Frist's announcement of his intention to proceed with the vote as planned despite the extent of the devastation caused by Hurricane Katrina becoming more apparent by the day, however, was met last week with surprise and even outrage. Many found Frist's myopic pursuit of estate tax repeal in light of the crisis insensitive, including Minority Leader Harry Reid (D-NV), who in a statement expressed surprise "at the Republican leadership's insensitivity toward the events of the last week. With thousands presumed dead after Hurricane Katrina and families uprooted all along the Gulf Coast, giving tax breaks to millionaires should be the last thing on the Senate's agenda." Reid's sentiments were echoed by a number Senate Democrats.

Early reports put the price tag of clean-up and reconstruction in hurricane-affected areas at more than $100 billion, quickly placing Katrina among the most costly and destructive natural disaster in U.S. history. Clearly, urgent priorities exist that need a large and continuing financial commitment from the federal government, in order to begin the long-term task of rebuilding devastated Gulf Coast communities. Repealing the estate tax would fundamentally undermine the government's ability to provide those resources over the long-term.

It is unclear when, or if, the vote to repeal the estate tax will be rescheduled. It is possible the Senate will simply not have enough time this year to reschedule the vote, in light of its already jam-packed schedule.

Finishing Appropriations Bills Will Be Juggling Act for Congress

Thanks to the House and Senate appropriations committee reorganization that took place earlier this year, the appropriations wrap up this fall promises to be particularly dreadful, causing headaches for politicians, congressional staff, and analysts alike. In a startling display of ignorance and lack of foresight, the House and Senate chose to reorganize their appropriations committees in an inconsistent and uncoordinated way. The result is a different number of appropriations bills in the House and Senate (11 in the House and 12 in the Senate) and committee structures that are not

easily reconciled across the two chambers -- there are only six appropriations bills this year with identical jurisdictions.

This situation is bound to cause confusion and grief on the Hill in forming and staffing conference committees for the remaining six bills without identical counterparts and also for outside analysts and observers in attempting to track appropriations for different programs across committee jurisdictions. It will almost surely lead to delays and drag out the conference committee process when Congress can least afford to waste its time.

The Senate, in particular, now has more than a full plate with confirmation hearings and a vote on the Supreme Court nomination of John Roberts (now for the post of chief justice), two difficult reconciliation bills, additional relief legislation for the victims of Hurricane Katrina, hearings into the federal response to the disaster, the reauthorization of the Higher Education Act, and more than half (seven, to be exact) of the appropriations bills to finish. Majority Leader Bill Frist (R-TN) already announced during the August recess that the Senate would be working well into the fall, past its target adjournment date - but it is unclear if even that extension will give them enough time to wrap up the work. Congress could very well be working through Thanksgiving or later again this year.

Yet the delays will have a broader (and more significant) impact than simply changing holiday travel plans for members of Congress and their staff. Because of the incongruence between the organization of the House and Senate appropriations bills and because the Senate is woefully behind in its appropriations work with little hope of catching up, Congress appears headed for another round of unending, short-term continuing resolutions, and most likely another extremely large omnibus appropriations bill.

Continuing resolutions are measures Congress passes that continue funding the federal government past the start of the new fiscal year when new legislation for funding has not been passed. Commonly called "CRs," the resolutions are passed by both chambers and signed by the president. Yet they fund government programs at the previous year's level, not taking into account inflation, population growth, or demographic changes such as greater rates of poverty or numbers of uninsured. Funding the federal government through CRs for long periods, as Congress did last year when it was unable to finish the appropriations bills on time, inevitably has an negative impact on the services and programs Americans depend on.

Further, the CRs ultimately lead to a last-stitch omnibus appropriations bill -- where all unfinished bills are throw together into one tremendous piece of legislation. Congress usually spends too little time debating and analyzing the contents of the omnibus bill, allowing unnecessary special interest projects and congressional pork to slip into the bill unnoticed.

