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## In This Issue



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## Parts of Patriot Act Ruled Unconstitutional

On Sept. 6, the U.S. District Court for the Southern District of New York ruled that a controversial section of the USA PATRIOT Act is unconstitutional. In *John Doe v. Gonzales*, Judge Victor Morrerro ruled that the National Security Letter (NSL) provisions of the USA PATRIOT Act are in violation of the separation of powers doctrine and the First Amendment's protection of free speech.

The NSL provisions of the USA PATRIOT Act gave the Federal Bureau of Investigation

(FBI) the power to issue NSLs to obtain records from businesses about their customers. The legislation broadened the ability to use NSLs, which previously were restricted to suspected terrorists or spies, to cover any information that is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." Without court approval, the FBI can issue NSL requests that require Internet service providers, telephone companies, credit reporting agencies and banks to disclose information relating to individuals':

- Internet use: websites visited and the e-mail addresses to which and from which e-mails were sent or received
- Telephone use: the times and durations of calls and the numbers to which or from which calls were received or dialed
- Financial transactions: checking and savings account information, credit card transactions, loan information, credit reports and other financial information

The USA PATRIOT Act also expanded approval authority of NSLs beyond senior FBI Headquarters officials to all special agents in charge of the FBI's 56 field offices. There is no policy regarding how long information collected through NSLs can be maintained or under what circumstances information must be disposed. Moreover, the order is mandatory and is accompanied by a gag order that prevents the recipient from disclosing the existence of the NSL with anyone besides legal counsel.

*Doe v. Gonzales* was remanded from the Second Circuit back to the U.S. District Court after the reauthorization of the USA PATRIOT Act changed the NSL provisions to explicitly allow for judicial review and consultation with counsel. The District Court originally found the PATRIOT Act provisions unconstitutional. Morrerro, in ruling for the District Court, affirmed that the revised provisions still violate the Constitution. He said,"The Court finds that several aspects of the revised nondisclosure provision of the NSL statute violates the First Amendment and the principle of separation of powers."

Morrerro cites a report by the Office of the Inspector General (OIG) at the Department of Justice (DOJ), which uncovered widespread abuse of the NSL powers. In March, OMB Watch reported on the OIG's findings:

- 39,000 NSL requests were issued by the FBI in 2003, 56,000 in 2004 and 47,000 in 2005.
- OIG investigation found that the FBI significantly underreported the requests.
- One-fifth of the reviewed files contained unidentified violations of NSL legislation and policy.
- 700 emergency letters ("exigent letters") were used to collect information from three telecommunications companies on over 3,000 telephone numbers in violation of law and policy.

Morrerro stated that the OIG findings support the claim that the NSL provisions are too susceptible to abuse. "[A]s powerful and valuable as it may be as a means of surveillance,

and as crucial the purpose it serves, the NSL nonetheless poses profound concern to our society, not the least of which, as reported by the OIG, is the potential for abuse in its employment," he wrote.

"As this court recognized, there must be real, meaningful judicial checks on the exercise of executive power," said Melissa Goodman, ACLU staff attorney who was counsel on the case. "Without oversight, there is nothing to stop the government from engaging in broad fishing expeditions, or targeting people for the wrong reasons, and then gagging Americans from ever speaking out against potential abuses of this intrusive surveillance power."

The court issued a 90-day stay on the order to enjoin the FBI from issuing NSLs. This will allow the government to appeal the decision to the U.S. Court of Appeals for the Second Circuit, which is the government is expected to do.

## Wiretapping Made Simple

On Aug. 6, President Bush signed the Protect America Act of 2007 (PAA), granting the government the authority to wiretap anyone, including U.S. citizens, without any court approval as long as the "target" of the surveillance is located outside the U.S. The legislation will expire in six months, but members of Congress and concerned public interest groups are not waiting for the sunsets. They are seeking immediate revisions to address the invasion of privacy and erosion of civil liberties contained in the act.

The PAA amended the Foreign Intelligence Surveillance Act (FISA) and permits the Attorney General and Director of National Intelligence (DNI) widespread wiretap authority without court approval, including such examples as:

- An immigration group calling a foreign country to help a client;
- A church calling Kenya to arrange for members to volunteer at an orphanage; or
- An association holding its convention in Toronto that calls a hotel to make arrangements.

This expansion of government authority to collect information without judicial oversight was fast-tracked into law without much congressional oversight. Only five days separated the introduction of the PAA bill in Congress on Aug. 1 and the president's signature. No committee hearings, no reports and no serious debate of the issues were conducted during those five days. Many groups contend that the impacts on personal privacy and people's right to due process were never sufficiently considered by Congress because of its haste to pass the legislation.

House Speaker Nancy Pelosi (D-CA) and Senate Majority Leader Harry Reid (D-NV) have agreed to ask Congress to take a second look at the PAA and FISA right away and consider important privacy protections that were not in the bill. Pelosi has issued a letter

to Judiciary Committee Chairman John Conyers, Jr. (D-MI) and Permanent Select Committee on Intelligence Chairman Silvestre Reyes (D-TX) calling for legislation to re-amend FISA as soon as possible.

The letter states, "Many provisions of this legislation are unacceptable, and, although the bill has a six month sunset clause, I do not believe the American people will want to wait that long before corrective action is taken."

Conyers responded with a Sept. 5 hearing to review the PAA. Hearing witnesses expressed unease with the White House for not explaining to the public the constitutional basis for the changes. Democrats have clearly made reconsidering the FISA amendments a top priority.

## EPA's Second Round of 9/11 Testing Falls Short

According to a Sept. 5 Government Accountability Office (GAO) report, the U.S. Environmental Protection Agency's (EPA) second program to test and clean building interiors contaminated by toxins from the World Trade Center (WTC) collapse was a virtual failure. The program's problems stemmed from EPA's inadequate public notification and refusal to listen to its own science experts. The GAO report also indicated that EPA was reluctant to accept cleanup responsibility according to expert recommendations. The result was a limited program grossly underutilized by the public.

The 2001 WTC attacks resulted in toxic dust clouds spread throughout New York City. Though EPA tested the outside air for public health concerns, it initially deferred responsibility for indoor air concerns to New York agencies. The Department of Homeland Security has since clarified that EPA has lead responsibility for building cleanup when contamination is related to terrorism. EPA then began the first building testing and cleanup program in September 2002 for individual apartments, upon tenant request, in lower Manhattan.

After a 2003 Inspector General (IG) review critical of the first program, EPA began a second program in December 2006, based on the recommendations of an expert panel, to address the IG concerns. The resulting program expanded the number of chemicals considered and allowed for testing dust as well as air but, disregarding panel recommendations, remained limited to independently participating apartments in the small area of lower Manhattan. The program also did not test outside of normally accessible areas, such as behind appliances and in heating systems. Cleaning an apartment without addressing recontamination risks from other potentially contaminated apartments in the same building is seen as short-sighted and counterproductive, ignoring the likelihood that other apartments are health risks to their tenants and could undo the progress made in the cleaned areas.

Though there are approximately 20,000 apartments in lower Manhattan, only 272

residents participated in the second program. This low participation rate may be more understandable when considering that EPA used results from the first program to insinuate that there was little or no risk of WTC dust contamination in residences. What EPA *didn't* explain was that 80 percent of the results finding no asbestos risks were from after cleaning, not before. Apartments with air so dirty the filters clogged were disregarded, and only asbestos levels were tested, which gives no indication of the potential health risks from other toxins.

EPA has also been reactive instead of preventative when considering geographic boundaries for the program. Though obvious that buildings outside the small designated area of lower Manhattan were polluted, EPA used the difficulty in confirming the origins of toxic dust that might be found as the reason for not expanding the program above Canal Street or into Brooklyn. Avoiding areas known to have a high probability of WTC contamination because the exact science for confirmation does not exist is more conservative than the expert panel recommended.

EPA has cited resource constraints for the second program limitations. However, EPA never assessed the program needs or requested additional funds, considering itself bound to $7 million left over from the first program, which used almost $38 million.

