In This Issue

Appropriators Continue Slow Pace

With much of the appropriations work still left to do, the Congress has been creeping along with their annual appropriations work. To date, only two of the 13 bills have made it to conference. The likelihood of an omnibus bill, a lame duck session, and/or a continuing resolution seems to be growing.

Among the developments:

- After voting in favor of a $2.9 billion amendment providing emergency drought disaster assistance for farmers and ranchers, the Senate passed the FY 2005 Homeland Security spending bill (H.R. 4567). The bill is now ready to go to conference with the House, which passed its version of the bill in June.
- Following the example set by the House, the Senate Appropriations Committee voted in favor of blocking funding for the Labor Department to implement recent changes to overtime pay regulations. The vote on the Amendment, which was sponsored by Tom Harkin (D-IA), passed 16-13. (See related story.)
- Debate on the Transportation-Treasury bill is expected in the House this week, as is debate in the Senate on the Legislative Branch bill. The Senate hopes to have a vote on the Military Construction bill on Sept. 20.
- The Senate Appropriations Committee approved the $19.5 billion Foreign Operations bill, increasing funding by $120 million from FY 2004. During the markup, the panel chose to adopt the Leahy Amendment to transfer $150 million worth of humanitarian aid from Iraq reconstruction funds to Darfur, in the Sudan. Also, the bill approved by the committee reduced aid to the administration's Millennium Challenge Corp. by more than half; approving $1.12 billion as opposed to the $2.5 billion requested. In its version of the bill, the House also provided less funding for the Millennium Challenge Corp. than the administration had hoped to see.

Economy and Jobs Watch: Cyclically Adjusted Deficit Reaches Record High

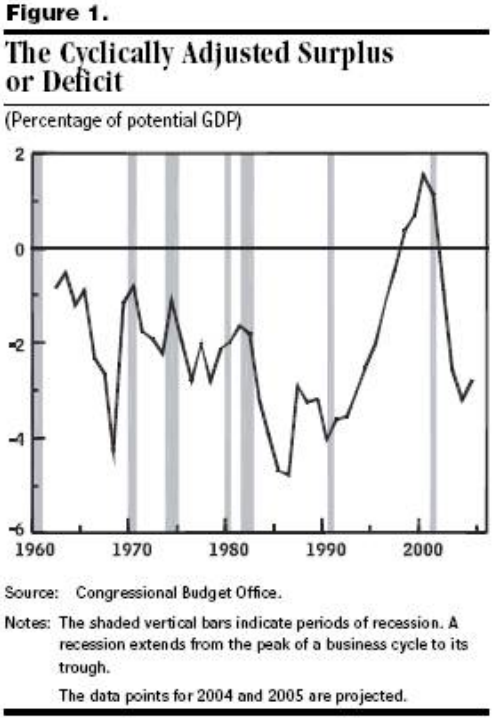
The cyclically adjusted deficit -- that is, the deficit adjusted to remove economic fluctuations -- reached an all-time high of $374 billion in 2004 according to a new report by the Congressional Budget Office. As a share of the overall economy, the cyclically adjusted deficit at 3.2 percent of GDP is at its highest levels since the early 1990's -- and has been exceeded in only 7 of the last 42 years (see chart below.)

When the economy fluctuates so do the finances of the federal government. In particular, during times of recession, tax revenue tends to decline, and spending tends to automatically increase -- thus increasing the deficit (or decreasing a surplus). Government finances are in part determined by these "cyclical" factors. The other part is determined by tax and budget policy decisions made by the president and Congress. The Congressional Budget Office (CBO) is able to analyze the historical pattern of the nation's finances to distinguish which components of the deficit that are: a) due to the cyclical factors and b) due to non-cyclical policy decisions.

In their most recent report on the topic, the CBO found that just 11 percent of the deficit in 2004 was due to cyclical factors -- leaving the remaining 89 percent of the deficit as a result of policy decisions, and not cyclic economic factors. The size of the cyclically adjusted deficit is projected to grow by $89 billion to $374 billion -- an increase of 31 percent in just the past year.

These numbers indicate that the current deficit is "structural" and will not simply go away when the economy recovers. The fundamental cause of this imbalance seems clear -- over the last couple years, federal revenues have remained at their lowest level as a share of the economy since the 1950's. What is needed is a policy change that raises adequate revenue to responsibly fund our nation's priorities -- and current policy is not living up to that test.

Figure 1.



Source: Congressional Budget Office.

Notes: The shaded vertical bars indicate periods of recession. A recession extends from the peak of a business cycle to its trough.

The data points for 2004 and 2005 are projected.

Return of a 'CYA' Budget Policy

The long-ago defeated proposal for a balanced budget constitutional amendment is rearing its ugly head once again. Unable to pass a budget this year and having created near-record deficits, some members of the House are desperate to create the appearance of being fiscally responsible, and are considering bringing up a vote on the measure (H. J. RES. 22).

A constitutionally mandated requirement to balance the budget every year would have terrible economic consequences. It would destabilize the economy by amplifying downturns in the business cycle; and it would restrict the nation's ability to invest in projects that would yield significant benefits in the future. (A good example of the various arguments made against the amendment is a Clinton-era Treasury Department memo by Brad DeLong.)

In addition, more than 1,000 economists have publicly opposed the amendment, including 11 Nobel laureates. The letter was coordinated by the Economic Policy Institute in 1997 (See press release).

It would be unfortunate if the return of this inherently misguided and economically risky amendment distracts Congress when they have so many important issues to address. This House Judiciary Committee may take this up this Wednesday, Sept. 22, and full House action could be next week.

Take Action Now! Urge Congress to reject the Balanced Budget Amendment.

Congress Defies White House, Saves Overtime for Millions

Both the Senate Appropriations Committee and the House of Representatives have defied a White House veto threat and voted to save overtime rights for millions of workers.