As we have previously observed, omnibus appropriations bills are bad policy:

> *Omnibus bills are bad legislative practice: they remove transparency and accountability from the appropriations process and usually lead to fiscal irresponsibility. The bills are massive, with plenty of cover to hide extra spending, legislative changes, and special interest items that end up making the bill more fiscally irresponsible than if the bills where passed separately. Removing transparency and accountability from the process by which Congress allocates government funds, especially for other members of Congress, is troubling.*
>
> -- *OMB Watcher*
> June 27, 2005

Roberts Errs on Side of Secrecy as White House Counsel

Documents recently released from the Ronald Reagan library reveal that, while acting as White House associate counsel during the Reagan administration, John Roberts supported government secrecy and strenuously avoided any implication that the White House had an obligation to provide information to anyone, including Congress. On occasion, Roberts made small efforts to assist those seeking information. These, however, tended to be minor issues; and, even in these efforts, Roberts typically included disclaimers to prevent any assumption that the administration was required to respond.

Freedom of Information

In one memo, Roberts expressed aversion to government openness, recommending the removal of a reference to the Freedom of Information Act (FOIA) from President Reagan's radio address to avoid endorsing the law. In the original text of the radio address, which condemned the Soviet Union's handling of a 1983 incident, in which its military shot down a

Korean Airline passenger plane, the president would have acknowledged that "freedom of information" is necessary to democracy. Roberts noted that the statement clashed with the administration's efforts to limit FOIA and advised replacing "freedom of information" with "free speech."

"'Freedom of information' is of course a legal term of art, and we have, quite correctly, taken several steps to limit the scope and certain abuses of the Freedom of Information Act."

That Roberts endorsed Reagan administration efforts to limit FOIA as undertaken "quite correctly" here offers a rare glimpse into Robert's personal opinions on freedom of information.

In another memo, Roberts appears willing to bend FOIA to avoid disclosure. Generally, when the White House received requests for information under FOIA, Roberts used standard response language, informing the requester that FOIA did not apply to the White House. Responses always noted that some offices of the executive branch were covered by FOIA and advised the requesters to resubmit their requests to specific offices. The White House exemption from FOIA is a fairly well established legal precedent, thus these responses reveal little of Roberts' position on FOIA.

However, on at least one occasion Roberts advised claiming the White House exemption when he did not believe it was legally justified. On March 30, 1984, Diane Powers of the White House Photo Office inquired if she could deny requests from photo collectors. Apparently, the Photo Office sought to avoid satisfying the deluge of requests under FOIA for copies of photos of the president with other world leaders and on other occasions of state. In a memo, dated April 27, 1984, to White House Counsel Fred Fielding, Roberts advised that "as an initial matter" the White House "take the position that the Photo Office is not subject to FOIA." Roberts also noted that "While I have no doubt that this is the position we should take, I must point out that it is not clear that it will withstand legal challenge."

Roberts explained in the memo that the legal precedent that exempts the White House from FOIA applies to the president's personal staff or those whose sole job it is to advise and assist the president. Clearly, the Photo Office would not fit into either of these categories. However, Roberts wrote that it is "unclear" whether the Photo Office would satisfy one of these criteria and acknowledges that a court asked to rule on the issue "could view the Photo Office as a discrete entity with functions that go beyond advising the President."

In this instance, Roberts went to questionable lengths to stretch the White House's FOIA exemption simply to shield a White House office from inconvenient requests. Robert's strong stance is likely the result of efforts to prevent any part of the executive branch from committing to any public disclosure requirements.

Presidential Records Act

Shortly before Reagan took office, Congress passed the Presidential Records Act of 1978 (PRA) to impose limited requirements for public disclosure upon the White House. Under the PRA, presidential documents would be archived and made public 12 years after a president leaves office. A memo, dated September 9, 1985, drafted by Roberts for Fielding, expressed great concern over the requirements of the new law. Specifically Roberts worried that the 12-year limit on restricting access was too short and that the "prospect of disclosure after such a brief period might inhibit the free flow of candid advice and recommendations within the White House."