Beyond ignoring the majority of the expert panel recommendations in the second program, the GAO report found that EPA's management of the panel and lack of transparency actually hindered the panel's effectiveness. EPA did not regard the panel as an independent body, and instead, treated them more as personal advisors. Rather than developing panel consensus recommendations, EPA considered members' individual suggestions separately. Thirteen of the eighteen members considered this process "inappropriate." Additionally, panel meetings and conversations were not adequately documented, which resulted in the reported loss of recommendations.

As a result, none of the members considered the panel successful in meeting its established goals:

1. to develop the second program;
2. to identify unmet public health needs;
3. to identify remaining risks using exposure and health surveillance information; and
4. to determine steps to further minimize risk.

Some members were so unsatisfied with the second program that they discouraged public participation.

## OMB Watch Releases *An Attack on Cancer Research*

OMB Watch released a report in late August that further documents industry's attempt

to restrict access to health and safety information produced by the National Toxicology Program (NTP). The report comes just as Congress is investigating allegations of mismanagement, industry influence, and suppression of whistleblowers at the National Institute of Environmental Health Sciences and the NTP.

*An Attack on Cancer Research: Industry's Obstruction of the National Toxicology Program* illustrates how, over the past five years, industry has repeatedly misused the Data Quality Act (DQA) to suppress or delay important cancer-related information. Among other duties, NTP publishes the biennial Report on Carcinogens (RoC), which is used by local, state and federal authorities to set environmental policies, explore regulations on dangerous substances and provide for preventative health measures.

DQA has been used by the chemical and manufacturing industry to obstruct NTP's research on cancer-causing agents. DQA is a two-paragraph provision that slipped through Congress in late 2000 without debate and has grown into a mountain of controversy, pitting industry against the public interest. It has been used to lodge frivolous information quality challenges, which slow regulatory action and pressure agencies to remove or revise information.

"We discovered that industry has tried to use DQA to challenge every aspect of the NTP scientific review and release process," said Clayton Northouse, Information Policy Analyst at OMB Watch and lead author of the report. "Special interest associations have challenged meetings, press releases, notices to study specific chemicals and other documents that are clearly beyond the parameters of DQA. Instead of seeking to improve the quality of data, the intent of these challenges seems to be to keep scientific information out of the hands of health professionals and government decision-makers."

The report documents how the latest RoC has been delayed for more than one year due to numerous frivolous DQA challenges. The industry challenges, though, do more than impede the flow of critical information to those who need it. The complaints also use up valuable staff time in a program with a small number of employees. This is time that should instead be used to research potential cancer-causing agents and safeguard public health. The report documents how government agencies and public health officials have been denied access to the latest information on the most dangerous toxic chemicals.

OMB Watch concludes the report with recommendations for NTP and other government programs and agencies regarding the implementation of DQA. In particular, the report recommends that government agencies implement the following procedures:

- Dismiss DQA challenges covered by existing information quality procedures.
- Only consider challenges of substantive information.
- Distinguish between fact and policy.
- Dismiss challenges that would result in significant delays in agency action.

The goal of the recommendations, Northouse said, is to "improve the quality of

government data without diverting resources away from protecting the health and safety of the American public."

## Federal Agencies Knew of Diacetyl Dangers and Kept Silent

Federal regulatory agencies have known for years the dangers that diacetyl exposure creates among workers in factories where bags of microwave popcorn are tested. The only agency to have taken any action, the U.S. Environmental Protection Agency (EPA), has kept its study of the chemical's impact on consumers secret except for sharing it with the popcorn industry. Now the first case of potential consumer illness from exposure to diacetyl has been documented.

Diacetyl is a flavoring added to many types of food, including artificial butter flavoring in microwave popcorn, and is in widespread use. The Food and Drug Administration (FDA) declared it safe for consumption, but the Project on Scientific Knowledge and Public Policy (SKAPP) at George Washington University's School of Public Health reports on its website that the

> National Institute for Occupational Safety and Health (NIOSH) conducted several studies that confirmed the link between occupational exposure to artificial butter flavoring and lung diseases. In 2000, they issued recommendations to a Missouri microwave popcorn plant about protecting workers from this hazard, and in 2003, they sent an alert recommending safeguards to 4,000 businesses that might use or make butter flavoring.

According to a *Seattle Post-Intelligencer* article, there have been "scores of jury decisions and settlements awarding millions of dollars to workers who sued after having their lungs destroyed" by diacetyl exposure. These workers suffer from the debilitating lung disease bronchiolitis obliterans, or "popcorn workers lung."

The Occupational Safety and Health Administration (OSHA) has the authority to regulate workplace safety in this area but has not. On Sept. 7, a coalition of unions and public health experts wrote a letter to Secretary of Labor Elaine Chao urging her to push OSHA to issue an Emergency Temporary Standard for diacetyl and then follow with a regulation. It was the second letter the group sent to Chao, the first sent over a year ago. OSHA failed to take any action after the first letter.

The second letter urging OSHA to address the issue was prompted in part by a new revelation that "popcorn lung" had been discovered in a non-factory worker, a consumer who ate microwave popcorn at least twice a day, according to a Sept. 6 *Chicago Tribune* article. Dr. Cecile Rose, a lung specialist at the National Jewish Medical and Research Center in Denver, treated the patient and tested the levels of diacetyl fumes in his home while microwaving popcorn. "Peak levels of the fumes were similar to those measured in

factories," the *Tribune* reported.

Rose wrote a letter in July to EPA, FDA, OSHA and the Centers for Disease Control and Prevention (CDC) about her patient and outlined the medical symptoms he experienced and their consistency with factory workers' clinical symptoms. SKAPP had petitioned FDA in September 2006 to remove diacetyl's "generally regarded as safe" status. Thus FDA and OSHA, the two agencies responsible for protecting consumers and workers, respectively, already knew the dangers from diacetyl exposure, and NIOSH (part of CDC) had confirmed the link between the lung disease and exposure.

The only agency that addressed the diacetyl issue was EPA, which conducts indoor air quality research. According to the *Post-Intelligencer* article, EPA began studying whether consumers were at risk in 2003 and finished its study last year. It still has not released the report, but it has circulated it to the popcorn industry for its review. The article states that George Gray, the head of EPA's Office of Research and Development, shared the report with the industry to assure it that none of industries' confidential information would be released to the public through the report. Gray also said the information could not be released publicly because it might prevent his scientists from getting their work published in peer reviewed journals.

The EPA denied a Freedom of Information Act request last fall from The Associated Press (AP) for the report, arguing it was a draft still under review. The agency has not yet answered an AP appeal of that rejection, according to a Sept. 5 article in the *Washington Post*. The Office of Management and Budget's 2004 Peer Review Bulletin allows agencies to exempt "time-sensitive medical, health, and safety determinations" from the peer review requirements. EPA has the discretion under the peer review guidelines, therefore, to release the information if it sees a public health benefit.

The *Post-Intelligencer* quotes Dr. David Michaels of SKAPP, and one of the signatories of the letter to Chao, as saying, "EPA cannot be permitted to play these games with matters that are important to public health. This is just questionable science at its worst."

Meanwhile, manufacturers of microwave popcorn have now begun to voluntarily remove diacetyl from their products, although they had the results of the EPA study in late 2005, according to the *Washington Post* story. ConAgra Foods, Inc., General Mills, Inc., the American Popcorn Company and Weaver Popcorn have started to phase out or replace the flavoring additive.

## Bush's Anti-Regulatory Ideology under Increasing Scrutiny

The public and the media are paying more attention to and showing increasing frustration with the anti-regulatory ideology of President George W. Bush. A new report by the Center for American Progress traces several recent failures of the federal

government to the anti-government views of Bush and senior administration officials. Separately, increasing concern over the federal product safety net is causing many to question Bush's seriousness about using government resources to protect American consumers.

On Aug. 23, the Center for American Progress, a progressive think tank founded by former Clinton advisor John Podesta, released a report authored by Reece Rushing titled *Safeguarding the American People: The Progressive Vision Versus the Bush Record*.

The report links Bush's anti-regulatory ideology to bad government practices. The report states, "This ideology sees government principally as an instrument for advancing the interests of the corporate sector and by extension political allies who support this agenda." It goes on to call the ideology "indifferent or even hostile to the common good."