On Sept. 9, the House voted to attach a pro-labor amendment to the FY 2005 Labor-HHS appropriation bill, overturning a key provision of President Bush's new overtime regulations, which took effect Aug. 23. The amendment sponsored by David Obey (D-WI) passed the House with a roll-call vote of 223-193, including 22 Republicans.

Under the administration's new overtime rules, workers who earn less than $23,600 a year will become automatically eligible for overtime pay, which is a significant increase from the current threshold $8,060, that was set in the 1970s. While this seems to be increasing the number of workers receiving overtime pay, critics of the new regulations say this gain is offset by provisions within the bill that would end up exempting millions of administrative and white-collar workers from being able to collect overtime. As a *Washington Post* article states, the new overtime regulations would "make it easier for employers to reclassify their workers as 'executive,' 'administrative,' or 'professional' employees, who are not entitled to the overtime protections of the FLSA [Fair Labor Standards Act]." The new regulations could, as the Economic Policy Institute estimated, strip up to 6 million workers of their overtime rights. The Obey amendment would keep the expansion in the lower income category, but reject the reclassification rules for moderate-income workers.

On Sept. 15, the Senate Appropriations Committee joined the House in demonstrating their opposition to the overtime regulations by passing an amendment by Sen. Tom Harkin (D-IA), which was very similar in context with the Obey amendment. The Harkin amendment requires the immediate reinstatement of the previous overtime rules, with the exception that the eligibility threshold is raised to $23,600. The committee voted 16 -- 13 to add language to the $142.5 billion Labor-HHS appropriations bill that would block funding from the Labor Department to implement the recent changes. Senate Appropriations Committee Chairman Ted Stevens (R-AK) criticized the vote; saying that the "Harkin language" will make it tougher for the bill, S. 2810, to see floor consideration. Even so, the support shown by Congress for both the Harkin and Obey Amendments is a real victory for labor groups and working people across the country.

However, passage is still not assured as the administration has threatened to veto the final Labor-HHS funding bill if it contains Harkin/Obey language. A Statement of Administration Policy released on Sept. 8 regarding the bill stated the following:

"[T]he President's senior advisors would recommend that he veto the final version of the bill if it contained any provision prohibiting or altering the Labor Department's enforcement of the final overtime security rule."

In addition, House Appropriations Committee Chairman C.W. "Bill" Young (R-FL) has indicated that the amendment will be stripped in conference. He noted that the House approved a retriction last year, but it too was stripped in conference.

We have yet to see if the Labor-HHS appropriations bill will even make it to conference, if it will be postponed to a lame duck session, or perhaps extended through a continuing resolution until next year. Whatever the case, it was an important first step for both members of the House and members of the Senate Appropriations Committee to stand up to the administration and vote against their new -- and potentially harmful -- overtime rules.

Tell Congress and the White House to save overtime rights and support the Obey/Harkin amendment! Click here to send a message to your representatives.

Congressional Report Cites Growing Bush Secrecy

Rep. Henry Waxman (D-CA) released a report last week detailing the vast expansion of secrecy and restrictions in public access to government information under the Bush administration. The Special Investigations Division of the House Government Reform Committee's minority staff prepared the report, "Secrecy in the Bush Administration," for Waxman.

The report systematically analyzes long standing federal public access laws, new laws that restrict public access, and barriers to congressional access. The report examines changes in the implementation of several major open government laws including the Freedom of Information Act, Presidential Records Act and Federal Advisory Committee Act. Investigators found that these laws, which were designed to ensure public access, have been undermined by various new policies and an overall culture shift that accompanied the Bush administration.

The report also found that laws allowing the government to restrict public access to government information have been abused by broad and excessive use. While touting a need for great security, the Bush administration created new restrictions on access and information and expanded the scope and use of several pre-existing security-based information restrictions. Ironically, the 9/11 Commission concluded that the excessive restriction of information contributed to the success of the terrorist attacks, and it strongly recommended reforms that would allow easier sharing of information among government officials and the public. The Waxman report notes that an Executive Order from President Bush directly contributed to the overclassification of documents, which greatly restricts the government's ability to use or share information even with other government officials.

Finally, the report details the new difficulties that even Congress faces accessing and using information due to policy changes under the Bush administration. The point that these access restrictions are not limited to the general public is an important and troubling one. Lawmakers need to easily obtain complete and objective information because they must make important decisions that will affect the entire country. Blocking access impedes their ability to discharge their

responsibilities.

Overall, the comprehensive secrecy report concludes the administration has exhibited a clear and consistent pattern of restricting public access and increasing government secrecy. The cumulative result is an unprecedented assault on the principle of open government.

Waxman also introduced new legislation to coincide with the secrecy report, described in a related story.

Waxman Introduces Open Government Bill

Open government advocates, who have suffered for years in defensive efforts to hold back a rising tide of secrecy, just got something to cheer about. Rep. Henry Waxman (D-CA) introduced a bill last week to make it easier for citizens to challenge agency denials under the Freedom of Information Act (FOIA) in court. The legislation would also reverse several policies and practices tied most closely to the Bush administration that undermine open government.

"The Restore Open Government Act of 2004" (H.R. 5073), would restore the presumption that agencies release requested documents absent an identified harm under FOIA. Further, the bill would narrow the secrets that businesses could keep when submitting reports on problems and vulnerabilities in our transportation, energy and communications infrastructure ("critical infrastructure information" or CII) to the Department of Homeland Security. It reverses the Bush executive order (E.O. 13233) on presidential records, wherein former presidents may veto requests to release their administration's papers. The bill would also ensure openness when the president obtains advice through committees such as Vice President Cheney's energy policy task force.

The bill is co-sponsored by Reps. Dennis J. Kucinich (D-OH), Bernard Sanders (I-VT), Elijah E. Cummings (D-MD) and Del. Eleanor Holmes Norton (D-DC).

To learn more about these issues, visit the OpenTheGovernment.org Right to Know Resource Center, which points to backgrounders on "critical infrastructure information" and other homeland security issues. For those interested in how the federal government is using the new CII law, OMB Watch tracks how the Department of Homeland Security implements CII protections, and its impact on public health and safety.