Roberts recommended "steps should be taken before the end of the Administration to cure the infirmities of the Act." He advised either a legislative amendment to the law or archive regulations that would allow "executive privilege claims to block disclosure after the expiration of the statutory 12-year period." While Robert's lack of enthusiasm for disclosure is disheartening, it is especially troubling that he would advise attempting to thwart the intent of Congress with a regulatory rulemaking.

Roberts noted in the memo that claims of executive privilege would hinge on the president in power in 2001. As it turned out, President Bush, still less supportive of government openness, forcefully exerted executive privilege to prevent the automatic release of Reagan documents as mandated by PRA. In fact, President Bush issued an executive order empowering past presidents and their representatives to invoke executive privilege and restrict presidential papers from the public indefinitely. This effort to block the PRA, which is currently being challenged, may eventually reach the Supreme Court, creating a potentially interesting predicament for the former-White House counsel, were Roberts to be confirmed.

Congressional Access

One might think Congress would more easily gain access to government information held by the White House, and that the administration would more readily disclose information to Congress on issues being decided by the legislature. Roberts, however, advised the Reagan White House against such cooperation and transparent dealings with toward Congress.

An April 23, 1985 memo drafted by Roberts for Fielding objected to the disclosure to Congress of information supporting the president's decision not to seek voluntary agreements for production restraint from copper-producing countries. Roberts asserted that "such documents could be protected from even compelled disclosure by a claim of executive privilege." Roberts appeared concerned that Congress would view the release of information as a precedent and expect disclosure of similar documentation in the future.

"We should not gratuitously release such materials, even on a 'confidential basis,' to Congress. Doing so creates a precedent that will cause problems when we wish not to disclose similar material in the future, and also whets the appetite of Congress for additional protected documents."

Roberts envisioned a future issue for which Congress would want additional information on the administration's process and deliberations to help it in its own efforts on the issue. Interestingly, he assumes that the White House would want to withhold this information from Congress. Similar to the Presidential Records Act, Roberts' comments from twenty years ago have remarkable resonance with recent events. Congress sought additional information from the Bush administration on Vice President Cheney's Energy Task Force after allegations were raised that the energy proposal was almost entirely based upon the wish lists of major energy companies. The administration refused to disclose the information, resulting in an unprecedented suit brought by Congress against the executive branch. The U.S. District Court for DC upheld the administration's use of executive privilege and Congress dropped the case. Private lawsuits from public interest groups did, however, result in the disclosure of thousands of pages from the Energy Task Force.

Conclusion

Roberts' own documents from his time as a White House assistant counsel show the Supreme Court chief justice nominee was neither a supporter of government openness or of executive branch transparency. He advocated against FOIA, the Presidential Records Act, and disclosure to Congress. Indeed, the near-constant struggle to obtain information from our federal government is why the Supreme Court regularly hears cases on granting public access to government information. Given the numerous restrictions put into place in recent years, including questionable homeland security restrictions, expanded use of executive privilege, denials of routine FOIA requests, and repeated stonewalling of the public and Congress on issues ranging from torture to energy policy, if his nomination is confirmed Roberts will undoubtedly hear new cases involving access to government information. What is in doubt is to what extent Roberts holds the same views now that he held as White House counsel. If he has retained the views he expressed during his White House years, surely we can expect his opinions to favor government secrecy over transparency.

Public Being Shut Out of Environmental Right-to-Know Hearings

House Resources Committee Chairman Richard Pombo (R-CA) has established a congressional task force to review and make recommendations on how to 'improve' the National Environmental Policy Act (NEPA). As the task force holds hearings around the country, however, environmentalists and ordinary citizens are finding it difficult to participate.

The task force has held four 'public' hearings this summer, soliciting input primarily from industry interests that view NEPA's environmental and health requirements as burdensome. In several cases, citizens concerned about loosing their voice in environmental decision-making have been prohibited from testifying. The task force intends to hold two more meetings, but has not announced the details on dates and locations of those hearings.

Critics contend that Pombo created the task force to undermine NEPA -- considered by many to be the cornerstone of American environmental law -- and that meeting announcements have been intentionally withheld until the last minute to silence NEPA supporters. Nearly 200 NEPA supporters demonstrated at the first task force hearing held on April 23 in Spokane, Washington. Since then details on hearing locations and times have been difficult to get in advance.