One questionable Bush practice is "cronyism." The report chronicles Bush appointees who, prior to government service, worked as industry lobbyists or were financial supporters of Bush's campaigns. The report finds these appointees have frequently failed their responsibility to protect the American people. The appointees include Michael Brown, the former director of the Federal Emergency Management Agency and Bush campaign contributor, who was blamed for the government's inadequate response to Hurricane Katrina, and Richard Stickler, the head of the Mine Safety and Health Administration and former coal industry executive, who has failed to implement congressionally mandated mine safety reforms in the wake of three mine disasters in 2006.

Other questionable practices include suppressing scientific research and findings, reducing monitoring of environmental threats and other problems, weakening and eliminating public protections already in effect, failing to enforce federal law, and restricting public access to information.

These practices provide a common link among a host of recent failures of the federal government. Food-borne illness outbreaks, the 2003 blackout of large sections of the Northeast, the Minneapolis bridge collapse, increasing identity theft, and a host of other problems can be traced back to the anti-regulatory philosophy of the Bush administration, according to the report. It identifies commonalities such as Bush's failure to devote adequate resources to federal agencies and response plans and his refusal to recognize the need for government action to protect the public from growing threats and worsening problems.

The report also describes a progressive vision for safeguarding the public. This vision embraces the idea of a positive government and actively seeks to expand information collection and public access and hold corporations accountable for violations of federal law.

The recent spate of controversies involving dangerous Chinese imports can also be linked

to Bush's anti-regulatory ideology. The Consumer Product Safety Commission (CPSC) is the federal agency responsible for ensuring product safety and for recalling products found to be dangerous. Critics have assailed CPSC for recent product safety problems including the lead paint contamination of Thomas and Friends train toys and Barbie dolls. The Toy Industry Association, an organization that lobbies on behalf of toy makers, has asked the CPSC to adopt a mandatory testing system to help ensure toys are safe.

However, many are beginning to realize the broader problems at CPSC which reflect Bush's anti-regulatory views. Multiple media reports and opinion columns and public interest groups such as Consumers Union, the nonprofit publisher of *Consumer Reports*, are increasingly recognizing the need for better funding and a change in CPSC's culture.

Throughout his presidency, Bush has slashed the CPSC budget and staffing. Bush has failed to propose increases in CPSC's funding to match inflation. Bush's proposed FY 2008 budget calls for 401 full-time employees, the lowest staffing level ever at CPSC.

A recent *New York Times* investigation by reporter Eric Lipton described the ways in which these budget cuts manifest themselves. According to the investigation, CPSC "investigates only 10 percent to 15 percent of the reported injuries or deaths linked to consumer goods." The investigation also found compliance investigations "dropped 45 percent from 2003 to 2006."

The agency's culture, which promotes voluntary compliance with product safety rules and negotiated recalls of dangerous products, may also be to blame. The agency has been relatively toothless in enforcing federal law in the face of industry opposition. In one case, Robert Eckert, the chairman of Mattel, revealed to the *Wall Street Journal* that the toy maker often conducts investigations of hazardous products on its own, and outside of the public view, before notifying CPSC. With rare exception, manufacturers are to notify CPSC within 24 hours if they believe a product to even be potentially hazardous. Eckert called the law and CPSC's enforcement unreasonable, according the article.

On Sept. 6, Consumers Union wrote to the Senate expressing its displeasure with Mattel's disregard for the law and urging Congress to take oversight action. On Sept. 12, a subcommittee of the Senate Appropriations Committee will hold a hearing on CPSC and toy safety. Eckert is scheduled to testify.

However, with senior administration officials believing government should not play a role in protecting the public, problems are likely to continue through the remainder of Bush's term. As a Sept. 6 *New York Times* editorial concluded, "The Bush administration apparently considers regulatory weakness a virtue."

# It's Industry vs. Consumers and Health Specialists in National Ozone Hearings

Recent field hearings in five major U.S. cities highlighted the debate over the need to write a more stringent air quality standard for ozone. The U.S. Environmental Protection Agency (EPA) is under court order to issue an updated standard by March 2008. Industry representatives used two familiar arguments to urge EPA to leave the existing ten-year old ozone standard untouched, while public health experts and citizens argued the health impacts under the current standard are potentially devastating.

On June 21, EPA announced a proposed rule revising the national standard for ground-level ozone. EPA proposed a range, 0.070 parts per million (ppm) to 0.075 ppm, from which it will choose a final standard. The current standard is 0.08 ppm. EPA Administrator Stephen Johnson called the current standard inadequate and recognizes the need for a more stringent regulation. However, Johnson will not endorse a standard within the 0.060-0.070 range proposed by the Clean Air Scientific Advisory Committee (CASAC), EPA's premier scientific panel on air quality issues. Other EPA internal reports call for a standard no less than 0.070.

The EPA field hearings were designed to collect comments on what the appropriate standard should be. Two hearings were held Aug. 30 in Philadelphia and Los Angeles. Three more were held on Sept. 5 in Chicago, Atlanta and Houston.

The Clean Air Act instructs EPA to put public safety above economic factors in setting its standard for ozone. The law orders EPA to protect public health within "an adequate margin of safety" (42 U.S.C. 7408, Sec. 109(b)(1)) regardless of economic costs or benefits. Nevertheless, industry representatives from organizations like the California Manufacturers & Technology Association and the National Association of Manufacturers consistently argued that the costs of implementing a more stringent standard would harm the economy, according to articles in the *Los Angeles Times* and the *Philadelphia Inquirer*.

At the Houston hearing, some industry representatives questioned the connection between asthma and ground-level ozone exposure, according to an article in the *Houston Chronicle*. "We do not believe that the current scientific evidence clearly supports the lowering of the ozone standard at this time," said David DiMarcello of the BASF Corporation. "The EPA's existing ozone standard ... will continue to provide ample protection for public health," the paper reported.

This issue of questioning the science behind regulation was the other argument industry consistently used at the hearings. A BNA story ($) on the Chicago hearing, for example, reported the statement of the Engine Manufacturers Association (EMA):

> "The science of ozone health effects does not provide sufficient evidence to justify tightening of the ozone standard from its current level," said Joseph Suchecki,

director of public affairs for the EMA. "EMA believes it is more important for the EPA and states to concentrate their efforts on achieving compliance with the current ozone standard rather than to adopt a stricter standard based on questionable scientific evidence."

Scientists, local air quality officials, local elected officials and citizens suffering from asthma and respiratory problems testified for the strong need for a stricter ozone standard. Critics maligned EPA for proposing too weak a standard. An American Lung Association (ALA) environmental health expert was quoted in a BNA story on the Philadelphia hearing as arguing that EPA's proposal "only grudgingly touches the review panel's weakest recommendation, and even worse, contemplates retaining the current inadequate standard." And he argued that there is a "truly immense body of evidence" establishing the adverse impacts of ozone pollution, especially on the most vulnerable populations such as children, the elderly and those with existing respiratory problems.

To counter industry arguments about the costs of a stricter standard, some public health advocates had their own cost-benefit arguments. The *LA Times* story reported that Linda Weiner, director of air advocacy for the ALA in California, argued, "The human toll from air pollution is huge in terms of illness, emergency room visits, asthma attacks and even premature death....Total benefits of EPA's air pollution regulations outweigh the costs by as much as 40 to 1."

Many environmental and health advocates urged EPA to adopt a standard of 0.060 ppm, the strictest option within CASAC's recommended range. BNA reported that at the Chicago hearing, Joel Africk, president of the Respiratory Health Association of Metropolitan Chicago, testified that a majority of the nation's public health organizations back the 0.060 standard. The article quoted Africk as saying. "We urge the EPA to listen to its own advisers and independent experts who recommended a tighter ozone health standard than the agency proposes ... Public health professionals and organizations such as the American Thoracic Society, the American Academy of Pediatrics, the American Public Health Association, the Asthma and Allergy Foundation of America, and the Respiratory Health Association of Metropolitan Chicago all endorse a much tighter standard."