Study Finds Nuclear Facilities Vulnerable to Attack

Access to information on nuclear security has been hard to come by, but some information has been surfacing that raises concerns about the security of America's nuclear power plants. Since 9/11, nuclear reactors and chemical plants have received considerable attention with critics calling for stronger government requirements and oversight to better ensure the safety of neighboring communities.

Government action to beef up security at nuclear facilities has been slow; it often allows industry to take voluntary steps in the absence of strong regulation. Officials have hidden information behind a veil of increased secrecy with the explanation that information restrictions prevent terrorists from obtaining dangerous data. However, recent reports and testimony indicate that this secrecy also keeps the public uninformed about safety risks and potentially irresponsible decisions made by officials.

Risks from the Air

Since the 9/11 attacks, the possibility that airplanes could be used to attack atomic generating stations has become very real. Critics have called for increased precautions against this type of attack such as strengthening spent fuel containment pools and erecting additional barriers to deflect or diminish any impacts.

Currently, the Nuclear Regulatory Commission (NRC) and energy companies maintain that such efforts are unnecessary. They assert that reactors are already hardened, secure structures, and claim that the possibility of an attack that would release radiation is highly unlikely. Power companies believe that the critics are merely trying to drive the cost of nuclear energy up so that plants have to close down.

According to the *Los Angeles Times*, a recently leaked study conducted by the German government indicates that nuclear plants may be more vulnerable to this type of attack than the NRC and energy companies claim. The study noted that higher speed impacts from airliners, which pilots were able to accomplish in simulators approximately half the time, could result in uncontrolled releases of radiation.

The two main concerns from such an attack are the reactor core and spent fuel storage. If the reactor's core were damaged, it could meltdown and result in an uncontrolled radioactive reaction. Spent nuclear fuel rods are stored in enclosed ponds of water, but if an attack damaged a pond and the cooling water drained away, the fuel would catch fire and release massive amounts of radiation. A 1997 report by the Brookhaven National Laboratory concluded that a spent fuel fire could render 188 square miles uninhabitable and cause as many as 28,000 cancer deaths.

Land Based Risks

Since the 9/11 attacks, efforts have been underway to improve security measures at nuclear plants throughout the country, especially from ground attacks. The NRC has ordered companies to prepare themselves for defense against larger more organized attackers then previously required. But Government Accountability Office (GAO) auditors reported during a House Government Reform Committee hearing that it could be years before NRC knows if facilities are meeting these

new requirements. Apparently, there is little real world data or oversight and plants are only required to file minimal paperwork.

The GAO also reported a clear conflict of interest in the security testing. The industry trade association, the Nuclear Energy Institute, contracted Wackenhut, a major security firm, to train and manage adversary teams used to test the security measures at nuclear power plants. However, Wackenhut also provides security guards to half the facilities. Concerns were raised over NRC allowing this controversial contract because of the conflict of interest. According to the Service Employees International Union, which includes the largest union of security officers, Wackenhut was already been caught cheating during a 2003 security drill at a nuclear weapons site in Oak Ridge, Tennessee. The organization operates an entire website devoted to documenting problems with the security company. The website also contains a report entitled "Homeland Insecurity: How the Wackenhut Corporation is Compromising America's Nuclear Security" that details the firm's failings at nuclear security including numerous security lapses, training cutbacks, and lax security measures.

Accountability and oversight for nuclear security has become more difficult recently as the NRC has re-removed almost all related data from its web site. The agency had completely shut down its site immediately following the 9/11 attacks but had eventually reposted most of the site including information on security. Without access to such information, watchdog groups working on nuclear issues can not effectively represent public interests or criticize officials' decisions.

Homeland Security Whistleblowers Work Together

Homeland security whistleblowers recently joined together in two different efforts. One group of whistleblowers issued a memo calling upon other government officials to come forward with information on mismanagement and deception. Another group released a letter criticizing the 9/11 commission's report for not attaching accountability to specific individuals.

Call to Whistleblowers

A group of 10 former government employees who have blown the whistle on issues from Vietnam to Iraq issued a public memo Sept. 9, calling upon current government officials to disclose classified information being wrongly withheld from the public. The officials worked for the Defense, Labor and State Departments, the FBI and the CIA. The group listed 12 specific documents that should be disclosed, including information on FBI misconduct, terrorism prisoners, security breaches, as well as costs and troop number estimates for the Iraq war.

The group asserted that government deception and secrecy actually costs lives and reduces national security, an opinion shared by the 9/11 commission, which concluded that information restrictions contributed to the success of the terrorist attacks. The group's memo acknowledges that whistleblowers currently have little actual protection under the law, and often face retaliatory actions such as the job loss.

Whistleblowers Unsatisfied

Another group of 25 homeland security whistleblowers released a letter critical of the 9/11 commission's report, claiming it does not accurately reflect their testimony and fails to hold any individuals accountable. While the commission acknowledged the contribution that information restrictions and excessive secrecy played in allowing the terrorists to succeed, it did not attach responsibility to any specific officials. The group believes that without this direct accountability, efforts to reform the intelligence community will be ineffective.

The whistleblower letter also criticizes Congress for not hearing testimony from field intelligence and national security employees with knowledge of corruption and mismanagement during recent hearings on sweeping intelligence and security reform.

Health Effects and Misinformation Drive 9/11 Suit

Leaseholders of the World Trader Center now face a suit from recovery workers, after hundreds of thousands of people were exposed to toxics immediately after the 9/11 attacks. This comes at the same time that a report reveals the government has not monitored or studied people suffering adverse health effects from 9/11.

Fourteen plaintiffs, including police officers, firefighters, transit workers, and other rescue workers filed the lawsuit Sept. 10. The law firm handling the case said more than 800 other plaintiffs are participating and that number could increase. The plaintiffs claim workers were not advised of the health risks in lower Manhattan, and proper precautions were not taken by the leaseholders of the trade towers. According to the law firm, additional actions will be taken against local governments in New York and New Jersey, as well as the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration.