Signed into law in 1969 by President Nixon, NEPA requires the government to determine and disclose the environmental impact of taxpayer-funded projects, consider alternatives, and respond to public comments. NEPA is often cited by environmentalists as having improved American quality of life by requiring, for example, builders to construct highways

away from drinking water sources and nuclear waste shippers to route their toxic cargo away from homes.

Unfortunately, the Bush administration has been chipping away at NEPA on a variety of fronts:

- Attached to a 2005 supplemental appropriations bill (H.R. 1268) was a measure exempting the Department of Homeland Security from obeying any laws (including NEPA) when securing U.S. borders. See: Homeland Security Wins Power to Waive All Law, *OMB Watcher*, February 22, 2005.
- President Bush issued an executive order on May 18, 2001 directing federal agencies to "expedite" energy-related permits, thereby shortchanging environmental reviews required under NEPA.
- The Healthy Forests Initiative (H.R. 1904), approved Dec. 3, 2003, included several waivers of NEPA requirements, on the suspect grounds of wildfire prevention efforts.
- The U.S. Forest Service announced on Dec. 22, 2004, new rules that reduce public participation, and eliminate NEPA requirements for many plans to include environmental impact statements. See: December 22, 2004 Wilderness Society letter.
- President Bush signed Executive Order 13274 in September 2002, exempting transportation projects from certain NEPA requirements. See: Paving Without Public Input, eUpdate on Community Right to Know, Sept. 1, 2004.

The NEPA task force is accepting public comments sent to the following email address: nepataskforce@mail.house.gov.

New Jersey Attorney General's Office Scraps Proposed Secrecy Rule

New Jersey's Office of the Attorney General has announced the state will abandon plans to establish controversial restrictions to its Open Public Records Act (OPRA). The restrictions, proposed in a state rule change, would have required requesters to prove a "need-to-know" before the state would release information about chemical hazards. The added burden on the public could have severely limited access to toxic-chemical inventories and other records widely used to monitor public health and safety, workplace conditions, and environmental quality.

The decision is welcome news to open government advocates who voiced strong opposition to the proposed restrictions since they were announced eight months ago. Earlier this summer, workers and environmentalists protested against the proposal, picketing the office of New Jersey Attorney General Peter Harvey. Protestors maintain that the proposed rules would have amounted to an "information lockout" and assert that safety, not secrecy should be the focus of state efforts.

According to New Jersey's Acting Governor Richard J. Codey, input from public interest groups and media attention around the issue played a major role in the attorney general's decision to reconsider the secrecy rules. Specifically, an August 18 letter from Codey to the New Jersey Work Environment Council (WEC) read, "It is my understanding that based on substantive input received at the July 22 hearing and in written form during the two open public comment periods, the Department of Law and Public Safety has decided not to adopt the rule as proposed."

Rick Engler, executive director of WEC, comments that, "New Jersey open government advocates have convinced the attorney general's office that their proposed rule was far too sweeping and would have endangered worker and community health, as well as jeopardized federal funding for state safety enforcement." WEC is coalition of 70 labor, environmental, and community organizations that advocates for safe, secure jobs and a healthy, sustainable environment.

Roberts Documents Show Troubling Disregard for Nonprofit Rights, Desire Not to 'Alienate' Industry

Recently released documents related to the nomination of John Roberts for chief justice of the Supreme Court reveal concerns he had over a 1983 proposal that would have prohibited recipients of federal grants or contracts from using their own money for lobbying and other forms of advocacy. The nonprofit community congratulated itself for beating back this "defund the left" proposal. The documents, however, suggest that what was heralded as a victory for nonprofits may have had more to do with the potential negative impact of the proposal on defense contactors such as TRW and Boeing.