## New Small Business Program Will Influence Agency Regulatory Reviews

The Small Business Administration's (SBA) Office of Advocacy has launched a new program that may expand SBA's influence into agency regulatory activity. The Office of Advocacy acts as a liaison between the business community and the federal government, particularly the executive branch.

The new program is an attempt by the Office of Advocacy to influence agency reviews of regulations already in effect. Agencies conduct these reviews for a variety of reasons.

Section 610 of the Regulatory Flexibility Act (RFA) requires agencies to review every ten years rules having a "significant economic impact" on small businesses or other small entities. Some agencies have internal policies for how frequently they review rules, and others conduct reviews on an *ad hoc* basis.

The new program, the Regulatory Review and Reform Initiative, or "R3," includes uniform recommendations for the conduct of agency reviews. More significantly, the Office of Advocacy will solicit the business community for recommendations on which existing rules agencies should review and transmit those recommendations to the appropriate agency.

The Office of Advocacy cites a new report by the Government Accountability Office (GAO) as the major reason for the inception of the new program. In the report, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO examined the reviews of nine regulatory agencies completed from 2001-2006.

GAO found the nine agencies reviewed at least 1,300 regulations. Of the 1,300, the majority were conducted at the discretion of agencies, not as a result of statutory requirements such as Section 610 of the RFA.

The report finds room for improvement in the conduct of agency reviews. The report urges agencies to employ uniform standards for conducting its reviews and to better document and inform the public of results. GAO also found agencies often conduct reviews at their own discretion more frequently than the ten-year Section 610 reviews. These discretionary reviews tend to be more valuable to the agency, according to the report.

The first part of the Office of Advocacy program, recommendations for best practices, addresses one of the problems GAO identified in its report — the need for uniform conduct and improved documentation in reviews. However, the best practices guide only discusses practices related to the conduct of Section 610 reviews. It ignores the conduct of discretionary reviews, which are more numerous and more helpful to agencies, as mentioned above.

The second part of the program, soliciting recommendations for rules agencies should review, is not consistent with GAO's findings. Agencies are able to select rules as they see fit and often do so in order to "address emerging issues." Agencies are not hindered in selecting rules to review but by a lack of resources to conduct reviews for the many federal regulations in effect, according to GAO.

The practice of soliciting recommendations for rules agencies should review is not new. Each year from 2001-2004, the Office of Information and Regulatory Affairs (OIRA), an office within the White House Office of Management and Budget, asked for suggestions from the public on specific regulations that could be rescinded or changed to increase

benefits to the public. Industry groups and conservative think tanks made many of the suggestions. OIRA tended to give those suggestions more priority than those made by other interest groups or individual citizens. Subsequently, many dubbed the White House effort an "anti-regulatory hit list."

That program was successful in prompting agency reviews. According to the GAO report, for the rules studied, the OIRA initiative accounted for up to 20 percent of reviews, and up to 74 percent of reviews conducted by the U.S. Environmental Protection Agency.

The White House may have been involved in the development of the new Office of Advocacy Program, and may continue to be involved as it progresses. The Bush White House has encouraged SBA to be aggressive in its regulatory advocacy on behalf of small businesses. In 2002, OIRA and the Office of Advocacy signed a memorandum of understanding under which both offices pledged to work together in order to "achieve a reduction in unnecessary regulatory burden for small entities." Although the memorandum expired in 2005, nothing precludes the offices from continuing to work together.

The Office of Advocacy's Chief Counsel Thomas Sullivan said in a statement, "The Office of Management and Budget has committed to work cooperatively with Advocacy to make R3 a success."

The Office of Advocacy also consistently cites the cost of federal regulations as another need for engaging in regulatory reform. Sullivan claims federal regulations imposed costs of $1.1 trillion on the economy in 2004. The $1.1 trillion claim comes from a study the Office of Advocacy commissioned and released in 2005.

The study, written by anti-regulatory academic W. Mark Crain of Lafayette College in Pennsylvania, is deeply flawed. The study relies on government predictions of what regulations will cost before they take effect, rather than actual realized costs to the economy. John Graham, former OIRA administrator under Bush, has criticized the study and pointed out that it is merely an updated aggregation of other studies, some of which date back to the 1970s. The study also ignores the benefits of regulations. Many of these benefits, such as human lives or environmental preservation, cannot be adequately expressed in monetary terms.

## Nussle Approved as Budget Head, Faces Task of Completing FY 2008 Budget

In the Senate's first vote following the August recess, former Rep. Jim Nussle (R-IA) was confirmed as director of the Office and Management and Budget (OMB), 69-24, with all Republican senators voting in favor of Nussle and the Democrats split down the middle. Notably, Senate Majority Leader Harry Reid (D-NV), Appropriations Committee Chair Robert Byrd (D-WV), and Senate Budget Committee Chair Kent Conrad (D-ND) voted

against the nominee. Nussle's approval sets up what is expected to be a bitter struggle to complete work on the FY 2008 budget during the fall.

The struggle ahead centers on how much to spend in the FY 2008 appropriations and other bills. The Senate has a mere fourteen legislative days until the end of the 2007 fiscal year on Sept. 30 to pass ten of the twelve FY 2008 spending bills and then conference all twelve bills with the House. This is simply not enough time to finish the bills individually, particularly when the executive and legislative branches seem deadlocked over spending levels. Congress' budget resolution calls for $22 billion more in overall discretionary spending than the $933 billion the president has requested, drawing veto threats from President Bush. Additional struggles on fiscal policy are expected over extending farm subsidies, reauthorization of the State Children's Health Insurance Program, and renewing more than 40 expiring tax cuts.

While there is a remote possibility Congress will pass all the appropriations bills before the current fiscal year ends, veto threats issued against nine of the bills put timely presidential approval in jeopardy. Congress and the president have held steadfastly to their positions, but private negotiations could yield a compromise. If a compromise cannot be achieved in the coming weeks, a continuing resolution or a multi-bill omnibus measure is almost assured.

A number of advocacy groups came out against Nussle — including OMB Watch — taking the opportunity of his nomination to express hope the White House will adopt a less ideological, more flexible approach to budget-making with a Congress now controlled by Democrats. The OMB Watch statement also drew attention to OMB's regulatory responsibilities, encouraging Nussle to "lead an OMB respectful of agencies' scientific and technical expertise and to focus on providing adequate resources rather than additional analytical burdens."

Despite Nussle's reputation as a fierce partisan during his years as chair of the House Budget Committee and his unwillingness during his committee confirmation hearings in July to specify a strategy for breaking the FY 2008 budget deadlock, little of the Senate floor debate on his nomination focused on him specifically. Conrad said though Nussle is "clearly qualified [my vote] was a question of what policy we pursue in the future." Conrad's floor vote was a surprise in view of his Budget Committee vote in favor of Nussle. Reid added, "Voting against confirming Congressman Jim Nussle as OMB Director will send a clear signal of my opposition to this [administration's] reckless fiscal policy."

Some of the most vociferous opposition to Nussle came from freshman Sen. Bernie Sanders (I-VT), who called Nussle a symbol of everything wrong with the president's domestic policies:

> Personally, I like Jim Nussle... My strong opposition to Jim Nussle becoming Director of OMB has much less to do with Mr. Nussle and much more to do with

> the current failed trickle-down economic policies of the Bush administration.... President Bush desperately needs a budget director ... who is willing to compromise with a Democratic Congress for the benefit of all of the American people, not just large corporations, and the wealthy few. Unfortunately, I am afraid Jim Nussle is not that person.

A more restrained but equally solemn assessment was issued from the Senate's other independent member, Homeland Security and Governmental Affairs Chair Joseph Lieberman (CT), who said although he would vote in favor of Nussle:

> I do so with the understanding that Congressman Nussle will have to exercise the full measure of his diplomatic skills at both ends of Pennsylvania Avenue to help bring the FY 2008 budget and appropriations process to a satisfactory conclusion.

It remains to be seen whether Nussle, and the rest of the Bush administration, will be able to find compromise with Congress on the FY 2008 spending bills before the fiscal year begins on Oct. 1.