The General Accountability Office (GAO) released a report on Sept. 8 regarding the health effects from the aftermath of 9/11. It found that up to 400,000 New Yorkers breathed some of the most toxic air ever recorded. According to the report, "Almost all the firefighters who responded to the attack experienced respiratory harm, and hundreds had to end their firefighting careers due to WTC-related respiratory illness." It also states that the government has not made an effort to study the health effects of exposure in New York City and across the country. The lawsuit seeks legislation that would set up testing programs for exposed citizens.

After the attacks, a great deal of controversy arose concerning the accuracy of EPA statements about the safety of lower Manhattan. An Aug. 21, 2003 EPA Inspector General's report revealed that EPA statements to the public immediately after 9/11 did not fully represent the data the agency possessed. The White House apparently influenced the wording of the statements to downplay potential health risks mentioned in EPA's original drafts. These statements misinformed people

who lived and worked in lower Manhattan that the area was safe. However, a subsequent Senate Environment and Public Works Committee report concluded that EPA and the White House did not act inappropriately in addressing public health concerns in New York City after 9/11.

Audit of Sensitive Security Information Requested

The Government Accountability Office (GAO) received a request from two House members last week, asking for an investigation into the Department of Homeland Security's (DHS) use of the "sensitive security information" (SSI) provisions. SSI receives protected status, which shields it from public disclosure.

Reps. David Obey (D-WI) and Martin Olav Sabo (D-MN) sent the Sept. 14 letter, expressing concerns that DHS and the Transportation Security Administration (TSA) were misusing the SSI label. They cited several examples including a recent security designation for an executive telephone list circulated to DHS staff. The list was stamped "Sensitive But Unclassified." It is highly questionable how a list of government phone numbers would qualify as SSI. Additionally, the representatives pointed to examples where TSA labeled information as SSI that was already released and in the public domain.

Specifically, Obey and Sabo requested that GAO examine the procedures for categorizing information as SSI; procedures for removing SSI designation; any internal checks to review SSI designations; and the internal operating structure for SSI actions.

The representatives made strong statements in the letter that while the transportation sector does need to protect truly sensitive information, the public has a right to know about information that could affect their safety and security.

For more information on SSI, see:

- "TSA to Expand 'Sensitive Security Information'"
- "Transportation Bill Pre-empts State Sunshine Laws"

Data Quality Act Progresses in the Courts

The debate over whether the Data Quality Act (DQA) is judicially reviewable might be getting closer to an end. The federal judge reviewing an industry DQA lawsuit questioned whether the statutory language provides for such review during oral arguments Sept. 3.

The case, brought by the Salt Institute and the Chamber of Commerce against the Department of Health and Human Services (HHS), is currently pending in a federal district court in Virginia. The plaintiffs claim that the National Institutes of Health (NIH) relied on a flawed study when disseminating information that claims or suggests that reduced sodium consumption will result in lower blood pressure in all individuals.

The judge presiding on the case, U.S. District Judge Gerald Bruce Lee, voiced skepticism that the DQA provided the court the ability to review agency decisions. Lee observed that the plain language of the DQA law makes no mention of judicial review. Additionally, he cited the lack of legislative history, since the DQA passed Congress as an appropriations rider with no discussion or debate. Lee also questioned if the plaintiffs met the three-part test to have standing in court, noting that the Salt Institute could not demonstrate any harm suffered from the NIH information. Lastly, the judge echoed what many public interest groups have stated since the inception of the DQA -- that allowing judicial review would limit scientific discourse.

A recent brief from the Department of Justice (DOJ) recommend the dismissal of this lawsuit for the same reasons Lee raised. DOJ asserted that the plaintiffs lack standing to challenge the sodium study that underlies the agency statements because it is not sufficiently demonstrated that they incur any injury because of the agency's statements. Additionally, DOJ stated that the court does not have subject matter jurisdiction, and even if it did, there is no statutory basis for federal court review.

If Lee dismisses the lawsuit, it would reinforce an earlier DQA ruling in which a Minnesota federal district court ruled that the DQA does not permit petitioners to seek judicial review. In the Minnesota ruling, the data quality issue was a minor one within a bigger complaint. (See Related Analysis.)

House Resolution on Energy Task Force Fails

The House Energy and Commerce Committee rejected a resolution last Wednesday that would have sought information on Vice President Dick Cheney's energy task force. The resolution sparked a rowdy and highly partisan committee session in which no debate was allowed before the vote.

Reps. John Dingell (D-MI), Henry Waxman (D-CA) and Edward Markey (D-MA) introduced House Resolution 745 on July 22. If passed, it would have asked President Bush to provide the House with specified task force information within two weeks. The information would include:

- Names of all present at each task force meeting
- Names of professional support staff for the task force
- Names of everyone members and support staff met with to gather information relevant to the task force, and the date, location and subject of each meeting
- Direct and indirect costs of developing the National Energy Policy.

In an unusual move, Republicans on the committee did not issue a press release about the markup, apparently in an attempt to minimize attention. The Energy and Commerce Committee Chairman, Rep. Joe Barton (R-TX), asserted that Democrats were using the resolution as a political tool to embarrass the administration before the elections.

After only allowing Dingell, the ranking Democrat, to give an opening statement the Republicans called for a vote without allowing any debate on the motion. Shouts and boos erupted. Waxman even left the room after claiming the representatives were acting like teenagers. The resolution was voted down in a party line vote of 30-22.

For background on the energy task force, see the following OMB Watch articles:

- "Supreme Court Denies Cheney's Bid to Avoid Discovery in Energy Task Force Decision"
- "Judge Orders White House to Turn Over Energy Task Force Documents, Again"
- "DOE Forced to Turn Over Energy Task Force Documents"
- "Court Orders Release of Additional Energy Task Force Documents"

Highlights from the Right to Know Resource Center

Homeland security is the hot issue of the day. So what could be better than to highlight in one place the many resources and groups working to represent the public's interests in homeland security debates? The Right to Know Resource Center, coordinated by OMB Watch for OpenTheGovernment.org, introduces the many facets of homeland security policies, explains the impacts on efforts to undermine the Freedom of Information Act and summarizes restrictions on the free flow of information in our open society that give the biggest opportunities for abuse.