On January 24, 1983, the Office of Management and Budget (OMB) published a proposal to modify Circular A-122, which presents cost principles for nonprofit federal grantees. The proposed modification would have barred all advocacy by nonprofit organizations that receive federal funds, including advocacy paid for with non-federal funds. This proposal was advocated by the Heritage Foundation's *Mandate for Leadership*, a blueprint for Reagan administration policy that called

for defunding the left by limiting the advocacy voice of nonprofit grantees.

OMB began work on this issue early in Reagan's first term. In April, 1982, OMB's Financial Management Branch privately circulated proposed language to a group of federal officials assembled by OMB. The unpublished proposal tracked the federal tax code; for example, confining "lobbying" to legislative activities. The proposal was one sentence long: "The cost of influencing the introduction, amendment, enactment, defeat, or repeal of any act, bill or resolution by a legislative body is unallowable." The proposal would have applied to state and local governments, and institutions of higher education.

A slightly less extreme version of the proposal was eventually published on January 24, 1983 much to the dismay of the nonprofit community. The proposal would have prohibited federal reimbursement for all costs of "political advocacy," which was sweepingly defined as "attempting to influence a government decision" of any type -- legislative, administrative, or judicial -- at any level of government. It would have applied to any staff, equipment, or facility involved in the slightest amount of political advocacy, even if the advocacy costs were paid with non-federal funds.

Upon release of the OMB proposal, the White House indicated that contractor rules operated by the Department of Defense, the General Services Administration, and NASA would ultimately change to be compatible with the Circular A-122 changes. A 1949 law already restricted federal contractors and grantees from charging the government for costs they incur (either directly or indirectly) to influence legislative action on any matter pending before Congress or a state legislature.

Roberts, then White House associate counsel, wrote a February 3, 1983 memo to White House Counsel Fred Fielding, describing the Circular A-122 proposal. Roberts notes that he has been advised that "the logic of the proposed rules would affect traditional lobbying activities of government contractors." Roberts then gets to the heart of the matter:

"The proposals paint with a much broader brush than is necessary to address the activities of government grantees that have been perceived as most objectionable. It is possible to 'defund the left' without alienating TRW and Boeing, but the proposals, if enacted, could do both."

Roberts also questions the "relevance" of the legal citations used in the OMB proposal.

Meanwhile a firestorm of protest was building over the OMB proposal. Lyn Nofziger, a political advisor to Reagan, wrote a February 17, 1983, memo to Fielding, along with Attorney General Ed Meese, White House Chief of Staff Jim Baker, and Assistant to the President for Political Affairs Ed Rollins, warning of the far-reaching effects of the proposed revision.

Nofziger detailed concerns over the vagueness and burdensome nature of the proposals. "What this is going to do is force companies to keep detailed records on the political activities of their employees. If this is Constitutional, and I doubt very much that it is, instead of getting government off people's backs as we promised to do for lo these many years, you are adding an intolerable burden onto the backs of many, many people." In a handwritten postscript, Nofziger notes that "the opposition is growing not only among the lobbyists but also among the Republicans on the Hill." Nofziger notes rumors that House Minority Leader "Bob Michel is upset" and that "Jack Brooks [the Democratic chair of an oversight committee] is thinking about hearings."

Roberts penned a letter to Nofziger addressing these concerns for Fielding. The letter indicates that OMB will publish a revised proposal.

The revised OMB proposal, released on November 3, 1983, hardly represented an improvement for nonprofits. The result was that the National A-122 Coalition, led by Independent Sector, OMB Watch, and the Alliance for Justice, who joined forces with defense and other government contractors to call for a fix to the proposal. With the strength of the contracting community and support within the White House for companies like TRW and Boeing, a more reasonable rule was published April 27, 1984.

OMB's final rule addresses "lobbying," not "political advocacy." The final rule also employed standard cost allocation principles, so that non-federal funds could be used to pay for lobbying activities. Lobbying is defined as attempts to influence legislation at the state or federal level, attempts to influence the outcomes of elections, or contributing to a political party.