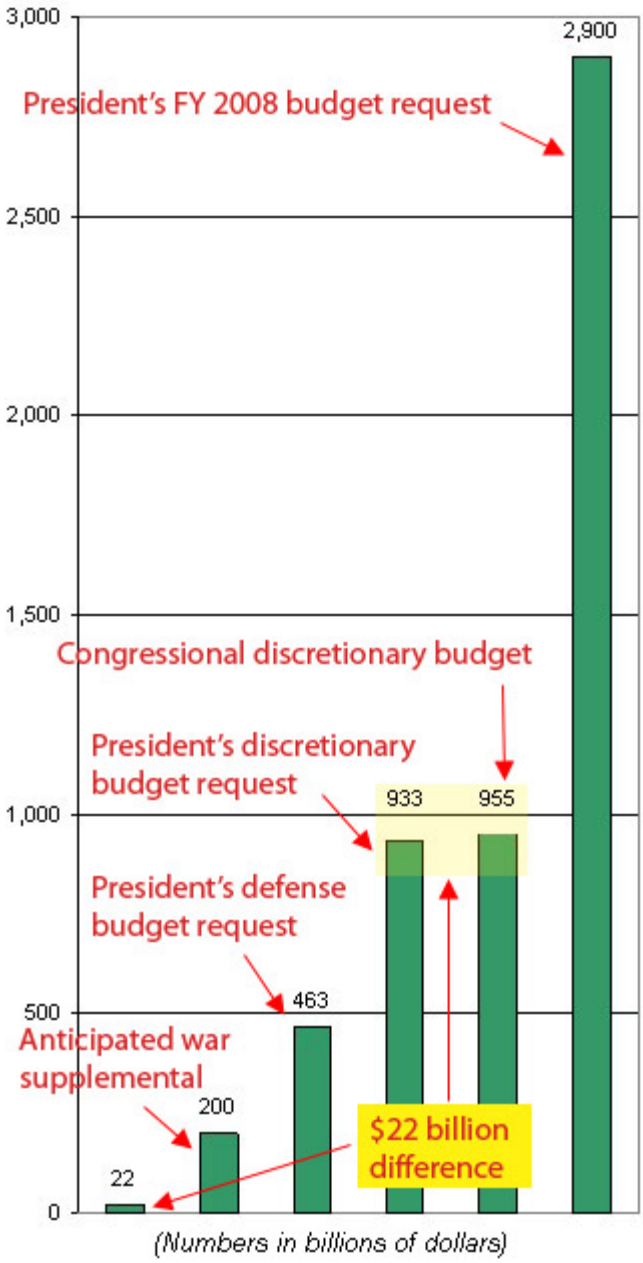
## Continuing Resolution a Virtual Certainty; Congress Continues to Work for Appropriations Passage

A plethora of veto threats and the Senate's dithering over spending legislation have combined to all but guarantee the necessity of enacting a continuing resolution before the start of the new fiscal year on Oct. 1. While Senate Majority Leader Harry Reid (D-NV) has indicated that a continuing resolution will likely fund government operations for weeks, not months, time is not their only obstacle. Although it remains unclear how long it will take the Senate to complete its appropriations work, congressional leaders will also have to formulate a strategy to overcome President Bush's veto threats to see their spending priorities ultimately enacted.

The House completed all its appropriations work on Aug. 5 when it passed its version of the Defense Appropriations bill. Across the Capitol, the Senate had passed only one of its spending bills (Homeland Security) when Congress adjourned for the month-long August recess. Upon returning from summer vacation, however, the Senate immediately passed both Military Construction-Veterans Affairs (92-1) and State-Foreign Operations (81-12) by veto-proof margins. However, of all three Senate-passed measures, none have been handed off to a conference committee for final negotiations with the House. While Senate floor action on Transportation-HUD is expected before the current fiscal year ends on Sept. 30, that will likely be the last spending bill passed by the Senate before the start of FY 2008.

Bush is also doing his part to slow down enactment of the spending bills. He has threatened to veto nine of the House-passed bills, citing Congress's failure to

"demonstrate a path to live within the President's top line" of $933 billion in total discretionary spending for seven of the bills. Although it is unlikely Congress will send to the president a veto-threatened spending bill before the end of the month, any veto of appropriations bills will delay enactment of new funding legislation for a significant length of time into the new fiscal year.




Showing no indication that he intends to negotiate with Congress, the president's position on the FY 2008 appropriations bills is little more than executive feet stomping. His nominal rationale for adhering to a "top line" of $933 billion is a desire to avoid "irresponsible and excessive level of spending." Representing a little over two percent of his discretionary budget, and less than one percent of his total budget, the $22 billion difference between Congress's and the president's budgets is vanishingly small — hardly worthy of risking government shutdown and certainly not worth the attention it has garnered this year during budget debates in Washington. Despite its size in relation to the rest of the budget, the extra discretionary money would go a long way to reverse underinvestment in communities around the country.

In addition, the reality of President Bush's fiscal record belies his claims of fiscal responsibility. Since taking office, the president has refused to veto a single spending bill even as many of his irresponsible policies caused the national debt to explode by more than $3 trillion. Bush may be serious about vetoing spending bills over insignificant differences, but he is hardly serious about fiscal responsibility.

Presented with Bush's obdurate veto threats, Congress may seek to put the president in the politically awkward situation of vetoing massively popular spending bills. Because of broad bipartisan support shown for Military Construction-VA and Homeland Security

appropriations bills, the Democratic Congress could attach other domestic spending bills with less Republican support to them in order to garner veto-resistant support. This will complicate the president's decision to veto combined spending bills as Congress may be able to override his veto. Congress's strong, bipartisan support of defense and homeland security spending may not only lead to a veto override, but rejection of must-pass spending may cost Bush a measure of his rapidly dwindling political capital.

As the fiscal year draws to a close, the Senate is inching toward completing its appropriations duties, but is still far behind schedule. It remains highly unlikely that its saunter will turn into a sprint to pass the nine remaining spending bills, virtually guaranteeing the enactment of a continuing resolution to fund the beginning of FY 2008. But even if the Senate finishes its work and both chambers manage to complete conference negotiations before Oct. 1, Bush's veto threats present significant hurdles for timely enactment of next year's spending legislation.

## Carried Interest Issue Gets Full Hearing(s) in Congress

On Sept. 6, the carried interest tax loophole took center stage, featuring a four-panel, 20-witness marathon hearing in the House Ways and Means Committee and the third hearing this year on the topic in the Senate Finance Committee. The day before the hearings, over 300 national, state and local nonprofit organizations sent a letter to Congress urging it to close the loophole in order to bring equity to the tax code.

By day's end, deep divisions had emerged among private equity and other fund managers, with an increasing number now openly supporting H.R. 2834, a bill introduced by Rep. Sander Levin ☼ (D-MI). The Levin bill would require fund managers to pay tax on their partnerships' carried interest income at ordinary rates of up to 35 percent, rather than the 15 percent capital gains rate they now pay. During the hearing, the Levin bill appeared to gain traction among committee members, particularly if it is paired with an effort to reform or patch the Alternative Minimum Tax.

Indeed, many of the arguments offered at the hearing by beneficiaries of the special carried interest tax break were countered by other such beneficiaries. In the words of one, William D. Stanfill, a founding partner of TrailHead Ventures, "I don't think it's fair for those teachers and firefighters to subsidize special tax breaks for me and other venture capitalists ... or for private equity and hedge fund managers."

Those testifying in defense of the preferential tax treatment warned of dire economic consequences for the United States, should the loophole be closed. Bruce E. Rosenblum, managing director of the Carlyle Group and chairman of an industry lobbying organization, said, "There is no inequity in the current taxation of capital gains attributable to carried interest. Fairness requires that the tax code not single out certain investors for less favorable treatment." Another, Jonathan Silver, managing director of Core Capital Partners, told the committee that the Levin bill would hurt the nation's

global competitiveness by raising taxes on investors and "fundamentally change the venture capital business."