To visit the Resource Center, go to www.openthegovernment.org/article/subarchiveboxes/4/. And let us know how we can make it better.

Nonprofits Needed to Help Fill Poll Worker Shortage

Low turnout among young voters is often ascribed to apathy, but part of the problem is the barriers young people face when casting ballots or trying to work at the polls. Nonprofits can help remove these barriers.

In many states, to register to vote, you must establish a "fixed and permanent" address. Yet many young people's "fixed and permanent" address is miles away from where they spend eight months of each year. College residence generally does not qualify as "fixed and permanent" for purposes of voting, since it does not demonstrate intent to establish residency.

Residency issues also often prohibit students from becoming poll workers. Many states require that poll workers be registered in the state, which is a problem for many students. This is especially crucial at a time where Election Boards are warning of poll worker shortages.

Congress passed the Help America Vote Act (HAVA) in 2002 to assist the states in resolving many of these issues. It established the U.S. Election Assistance Commission (EAC) to oversee implementation, including the HAVA College program. The program was created to encourage students enrolled at institutions of higher education to assist in local election administration by serving as poll workers.

However, the EAC has not been adequately funded by Congress and many students are not getting the help they need. In addition, many organizations dedicated to increasing the number of registered youth voters have not taken effective action to assist students to become more involved.

Nonprofits can provide a critical public service by taking steps to increase both voter turnout and participation. Voting gives students a voice in our democracy, but participation ensures there will be a democracy to vote in. For information on how your group can help see NPAction's Nonprofits Can Help America Vote! website.

Independent Political Committees Controversy Hits Courts

The Bush campaign lost the first round of a legal bid to force the Federal Election Commission (FEC) to act on a complaint it filed against political committees opposing his re-election, but attorneys for the campaign promised to pursue the issue. Meanwhile, the House sponsors of campaign finance reform legislation filed suit against the FEC seeking stricter rules regulating political committees.

On Sept. 1 the Bush campaign sued the FEC in the U.S. District Court for the District of Columbia asking for an injunction forcing the FEC to act on the campaign's complaint challenging the legality of soft money spending by independent groups working to defeat President Bush: The Media Fund, America Coming Together, and MoveOn.org's Voter Fund. The legal issues are the same as those debated throughout the year in FEC rulemakings and Advisory Opinions. See www.nonprofitadvocacy.org for more information.

The court ruled against the Bush campaign on Sept. 15, saying the law does not permit courts to intervene unless the FEC delay is unreasonable. Counsel for the FEC noted that the campaign's complaint is 550 pages long and "the issues they raise are complex and fact-intensive, and involve controversial and unsettled legal and constitutional questions." They also argued that the campaign would not suffer irreparable harm, a required threshold before an injunction can be issued, because campaign finance laws are "designed to protect the public interest" and not "to protect a candidate from public criticism, or from the registration of voters who might support his or her opponent." Attorneys for the Bush-Cheney campaign argued the case is unusual because outside groups have spent $80 million on this election and are still active.

The judge rejected the campaign's argument, even though he said the FEC is notoriously slow in resolving complaints, noting "that's the way Congress set it up and apparently that's the way Congress likes it." The Bush campaign said it will pursue the issue, but it was not clear whether or not they will appeal the ruling. The decision means the court will not force the groups in question to cease their activities before the election.

The issue of what independent groups should be regulated by the FEC remains in the courts however, as the result of a federal lawsuit filed Sept. 14 by Reps. Chris Shays (R-CT) and Martin Meehan (C-MA), House sponsors of the Bipartisan Campaign Reform Act of 2002. The suit asks the court to force the FEC to approve stricter regulations for independent political committees than those approved by the FEC last month. For a summary of the new rule, see the August 23, 2004 OMB Watcher.

Tax Bill May Include Church Electioneering and Charity Tax Provisions

While House and Senate negotiators are beginning to advance must-pass export tax repeal legislation (H.R. 4520, S. 1637), some lawmakers are beating down doors to slip legislation harmful to nonprofits into the bill by the backdoor -- a bill that would allow church electioneering.

Political pressure is building on powerful House lawmakers as well as on Senate conferees to the export tax repeal bill to allow religious organizations to endorse political candidates and use their resources for partisan activities. Conservative lawmakers are trying to include the, Houses of Worship Free Speech Restoration Act, H.R. 235, into the American Jobs Creation Act of 2004, H.R. 4520, currently slated to go to conference. The church electioneering bill has already been rejected twice in the House.

H.R. 235 discriminates against nonreligious nonprofits by giving religious organizations rights that other 501(c)(3) groups would not have. It would also permit considerable expenditures of tax-deductible funds to publicize endorsement-sermons and other election-related presentations made during religious services or gatherings through television, radio, and other media. This soft-money loophole would hurt all nonprofits.

See our action alert to let your representatives know HR 235 is a bad idea for nonprofits.

On another front, a series of reforms proposed by Senate Finance Committee staff that would provide greater scrutiny of charities is also currently under debate. In July, the Senate Finance Committee held hearings on possible reform to the tax laws that govern nonprofits. The Finance Committee is angling to get some language on accountability included into pending tax legislation. Committee staff began drafting language in case legislators decide to move forward with proposals to eliminate some controversial charitable tax deductions to raise revenue this year.

This effort has been bolstered by the recent release of a Brookings Institute study, Sustaining Nonprofit Performance:The Case for Capacity Building and the Evidence to Support It. The study showed that public confidence in charitable organizations has steadily declined over the past few years.

Courts Rule on Nonprofits Electioneering Communications

Federal Election Commission (FEC) regulations have come under scrutiny lately as the U.S. District Court for the District of Columbia and the Supreme Court have ruled on lawsuits regarding electioneering communications. These actions have implications for nonprofits.