Roberts' work on the Circular A-122 rule revision demonstrates troubling values. For Roberts and others in the White House at the time, only the concerns raised by corporate interests prevented their efforts to silence the nonprofit community in an effort to "defund the left." That the defeat of OMB's reckless proposal to modify Circular A-122 was

brought about by the power and influence of the contracting community, and not recognition of the issue-advocacy rights of the nonprofit sector, should be of concern to all Americans.

Debate Over Grants Rules Heats Up as Groups Lose Funds, Challenge Policy

DKT International, a Washington-based charitable organization, has filed suit against the U.S. government over a grant condition that dictates organizations adopt a specific policy statement, while a second organization has lost federal funding as a result of a suit brought for noncompliance with grants rules for faith-based organizations. Both developments point to important issues in federal grants rules, the first challenging the degree to which government may dictate privately funded speech, the other demonstrating the practical problem of separating privately funded religious content from publicly funded programming.

DKT International has sued the U.S. Agency for International Development (USAID) to block its requirement that grantees adopt an organizational policy opposing prostitution and sex trafficking. DKT has refused to adopt the USAID policy, it explains, because such a policy would hinder its work to reach those most at risk of contracting HIV/AIDS, as well as being an unconstitutional coercion of speech by private individuals. As a result of this refusal, DKT lost a $60,000 grant to market condoms in Vietnam.

DKT manages contraceptive and family planning programs in 11 countries in Africa, Asia and South America. Its annual budget of $50 million serves 10 million couples, and its programs target those most at risk of contracting HIV/AIDS. A statement by DKT President Phillip Harvey lays out DKT's objects to the USAID policy requirement as "further stigmatiz(ing) the very people we are trying to help...thus undermining the relationship of trust and mutual respect required to effectively conduct AIDS-prevention work." Harvey also explains the policy violates the First Amendment rights and integrity of affected organizations.

While the DKT case raises objections to government intrusion into private speech, another case involving a faith-based grantee raises the issue of intrusion of private, religious content into government-funded services. The U.S. Dept. of Health and Human Services (HHS) notified the abstinence-only program Silver Ring Thing (SRT) that it cannot draw down a $75,000 grant until it submits a plan to implement safeguards that ensure its publicly funded programs are free of religious content. Three months ago the American Civil Liberties Union (ACLU) filed a lawsuit against HHS alleging the Boston-based program used federal funds "to promote religious content, instruction and indoctrination." HHS conducted site visits to the program before suspending funding.

Federal regulations require that faith-based organizations provide religious programs at a separate time and /or location from publicly funded programs. It is unclear how or whether SRT will correct the problem, but a plan for doing so is due to HHS on Sept. 6. Joel Oster, a spokesman for the Alliance Defense Fund that represents the group, was quoted as saying, "Basically, they want us to change our accounting system." It would appear, however, that changes in bookkeeping methods would not address the broader issue of religious content in SRT programs.

FBI Documents Reveal Further Spying on Peace, Civil Rights Groups

Joint Terrorism Task Forces conducted surveillance of peace, civil rights and animal rights groups in Michigan and Colorado, according to documents released as part of a suit brought by the American Civil Liberties Union (ACLU) accusing the Federal Bureau of Investigation (FBI) of misuse of anti-terrorism funds. The ACLU is seeking documents for 16 organizations and ten individuals nationwide relating to the case, in which the ACLU alleges the FBI used state task forces to spy on domestic advocacy groups that oppose Bush administration policies.

The ACLU obtained documents through the Freedom of Information Act (FOIA) showing the FBI investigated the Rocky Mountain Peace, Justice Center and the Colorado American Indian Movement, and four groups in Michigan. The investigations were carried out by the state Joint Terrorism Task Force (JTTF), which are meant to combine federal, state and local law enforcement resources to combat terrorism.

The Colorado groups were both investigated after announcing plans for anti-war demonstrations. In a statement issued by the Colorado ACLU, Legal Director Mark Silverstein said, "These documents underscore the ACLU's concern that the JTTF inappropriately regards public protest as potential 'domestic terrorism'... By casting its net so unjustifiably wide, the FBI wastes taxpayers' money and threatens to chill legitimate dissent." The ACLU has asked the city of Denver to

withdraw from the Colorado JTTF.