But others in the business pointed out that the Levin bill has no impact on investors as such, only on fund managers, and that fund managers had indeed been singled out — and given a special tax subsidy enjoyed by no other profession. Leo Hindery Jr., managing partner at a private equity fund, InterMedia Partners, disputed Rosenblum and Silver's claims, telling the committee that the industry had taken advantage of a "tax loophole the size of a Mack truck ... Congress, starting with this committee, needs to tax money management income, what we call carried interest, as what it is ... plain old ordinary income." He called the argument that the bill would hurt the economy "self-serving ... complete poppycock."

Testimony at the Senate Finance Committee hearing similarly dismissed concerns the Levin bill will reduce returns to state pension plans, many of which are partially invested in hedge funds. Professor Alan Auerbach said in his testimony that while affects are difficult to predict, he thought state pension funds "might see a decline in returns of one basis point, or one-one hundredth of one percent." The pension fund investment industry involves trillions of dollars, Auerbach said.

Managers of public employee pension funds also testified at the hearing that claims about the Levin bill's potential affects on such funds are overstated. Russell Read, the Chief Investment Officer of the California state pension fund, the largest public pension fund in the country, said he could not predict what the effect of the Levin bill might be on the pension fund's investments. Further, a representative from the New York state pension fund said he highly doubted a different tax structure would discourage people from working at hedge funds.

Additionally, the National Conference on Public Employee Retirement Systems retracted a statement it had made opposing the Levin bill at a prior Senate hearing, after many of their members pressured the conference's leadership for the retraction.

Although it has developed momentum through the summer, the fate of the Levin bill could be bound up with efforts afoot to eliminate the Alternative Minimum Tax (AMT) or to pass an AMT "patch," which would hold the number of taxpayers liable under the AMT steady for one or two years. Ways and Means Committee Chair Charles Rangel (D-NY), asked if he would support a one-year patch while working on a larger repeal bill, replied ($), "You do what you have to do, but that is not on the radar screen at all." Rangel said he would look to the Levin bill to help pay for the expensive ten-year, $800 billion AMT repeal or for a $60 billion one-year patch he implied he might "have to do." This would not only help AMT legislation comply with Congress' new PAYGO requirements, but would also offer a way to simplify and bring equity to the tax code.

# Census Report Shows Working Americans Falling Behind

The U.S. Census Bureau released its annual report, *Income, Poverty, and Health Insurance Coverage in the United States 2006* on Aug. 28. The report, which covers the most recent Current Population Survey (CPS) data, showed slight overall improvement in income and poverty, but continued declining rates of health insurance coverage. The headline numbers — a 0.7 percent increase in median household income and a 0.3 percent decline in poverty — are undermined, however, by the underlying story that middle- and low-income working Americans are not seeing substantial gains from the current economy.

Upon release of the Census data, President Bush used the veneer of apparent improved living standards to tout "low" taxes and "in check" government spending. He also erroneously claimed the Census report "confirms that more of our citizens are doing better in this economy, with continued rising incomes and more Americans pulling themselves out of poverty."

His claims, however, are not supported by even a cursory examination of the data. For a third year in a row, men and women both saw their annual earnings decrease. From 2005 to 2006, median income for men declined from $42,743 to $42,261; women saw their income fall from $32,903 to $32,515. Therefore, the $356 rise in median household income (from $47,845 to $48,201) is attributed not to robust economic gains accruing to the middle-class, but rather to the fact that more members of the average household are working.

The trend in income is even more disturbing when income levels in 2006, five years into an economic recovery, are compared to income levels in 2001, when the last recession bottomed out. An analysis by the Center on Budget and Policy Priorities shows median, working-age household income was $1,336 lower in 2006 than it was in 2001. The analysis also reports those same families are $2,375 off their peak income from 2000, immediately prior to the most recent recession.

Perhaps the most troubling statistic uncovered in the Census data is that the trend in poverty follows that of income. An apparent improvement over the prior year's measurement of poverty is strongly tempered when put into the context of past economic performance. During worst part of the mild 2001 recession, 32,907,000 people were poor, a poverty rate of 11.7 percent. In 2006, well into the recovery, the poverty rate was 12.3 percent (a 0.6 percent increase) with over 3 million more people living in poverty.

And, according to the CBPP analysis:

> The findings that poverty remains higher, and median income for working-age households lower, than in 2001 when the last recession hit bottom, are the latest evidence that the current economic recovery has been exceptionally uneven and that an unusually small share of the gains has reached low- and middle-income

families.

| Table 2: Key Changes in Poverty, Income, and Health Insurance | | |
|---|---|---|
| | **2005 to 2006** | **2001 to 2006** |
| Poverty Rate | -0.3 percentage points* | +0.6 percentage points* |
| Number Poor | -490,000 | +3.6 million* |
| Real Median Household Income | +$356* | -$110 |
| Real Median income of non-elderly households | +$725* | -$1,336* |
| Percentage of Americans without Health Insurance | +0.5 percentage points* | +1.7 percentage points* |
| Number without Health Insurance | +2.2 million* | +7.2 million* |
| * denotes a statistically significant change | | |

*(source Center on Budget and Policy Priorities)*

More troubling than the income and poverty data, however, was Census data on health insurance coverage. The number of Americans with health insurance continued its six-year decline as 46,995,000 Americans went without coverage in 2006. Fortunately, there is an opposite trend in the number of people covered by government health care. For the ninth year in a row, coverage of individuals by Medicare, Medicaid, military health care, or other government health care programs, like the State Children's Health Insurance Program, has increased. Private health insurers continued to cover a smaller portion of the population, falling from 60.2 percent in 2005 to 59.7 percent in 2006.

This year's CPS data report is far from good news, and for many Americans, the data show an economy in which workers continue to fall behind. The rise in household income from 2005 to 2006, when viewed in the context of recent economic history, is rather disappointing as the median household income has yet to catch up with that of the trough of the 2001 recession. The poverty data, marking the second year of a reverse in the upward trend in the poverty rate, is a positive indicator, but both the poverty rate and the number of poor people are still above their respective levels of the lowest point of the 2001 recession.

Meanwhile, gains in household income are mitigated by declining rates of health insurance coverage. Declines in wages are exacerbated as families lose health insurance and are forced to spend more of their paychecks on health care. Although the Census report shows improvements in household income and the poverty rate, it marks only the

beginning of a reversal of troublesome trends and an economy that has left too many working families behind.

## Americans Dislike Rising Inequality, Contrary to Popular Belief

It is commonly assumed that Americans do not oppose increasing inequality. After all, a consensus among social scientists exists that most Americans favor equality of opportunity over equality of outcome, and the public has supported welfare state retrenchment and regressive tax cuts, both of which increase inequality. However, this belief may be a misinterpretation of American values and policy preferences.

Recent research on public attitudes regarding inequality has shown that Americans have strong concerns that income differences are too large, and these views are mainly dependent on perceptions of the "deservingness" of different income groups. In addition, policy preferences may be a poor indicator of how the public sees inequality.

### What the Public Believes about Inequality

While most Americans believe equality of opportunity is more important than equality of outcome, survey data shows a significant portion of the public is aware of and unnerved by rising inequality of outcome. In a paper soon to be published, Professor Leslie McCall of Northwestern University examined survey data from 1987 to 2000 on public attitudes toward inequality and found significant opposition to it:

> Even at their lowest points during the period under study, 58, 49, and 38 percent of Americans strongly agreed or agreed that income differences are too large, that inequality continues to exist because it benefits the rich and powerful, and that inequality is unnecessary for prosperity, respectively. At their peaks in 1992 and 1996, these shares rose to 77, 63, and 58 percent. These are significant increases that remain so after extensive controls for compositional and behavioral shifts.

McCall concluded that the public may see outcomes as a measurement of the availability of economic opportunity. Attitudes about inequality depended on the state of the economy and how broadly prosperity was shared. If *only* the rich are getting richer, Americans may believe that opportunities are not being made available to enough people. In short, inequality may be tolerated only if it is a sufficient condition of upward mobility in the nation as a whole.

An alternative theory, articulated by Professor Christina Wong at Carnegie Mellon University, is the public's preference for redistribution depends on whether incomes are perceived as fairly acquired. Americans tend to judge the fairness of market outcomes by effort, talent and societal contribution. Opposition to inequality may grow if the public becomes skeptical that the market rewards these traits and behaviors, or if the wealthy

are primarily perceived as the beneficiaries of luck or family background.