On Sept. 18, District Court Judge Colleen Kollar-Kotelly struck down more than a dozen of the FEC's current rules on political fundraising, including rules regulating electioneering communications of 501(c)(3) groups.

In 2002 the Commission ruled that 501(c)(3) organizations were exempt from a rule that restricts paid broadcasts that mention clearly identified federal candidates within 60 days of an election or 30 days of a primary or party convention. The logic was that 501(c)(3) organizations are already prohibited by tax law from electioneering; hence, any mention of a candidate would only be for non-electioneering purposes, such as lobbying.

In its ruling, the Court found that the agency had not adequately explained its dependence on Internal Revenue Service enforcement against rogue 501(c)(3)s. The Court noted, "It is the FEC, not the Internal Revenue Service (IRS), that is charged with enforcing FECA." (Op. at 151) The IRS does not view Section 501(c)(3)'s ban on political activities to include activities detailed under FECA.

The Court declined to enjoin the rules, instead remanding them to the FEC for further action consistent with the opinion.

The District Court opinion resulted from a lawsuit filed by Reps. Chris Shays (R-CT) and Martin Meehan (D-MA), the two sponsors of the House version of the new campaign finance reform law, who were dissatisfied with the FEC regulations being published by the FEC to implement the new law. Supporters of the new law have expressed delight in the court's decision.

Yet because the Court told the FEC to write new rules to govern key aspects of fundraising, including when candidates and outside parties can coordinate activities and whether 501(c)(3) organizations should be exempt from the paid ad restrictions, it is not clear what the outcome will be. It appears the existing FEC rules will stay in effect until the FEC can write new rules or challenge the Court's opinion -- likely through this election cycle.

The District Court's ruling came on the heels of a Sept. 14 Supreme Court decision not to issue an emergency injunction in a case involving Wisconson Right To Life (WRTL), a 501 (c)(4) organization that has endorsed Republican candidates. WRTL aired ads urging the public to contact Sens. Russ Feingold and Herb Kohl, both Democrats, to end the filibuster against President Bush's judicial nominees. Feingold is running for re-election. The suit sought an injunction against application of the rule to these facts, even though the Supreme Court upheld the general provisions of the law in December 2003. WRTL's attorney said the group will continue their appeal, even though there will is no chance of relief before the November election.

In the McConnell case the Supreme Court held that the rule prohibiting paid ads is not unconstitutional on its face. However, WRTL argued that it was unconstitutional "as applied" to their situation. The lower court rejected the "as applied" theory, noting the ads WRTL wishes to broadcast "may fit the very type of activity" that Congress and the Supreme Court meant to regulate. Court documents in the case are on the FEC website.

A few days before the Supreme Court action, the Federal Election Commission issued two Advisory Opinions clarifying application of the paid broadcast prohibition. The first, AO 2004-30 was requested by Citizens United, a 501(c)(4) organization that wished to broadcast ads promoting a book and film critical of John Kerry. The FEC said this would be impermissible under the electioneering communications rule, since the group does not qualify as a media organization, as it claimed to do.

The second, AO 2004-33 was requested by the Ripon Society, which wishes to run ads featuring a Republican member of the House, Rep. Sue Kelly (R-NY), and praises "Republicans in Congress". The FEC said the ad could not be run in Kelly's district, since she appears in it. However, the ad could be run in other districts, since it does not name any candidate specifically. However, if the group coordinates with the Republican Party it would lose its independent status and have to use hard money for such ads.

Bush Expands Faith-Based Initiative to Vouchers, State Control

In an effort to further weaken the wall separating church and state, President Bush is seeking to expand his faith-based initiative to the state and local levels. He is pushing state and local governments to adopt rules and policies similar to federal regulations that favor faith-based groups in government-funded programs.

Most federal grant services programs are administered at the local and state levels. According to a report issued last year by the Roundtable on Religion and Social Policy, only a few states have made the specific regulatory changes aimed at increasing participation by the faith-based service providers. However, many faith-based groups have been receiving government grants for years.

Jim Towey, director of the White House Office of Faith-Based and Community Initiatives (FBCI) has reassured state groups that the Bush administration is committed to further easing regulations of faith-based groups. President Bush has, through executive order, mandated that federal funds be awarded to faith-based groups even if they refuse to follow state and federal civil rights laws. For example, in Maine, state laws bar federal grants to religious groups that discriminate against minorities. In a meeting with the leaders of Catholic Charities of Maine, Towey stated that the White House was studying "what to do when local ordinances discriminate against faith based groups like they do here in Portland".

The Bush administration has repeatedly failed to win Congressional approval of its faith-based initiative because it permits

federal dollars to be awarded to religious groups that discriminate in hiring. In response, the administration has issued executive orders that force several federal agencies to award public dollars to faith-based groups without the usual constitutional safeguards.

Additionally, the Bush administration will continue to push vouchers as a way to fund faith-based service providers. Currently, any organization that provides direct federal funding for social welfare services is prohibited from using such funds for "inherently religious activities." However, new regulations pushed through by the administration created a system of vouchers to allow faith-based organizations to get around the inherently religious activities restriction. When the organization receives indirect government funding, for instance, vouchers, they are not required to separate the financed service from the inherently religious activity. These regulations were approved despite the fact that Congress did not pass H.R. 7, the Charitable Choice Act of 2001, which contained a similar provision.

Using these regulations, the Bush administration has extended the use of vouchers to provide funding to organizations offering substance abuse treatment, childcare, and job treatment. This has marked a major shift in the constitutional separation of church and state. For example, in August, Bush announced $43 million in funding for faith-based organizations and stated, "one of the most effective ways our government can help those in need is to help the charities and community groups that are doing God's work every day. That's what I believe government ought to do."

The administration has encouraged faith-based groups to develop programs to treat substance abuse. It has proposed the Access to Recovery program, which provides $100 million in vouchers to recipients of social services in up to 15 states. Recipients use the vouchers to choose rehabilitation programs, including those that are faith-based.