In Michigan four advocacy groups were listed as targets of investigations described at a January 2002 "Domestic Terrorism Symposium" attended by representatives of the FBI, Michigan State Police Force, including its Criminal Intelligence Unit, the Secret Service, Michigan State University, and Michigan's National Guard and Department of Corrections. Documents obtained from the meeting state its purpose was to keep law enforcement "apprised of the activities of the various groups and individuals within the state of Michigan who are thought to be involved in terrorist activities." In addition to covering white militias and prison gangs, the meeting reported on the following:

- *By Any Means Necessary*, a national organization that defends affirmative action. The documents indicate that the FBI reported that all their activities have been peaceful.
- *East Lansing Animal Rights Movement* and *the Animal Liberation Front* (ALF) and *Earth Liberation Front* (ELF). The report states a student group of 12-15 members had planned a meeting and potluck dinner on the Michigan State University campus.
- *Direct Action*, a peace group that organized a march to protest a 2002 FBI program to interview 37 Lansing-area immigrants from the Middle East as racial profiling.

In a statement announcing release of the documents, ACLU Staff Attorney Ben Wizner said, "This document confirms our fears..." Michigan ACLU Director Kary Moss said, "Labeling political advocacy as 'terrorist activity' is a threat to legitimate dissent which has never been considered a crime in this country. Spying on those who simply disagree with our government's policies is a tremendous waste of police resources."

American League of Lobbyists Proposes Principles to Guide Congressional Reform

Responding to Democratic-sponsored lobbying and ethics reform bills recently introduced in the House and Senate, the American League of Lobbyists (ALL) recently adopted a set of principles to guide lobbying reform. Among its recommendations is an expansion of the definition of lobbying to cover all types of legislative advocacy efforts, include advertising, media campaigns and grassroots efforts that are currently exempt from filing and disclosure requirements forms.

ALL, a membership organization representing more than 700 lobbyists, concluded at its August board meeting that the Lobbying Disclosure Act (LDA) should apply to all legislative activities, including those of "church groups, state and local governments and public relations professionals."

The league began crafting its reform principles in May when Reps. Marty Meehan (D-MA) and Rahm Emanuel (D-IL) introduced legislation to reform the LDA. The Special Interest Lobbying and Ethics Accountability Act of 2005 (H.R. 2412) would increase lobbying disclosure requirements for grassroots groups and coalitions, curb privately funded travel by U.S. Congresspersons, and strengthen enforcement and oversight of current ethics and lobbying disclosure rules by the Senate clerk's office. Sen. Russ Feingold (D-WI) introduced a similar bill in the Senate.

The Lobbying Disclosure Act of 1995 (LDA) governs federal lobbying by professional lobbyists, lobbying firms, and tax-exempt organizations. The LDA requires an organization to register with and file semi-annual reports to the clerk of the House of Representatives detailing its federal lobbying activities if it 1) has at least one employee who qualifies as a lobbyist as defined by the act, and 2) expects to spend $24,500 or more in a six-month period on lobbying. Houses of worship are currently exempt from the LDA.

Nonprofit 501(c)(3) organizations are already required annually to submit extensive filings (in the Form 990) to the Internal Revenue Service (IRS), including disclosing lobbying activities at the federal, state and local level. Currently the LDA permits a nonprofit organization that has chosen to fall under an expenditure test -- a test that identifies how much money an organization may spend on lobbying -- to submit lobbying information through the Form 990, instead of completing the LDA forms. Accordingly, these nonprofits have already been reporting their lobbying activities under a definition of lobbying that differs from that of the LDA.

If the LDA is modified, it is unclear how such modifications will affect nonprofits. Currently the provision to submit the Form 990 continues, but that could change. Nonprofits are being urged to follow developments related to and to better understand reporting rules that may change, with nonprofit advocates fearing new rules may create burdensome reporting requirements and fuzzy definitions. Education and enforcement of rules, which ALL also supports, are critical for

nonprofit accountability, as well as an expansion of the range of voices in the advocacy arena.