Both researchers seem to have found that the public's attitude towards different aspects of inequality is most influenced by how people view social groups. Much opposition to redistribution is rooted in the racially-tinged belief that poor people do not work hard enough to deserve assistance, and that they are unwilling to take advantage of readily available opportunities. Yet support for redistribution could arise from beliefs that the rich may not work hard enough to justify a large income, or may be taking unfair advantage of opportunities unavailable to others.

According to McCall and Wong, perceptions of the poor, the middle class and the rich also appear to be malleable, being highly dependent on the type and quantity of media coverage, while loosely tracking trends of rising inequality. And minorities, who may be more aware of discrimination in market outcomes, and college-educated respondents tended to express stronger support for redistribution.

**Inequality, Policy and the Market**

Policy preferences may not only be affected by beliefs regarding "who deserves what," but of the state and the market.

A limited set of policies that address inequality seem to attract public support. McCall found that significant support exists for reducing inequality, but not through policies that are connected to poverty reduction or progressive taxation (though in 1992, concern about inequality probably led to greater support for taxing the rich). Increased educational funding, for example, consistently resonated as a solution for inequality.

The public also fails to recognize — or be concerned — that policies they favor are not in line with their views on inequality. The public may have supported the regressive tax cuts of 2001-2006 out of dislike for taxation, connected in part to their perception of whether they pay too much in taxes. Professor Larry Bartels of Princeton University analyzed a survey of public opinion regarding these tax cut packages and found significant support for tax cuts regardless of who they actually benefited. Even people who disliked rising inequality still supported the tax cuts.

Many people also look toward the market, rather than the government, to address inequality. Pollster Stan Greenberg observed, in focus groups held in 1996, that people who aspire to a better-than-average lifestyle see government as offering limited help — even as being an obstacle to advancement:

> This struggle to rise above the average is highly personal. It depends on people's qualities and attitudes, on their personal determination to improve themselves and get an education. It depends on the support and work of family members. Without those things, one would struggle like the rest of America, not getting anywhere. But the resources and strategies are private; as one of the men bluntly put it, "Unless you're willing to watch out for yourself or do something for

> yourself, nobody else is really going to help you."
>
> When asked who is on their side, about a third of the participants look to family, about 10 percent look to friends, and about a quarter look to the church. People have little expectation that civic organizations will rise to their defense or advance their interests. Barely anybody thinks of unions. Barely one in ten of the participants mention political leaders as a force on their side.

In addition, McCall argued the public tendency to rely on the market and a limited set of policies may be a product of history and institutional configurations.

> One way to partially reconcile these opposing perspectives — though, admittedly, it gives more credence to the former "persistence" perspective — is to suggest that existing levels of welfare state generosity will condition the response to similar rises in inequality across countries. Support for redistributive policies will increase where generosity is taken for granted (i.e., in social democratic societies), while it will be unaffected where generosity is more limited (i.e., in liberal market societies), reinforcing existing regimes.

Views about government, however, may not always be static and self-reinforcing. Greenberg found a significant change in attitudes once respondents were exposed to pro-government statements. Indeed, the persistence of rising inequality and the destabilizing affects of globalization, technological change and policy retrenchment may provide an opening for a progressive message that generates support for selective government intervention, if it taps and shapes public beliefs in equality of opportunity and market fairness.

## FEC Proposes Rulemaking on Elections and Issue Advocacy

On Aug. 23, the Federal Election Commission (FEC) issued a Notice of Proposed Rulemaking (NPRM) stating the agency's intent to make its regulations consistent with the recent U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life* (WRTL II). The FEC seeks public comment on two alternative proposals by Oct. 1. The FEC will hold a hearing on Oct. 17, and it plans to vote on a final rule by the end of November, in time for the presidential primaries. The difference between the alternative proposals is that one would require sponsors of grassroots, non-electoral broadcasts to file disclosure reports on their funding sources to the FEC; the other approach amends the definition of electioneering communications to allow issue advocacy and would not require disclosure to the FEC.

In the WRTL II case, the Supreme Court ruled the electioneering communications provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) cannot be constitutionally applied to broadcasts that cannot be reasonably interpreted as appeals to vote for or against a federal candidate. (The law bans corporations, including

nonprofits and labor unions, from paying for broadcasts that refer to federal candidates within 60 days of a federal general election or 30 days of a primary.) The Court's decision then left it up to the FEC to determine which ads, other than the ones considered in the WRTL case, would also be exempt from BCRA's electioneering communication restrictions.

**The FEC Proposal**

Each of the two alternatives proposed by FEC have some common elements. They provide a general exemption from BCRA, using language directly from the Court opinion, that says corporations and labor unions can pay for broadcasts that otherwise meet the definition of electioneering communications if "the communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." (p. 54-55)

Under both alternatives, the FEC proposal provides a series of safe harbors. The safe harbor for grassroots lobbying exemption would protect a paid broadcast that:

- "exclusively discusses a pending legislative or executive matter or issue"
- "urges an officeholder to take a particular position or action with respect to the matter or issue, or urges the public to adopt a particular position and to contact the officeholder with respect to the matter or issue."
- Does not include any reference to "any election, candidacy, political party, opposing candidate, or voting by the general public", and
- Takes no position about the officeholder's character or fitness for office.

The proposed safe harbor for commercial and business broadcasts contains similar factors, except it must refer to the candidate's business instead of pending legislative or executive decisions. Although the electioneering communications provision in BCRA only applies to broadcasts on television, radio, cable or satellite, the proposed rules refer generally to "communications" or "ads." This is misleading, since the rule has never applied to non-broadcast forms of communication, such as direct mail campaigns, newspaper ads or the Internet.

**The FEC's Background and Questions for Public Comment**

The proposal clarifies in the beginning that "electioneering communications are subject to both funding restrictions and reporting requirements" (p. 6) and that the WRTL II case only challenged the funding restrictions. As a result, the FEC seeks comment as to "whether the Commission has the authority to change its electioneering communications rules beyond what is required by the Supreme Court's decision." (p. 7)

This is an odd question, since the FEC notes on page 3 that BCRA "specifically authorizes the Commission to promulgate regulations exempting other communications as long as the exempted communications do not promote, support, attack or oppose ("PASO") a

candidate." That section of BCRA also specifically exempts broadcasts of announcements of candidate debates, forums and news. It is highly doubtful that the FEC would attempt to force news corporations to disclosure their shareholders names. The same logic should apply to any exempt electioneering communication, including grassroots lobbying and issue ads.

**The Proposed General Rule**

The Supplementary Information preceding the text of the proposed rule makes some clarifications and asks a series of questions about the general rule. In particular, it says, "a communication that does not qualify for either of the safe harbors may still come within the general exemption..." The FEC asks if it should include a list of examples of "background information", and if so, what they should be. It also asks whether it may look beyond the actual content of the broadcast.

**The Two Alternatives**

The FEC provides two alternatives. Under Alternative 1, FEC seeks input on whether to create a reporting requirement on broadcasts that are not express advocacy. The FEC's discussion of its disclosure proposal begins at page 41. Alternative 1 would require nonprofits, labor unions and corporations to file detailed reports naming every funder, donor or shareholder that contributes $1,000 or more "during the period beginning on the first day of the preceding calendar year and ending on the disclosure date" if they spent more than $10,000 on exempt grassroots lobbying broadcasts (p. 41). If an organization uses a separate segregated fund (SSF) for its grassroots lobbying broadcasts, it only would have to report the donors to that fund.

The proposed disclosure requirement for Alternative 1 raises several serious issues that are inconsistent with the Supreme Court's holding in the WRTL II case. For instance:

- It would violate donor privacy for issue advocacy unrelated to federal elections, which was barred by the Supreme Court in the case *NAACP v. Alabama*.
- On a practical level, it leaves a nonprofit with two bad choices: either disclose donors for the entire organization or have the difficult job of separate fundraising for the SSF.
- FEC reporting for non-electoral activity would place a significant burden on free speech, contrary to the Supreme Court's warning to the FEC in WRTL II that its enforcement process must not be overly burdensome.