Without vouchers, many faith-based groups would not have applied for the grants. To receive direct funding, the faith-based organizations would have been subjected to government oversight and increased scrutiny from watchdog organizations. Vouchers effectively remove the oversight attached to direct funding by eliminating the question of whether there has been a mingling of religious services with the federally funded program.

Historically, Americans have been free to contribute only to the religious groups of their choosing. Voucher programs violate this principle by forcing taxpayers to subsidize religious social service programs that have minimal government oversight. Taxpayers should not be required to subsidize programs that may promote concepts they disagree with. People in need should not be forced to participate in religious activity in order to receive vital services. In addition, the voucher system assumes a range of choices in service providers that is rare.

It does not look like the faith-based train is going to stop anytime soon. In his announcement publicizing the addiction vouchers that will fund religious programs, Bush stated, "Government is not good at changing hearts. The Almighty God is good at changing hearts, which happens to be the cornerstone of effective faith-based programs." His comments do not address the role poverty plays in the need for services. A change in heart does not produce a change in income.

For more information on faith-based programs see:

- The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative
- Death by a Thousand Cuts (OMB Watch)
- HR 7 In-Depth (OMB Watch)
- Analysis of Charitable Choice (OMB Watch)

Report Discovers 'Pattern of Failure' to Serve Public

OMB Watch's new report, *The Bush Regulatory Record: A Pattern of Failure*, analyzes the last year of federal regulatory activity for four key agencies charged with serving the public interest and places its findings in a broader four-year context.

The agencies studied are the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and the Occupational Safety and Health Administration (OSHA).

The report finds that, even though overwhelming majorities of the public believe the government plays an important role in protecting the public interest, the Bush administration continues to shape regulatory policy in ways hostile to the public interest. It continues to abandon work on documented public health, safety and environmental problems, and has done virtually nothing to identify other priorities needing attention. It cannot meet even short-term benchmarks for action, and is allowing proposals for addressing long-identified needs to languish on its regulatory agenda. Finally, what little this administration has accomplished is made to weak to meet the public's needs.

The report is available, along with charts of supplemental information at www.ombwatch.org/regs/patternoffailure.

OMB Watch Launches Regulatory Weblog

OMB Watch is pleased to announce the launch of *RegWatch*, its new blog (short for "weblog") to track regulatory issues. Bookmark it at www.ombwatch.org/regwatch.

House Committee, Journals Call for More Clinical Trial Data

Members of the House Energy and Commerce Committee blasted the Food and Drug Administration (FDA) last week for urging drug companies to withhold information on the efficacy of antidepressants used on children. The controversy comes just as patient advocacy groups, the American Medical Association, and a dozen medical journal editors are calling on pharmaceutical companies to register their clinical trials in order to meet increasing public demand for information on the effectiveness and safety of drugs.

Lack of Information on Clinical Trials Leads to Use of Ineffective Drugs

After British scientists determined in February that many antidepressants were not only ineffective but perhaps even unsafe for children, the FDA and the House Subcommittee on Oversight and Investigations began to review the clinical trials withheld from the public. The FDA also conducted its own studies on the safety and efficacy of antidepressants used on children. Two internal FDA studies confirmed that antidepressants do pose an increased risk of suicidal ideation for children.

Furthermore, two thirds of clinical trials on antidepressants used on children found that the antidepressant medication performed no better than placebos.

According to testimony from drug companies during a House Energy and Commerce Committee hearing on Sept. 9, FDA encouraged drug companies to withhold clinical trials information from the public. Drug company executives testified that FDA regulators said that releasing the information could scare parents and physicians away from the drugs. According to the *Washington Post*, "Janet Woodcock, FDA's deputy commissioner for operations, responded that regulators believe the jury is still out on the drugs. The negative trials, she said, did not mean the medications were ineffective." Because the FDA allowed and even urged the drug companies to withhold the clinical trial data, physicians and the public were denied critical information on the efficacy of such drugs.

On September 15, FDA's Psychopharmacologic Drugs Advisory Committee and Pediatric Advisory Subcommittee recommended in a vote of 25-1 that antidepressants for children include a "black box" label warning of the increased risk of suicidal ideation associated with the drug. The black box warning is the highest level of label warning that the FDA issues. In a public statement, FDA supported the assessment of the committee.

Journal Editors Demand Registration of Clinical Trials

As reported by OMB Watch in July, FDA is actually required to keep a databank of information on clinical trials by the FDA Modernization Act of 1997, but the agency does not enforce it. The FDA had previously argued that it has not enforced the law because though the statute gives them the authority to establish the database, it does not give the agency explicit authorization to enforce reporting requirements. One indication of the incompleteness of the database is that a mere 16 percent of the registered trials were reported by the pharmaceutical industry, even though more than 80 percent of trials are funded by for-profit companies. Because the act is not enforced, drugs companies can pick and choose which studies they will make publicly available.

Gregory D. Curfman, Executive Editor of the *New England Journal of Medicine*, told the *Washington Post*, "When a pharmaceutical company sponsors a clinical trial and the results turn out not to be in the best financial interests of the company, it has been our experience these results are not made public."

The editors of 12 medical journals have responded by requiring drug companies to register their trials -- before the results of the study are known -- in order for the resulting studies to be eligible for publication. The editors hope to compel the pharmaceutical industry to release more information, particularly when studies yield results unfavorable to the industry. Although pharmaceutical companies could still withhold results, knowledge of the undisclosed clinical trials would still reveal critical information to the public.

The House Energy and Commerce Committee will conduct another hearing Sept. 23 on "FDA's Role in Protecting Public Health: Examining FDA's Review of Safety & Efficacy Concerns in Anti-Depressant Use by Children."

Congress Defies White House, Saves Overtime for Millions

Both the Senate Appropriations Committee and the House of Representatives have defied a White House veto threat and voted to save overtime rights for millions of workers. **Full story**.