Many nonprofits, particularly small groups, do not put substantial resources into federal lobbying. Although nonprofits value public policy participation, most are not involved in advocacy on a consistent basis. For example, of the nonprofits that report carrying out any lobbying activity, roughly three out of five say they lobby infrequently. In general, many nonprofits have a hazy understanding of federal advocacy and lobby laws. A 2002 study, conducted by OMB Watch, The Center for Lobbying in the Public Interest and Tufts University, found that even among those who claim to know the rules, most groups lacked an understanding of the basic limits on lobbying and were unaware even of what constitutes lobbying under IRS rules.

Roberts Showed Prudence in Reg Reform Initiative

Although Supreme Court chief justice nominee John Roberts worked for an administration generally hostile to regulation, documents released by the Reagan Library from his time as White House counsel reveal that he raised considerable objections to at least one of the period's far-reaching regulatory "reform" proposals.

In 1983, while working as Associate Counsel to President Ronald Reagan, Roberts was asked to review a radical regulatory reform bill proposed by then-Rep. Trent Lott (R-MS). The bill, known as the Regulatory Oversight and Control Act of 1983 (H.R. 3939), would have imposed significant burdens on regulatory agencies, mandating the following:

- All regulatory agencies would perform cost-benefit analysis for all new major rules (i.e., those that would impose costs greater than $100 million).
- Agencies would also have to review all existing major rules over a ten year cycle.
- All newly proposed and existing major rules would include sunset provisions, which would force the rule to expire no later than 10 years after it was promulgated.
- Further, major rules would only pass with congressional approval, and Congress would be given an opportunity to disapprove all non-major rules.

Along with these provisions, the legislation would have also codified parts of Reagan's Executive Order 12911, such as the requirement that agencies produce a regulatory agenda. Other provisions would have changed the way rules were judicially reviewed and given Congress greater oversight authority over the rulemaking process. Many of these provisions would have in effect stifled all agency rulemaking. Moreover, many of these ideas are now being proposed once again by conservatives in the House.

Roberts wrote two memos to White House Counsel Fred Fielding responding to the proposed legislation. In the memos, Roberts opposed several specific provisions of the bill and criticized the bill overall for overburdening agencies. Though Roberts did condone the use of cost-benefit analysis in agency rulemaking, he believed that the review of existing rules would overly burden agencies. Roberts also strongly disagreed with the mandate for congressional review of agency rules.

Very little about Roberts' opinions on regulatory reform can be discerned from the first of these documents, an Oct. 7, 1983 memo with recommendations for a White House letter to Lott regarding the bill. Roberts took a prudent, legalistic approach to the legislation, recommending the White House respond with only "broad generalities" until the White House Counsel office had time to evaluate the bill carefully and consult the affected agencies. He did elaborate on one part of the bill, but only because he concluded it was unconstitutional.

Roberts' second memo, from Oct. 17, was more revealing. In response to an OMB request for comments on the bill, Roberts was stronger in his criticism of H.R. 3939 as a handicap to agency rulemaking, objecting to "the burden of mandating agency review of existing regulations." Roberts also criticized the bill for "hobbling agency rulemaking by requiring affirmative Congressional assent to all major rules." Though Roberts did agree with the use of cost-benefit analysis in evaluating new regulations, he believed applying cost-benefit analysis *ex post* would drain agency resources and stymie White House efforts to put forth new regulatory initiatives. In a document drafted by Roberts and signed by Fielding, Roberts acknowledged that "several of the provisions, such as those mandating regulatory analyses of agency rules and requiring agencies to adopt the most cost-effective alternative, appear to be consistent with the Administration's approach to regulatory reform." Roberts added, however, that "other provisions of the bill would seem to impose excessive burdens on the regulatory agencies in a manner that could well impede the achievement of Administration objectives."

Although the Roberts files reveal little about his approach to regulatory policy itself, there is ample additional evidence that Roberts is hostile to the exercise of federal power to fashion solutions to national problems, whether by questioning

the Commerce Clause as a basis for environmental protection or by actively litigating against standards established through Spending Clause programs.

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