Under Alternative 2, the FEC proposes to modify the definition of an "electioneering communication." A communication qualifying for the exemption — that is a broadcast that is not express advocacy — would be exempt from the funding restrictions and would not be subject to the reporting requirements to the FEC. These communications would be construed as grassroots lobbying.

**The Proposed Safe Harbor for Grassroots Lobbying**

Safe harbors have a tendency to become de facto rules because of the certainty they provide. For that reason, it is important to look closely at the FEC's questions about its proposed grassroots lobbying safe harbor. On page 16, the FEC asks if it should take this approach at all. It asks if it should "instead of, or in addition to, creating safe harbors, provide an exhaustive or non-exhaustive list of factors to be considered." The FEC then provides a list of examples for each prong of the proposed safe harbor.

For nonprofits engaged in issue advocacy and grassroots lobbying, the four criteria of the proposed safe harbor raise some concerns. For example:

- Prong 1 requires a broadcast to focus exclusively on a pending legislative matter. The practical problem with this is that a nonprofit might want to include a fundraising appeal or other non-electoral message in its broadcast. It should be able to do so. In addition, there is no definition of "pending." A nonprofit may want to push for consideration of a stalled bill, which should be protected under the WRTL II decision.
- Prong 2 requires the broadcast to urge an officeholder to adopt a position or ask the public to contact him or her and ask to adopt that position. This excludes appeals to contact a federal candidate who is not an officeholder. Non-electoral issue ads could potentially refer to such a person.
- Prong 3 bars the ad from mentioning the election, parties or related activity, including voting. The FEC asks if it should be possible to include a reference to voting. Nonpartisan get out the vote appeals could potentially be included in an issue advocacy ad.
- Prong 4 says the broadcast cannot comment on an officeholder's character or fitness for office. The FEC says "effective lobbying may require reference to an officeholder's position or record on a particular issue. . . . Thus, a discussion of an officeholder's position on a public policy issue or legislative record may be consistent with the content of a genuine issue advertisement, and may, therefore not automatically render a communication ineligible for the proposed safe harbor." (p. 24-25) The FEC asks for comments to clarify where the line on this question should be.

Overall, both alternatives put forth by the FEC include a general exemption and safe harbors for grassroots lobbying and business advertisements. The difference is that Alternative 1 would require that sponsors of non-electoral broadcasts file disclosure reports on their funding sources to the FEC. The FEC does not have jurisdiction over lobbying, and the federal Lobbying Disclosure Act, ethics disclosure requirements in most states and, for charities, the Internal Revenue Service, all require disclosure of lobbying information. This makes it difficult to see how the FEC could require donor disclosure for activities it has no authority to regulate.

In supporting the First Amendment rights of nonprofit organizations to engage in

advocacy and their valuable role in public policy, OMB Watch plans to submit comments reiterating that the FEC should not try to require the disclosure of grassroots lobbying costs. Grassroots advocacy communications are not about an election, and therefore they should not have to be reported to the FEC. We encourage nonprofits to submit comments before the Oct. 1 deadline.

## USAID Temporarily Delays Implementation of Partner Vetting System

The U.S. Agency for International Development (USAID) has agreed to temporarily delay implementation of a new database, called the Partner Vetting System (PVS), that would "[ensure] that neither USAID funds nor USAID-funded activities inadvertently or otherwise provide support to entities or individuals associated with terrorism." Under the plan, initially announced on July 17, all nonprofits that apply for grants, contracts or other financial partnership with USAID would have to provide the government with highly detailed personal information about employees, executives, trustees, subcontractors and others associated with the organization. On July 20, USAID also proposed to exempt portions of the PVS database from the Privacy Act. USAID is accepting comment on the Privacy Act exemption until Sept. 18. Charities are actively objecting to this burdensome and unwarranted program in which thousands of nonprofit workers would have to be screened. USAID is moving forward with a pilot program for aid recipients working in the West Bank and the Gaza Strip before expanding it globally as first intended.

The information USAID would collect under the PVS includes phone numbers, date and place of birth, e-mail addresses, nationality, gender, profession, citizenship, and government issued identification (such as Social Security numbers and passport numbers), which would be vetted for possible connections to individuals or groups designated as terrorists by the federal government. Organizations would be forced to maintain far-reaching records, imposing a great administrative burden. Resources meant for charitable works inevitably would be stretched thin, especially in smaller organizations.

Congressional spending bills since 2003 have required the Secretary of State to take "appropriate steps to ensure that such assistance is not provided to or through any individual, private or government entity, or education institution that the Secretary knows or has reason to believe advocates, plans, sponsors, engages in, or has engaged in, terrorist activity." A Government Accountability Office (GAO) report criticized USAID's implementation of these requirements. However, the GAO report did not make any recommendation to expand the PVS program globally.

There are many reasons the charitable community has protested this proposal. One main concern is that there has simply been no evidence that USAID funds are going to terrorist organizations. According to the most recent USAID Office of Inspector General

report, which covers October 2006 to the end of March 2007, "OIG oversight activities during this period did not identify any instances where terrorist organizations received USAID funds." USAID audit procedures should be enough to prevent terrorist financing.

InterAction, a coalition of U.S.-based foreign aid groups including many that receive USAID funding, sent a letter to the Chief Privacy Officer at USAID asking that the plan be withdrawn. The coalition's letter states, "There is no statutory basis for the PVS or any similar system outside of, arguably, the West Bank and Gaza. The fact that Congress has not required such measures elsewhere indicates the proposed system has not been deemed necessary by our national legislature. Nor is it required by Executive Order 13224."

The letter InterAction submitted also makes the important point that the lives of those working in particular areas may be put at increased risk. "If they are perceived to be extension of the U.S. intelligence community, terrorist attacks against them can only increase."

An alarming aspect of the PVS as USAID noted in its proposal to exempt the program from the Privacy Act is that "USAID cannot confirm or deny whether an individual 'passed' or 'failed' screening." This secrecy was part of the focus of comments OMB Watch submitted to USAID, which stated, "PVS will more than likely result in the creation of a secret USAID blacklist of ineligible grant applicants, based on PVS results. Organizations and individuals erroneously listed as having ties with terrorism will have no way of knowing they are deemed as such, or why. Innocent and well deserving grantees will have no formal means of appealing such decisions."

The program was proposed without any consultation with relief and development organizations, and it seemingly was intended to begin without any consultation. The program was originally scheduled to go into effect the day public comments were due, Aug. 27, suggesting the agency had no intention of considering the concerns of the charitable community. However, USAID said it would delay implementing the program until comments were reviewed. The program has been cut back to begin first as a pilot program in West Bank/Gaza. After reviewing the pilot program and the written comments received, the agency would implement the program globally. In addition, after receiving such outspoken protest, USAID also agreed to meet with some representatives of organizations that submitted comments.

According to the *Washington Post*, at the meeting, USAID officials explained the pilot program for recipients of grants and contracts in the West Bank and Gaza. The USAID presentation referenced a report by the Palestinian Media Watch, an Israel-based organization that was also pushing for the program. The report stated that Al-Quds Open University, a USAID recipient, "hosts branches of the Hamas and Islamic Jihad terror organizations." It also protested USAID's plan to provide $2.4 million in scholarships for about 2,000 Palestinian students without a guarantee that recipients have not voted for Hamas in any election. The fact that the U.S. government is responding to the appeals of

an organization which is concerned about the political beliefs of students who receive scholarship money from U.S. funds and may or may not have voted for Hamas is disturbing. This politicizes aid and violates the principle of a secret ballot.

The notice in the *Federal Register* left many with unanswered questions because the language is so vague and open-ended. For example, who would decide whether groups are qualified to receive grants? What does "associated with terrorism" mean, and how will it be determined? If one person is suspect, would an entire organization be banned from receiving any USAID funds completely? USAID has not provided any information regarding how an individual or the organization would be able to provide any defense. Whom will be vetted — every employee of an organization? If the program is about stopping money from going to terrorists, or those associated with terrorists, such a vetting program should also be applied to government contractors working in those areas as well since they are just as likely as charities to be infiltrated with ties to terrorists.

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