OSHA Sets Ergonomics Guidelines for Poultry Workers

The Occupational Safety and Health Administration (OSHA) released their voluntary ergonomics guidelines for the poultry industry without fanfare on Sept. 2.

The guidelines are part of OSHA's "four-pronged" method for reducing musculoskeletal disorders (MSDs). This is the third set of ergonomics guidelines released by OSHA.

Though the guidelines are supported by both union and industry, union representatives concede that the guidelines are not likely to change the way the industry functions. Jackie Nowell, safety and health director for the United Food and Commercial Workers union to told the BNA, "We didn't have a problem with the proposed guidelines, and we don't have a problem with them now. Is it going to change the industry? No."

According to the University of Maryland's Environmental Safety Division of Administrative Affairs, "Repetitive Motion Illness or Cumulative Trauma Disorders represent almost 1/2 of all occupational illnesses reported by the Bureau of Labor Statistics." Though the estimates vary, the cost of such injuries could exceed $100 billion annually.

Despite these astounding numbers, OSHA continues to allow industry to regulate itself and has only offered voluntary best-practice guidelines. Moreover, as reported in the recent report, The Bush Regulatory Record: A Pattern of Failure, a rule promulgated by OSHA this year eliminates the requirement that MSDs be reported separately rather than be lumped in with the total number of workplace injuries, making it more difficult to track this prevalent and dangerous workplace hazard.

NHTSA Finally Issues Long-Delayed Tire Pressure Rule

The National Highway Traffic Safety Administration (NHTSA) issued a proposed rule Sept. 16 for requiring tire pressure monitoring systems. The ruling came a full year after its first attempt at a rule was overturned by a federal court, and two months after Public Citizen returned to that same court seeking an order compelling NHTSA to stop delaying and issue a rule.

NHTSA issued the Notice of Proposed Rulemaking (NPR), announcing the agency's intent to require a tire pressure monitoring system (TPMS) that alerts drivers when the air pressure in their tires becomes dangerously low. The TPMS system envisioned by the proposal would only be required to work with the tires on a vehicle at the point of sale, however, and would not be required to work with replacement tires.

The TPMS rule addresses the common hazard of driving on underinflated tires. Underinflated tires make vehicles more difficult to handle and increase the risk of crashing because of tire blow-outs, flat tires, skidding, and hydroplaning.

NHTSA was required to produce a TPMS rule by section 13 of the Transportation, Recall Enhancement, Accountability, and Documentation Act ("TREAD Act"), Pub. L. No. 106-414 (2000). Congress passed TREAD in the aftermath of the Ford-Firestone controversy.

NHTSA issued the new proposed rule after its first attempt at a TPMS rule was overturned by a federal court. During the first rulemaking, NHTSA recognized a distinction between "direct" and "indirect" systems:

- A **direct system** warns a driver when any tire or tires are significantly underinflated. It functions from the moment a vehicle is turned on, operates on any road surface, and can be installed in any vehicle.
- An **indirect system**, by contrast, warns a driver when (1) any single tire or combination of three tires (2) is 30 percent or more underinflated *as compared to the other tires*. Unlike a direct system, it cannot detect underinflation of all four tires or underinflation of two tires on the same axle or on the same side. Further, the system does not work until the vehicle has been driven for at least ten minutes, and even then it does not function on bumpy or gravel roads or at speeds above 70 miles per hour.

NHTSA recognized that a direct system would be more reliable and would prevent more harm -- 4,050 more injuries and 30 more deaths -- than an indirect system, but it opted, under White House orders, to require an indirect system.

After a federal appeals court in August 2003 rejected the indirect TPMS rule for insufficiently meeting the mandate of TREAD, NHTSA was ordered back to the drawing board. The plaintiffs in that case, Public Citizen and other consumer and safety groups, observed a pattern of delay in the year that followed the court ruling:

Document	Anticipated Deadline for Final Rule
Monthly status report to Congress (Nov. 2003)	May 1, 2004
Status report (Feb. 2004)	July 2004
Status report (June 2004)	August 13, 2004
Unified Agenda (June 28, 2004)	September 2004

Frustrated that needless deaths and injuries were occurring while NHTSA delayed action, the plaintiffs returned to court in July 2004 with a motion to compel NHTSA to comply with the court's previous judgment and issue a TPMS rule without delay.

In response to the plaintiffs' motion, NHTSA actually used its delay as evidence of progress. In its response brief, the agency pointed out that it had submitted a draft notice of proposed rulemaking to the White House Office of Management

and Budget (OMB) for its approval, but OMB returned it to the agency to work on "[u]nanticipated issues requiring further analysis."

The new notice of proposed rulemaking now puts an end to that dispute, but there will still be a significant period of time before a final rule is actually issued. The NPR calls for a new comment period that will be open until as late as November 2004.

Nuclear Commission Avoids Accountability in Secret Rule Change

The Nuclear Regulatory Commission illegally issued new orders, without opportunity for public participation, that secretly change terrorism preparedness requirements for nuclear facilities, according to a challenge filed by two citizen groups and recently argued in a federal appeals court.

Citizen action groups Public Citizen and San Luis Obispo Mothers for Peace petitioned the D.C. circuit appeals court for review when the Nuclear Regulatory Commission (NRC) revealed that it had changed the "design basis threat" (DBT) standards, which define the threats of terrorism and sabotage against which nuclear facilities must be protected. NRC announced the changes in a *Federal Register* notice -- not as a notice of proposed rulemaking, in which the public would have an opportunity to submit its assessment of the changes, but as an order abruptly declaring that the old DBT is now superseded by a new DBT outlined in an attachment that would remain hidden from public view.

A Context of Failure and Secrecy

"The steps that should be taken to protect nuclear installations against terrorist attacks are a matter of great public concern and a legitimate subject for public discussion and debate, even -- or perhaps especially -- when such discussion may lead to the revelation of flaws in security procedures that require a remedy for the protection of the public," the petitioners explained. NRC's secret rulemaking process and undisclosed DBT standards make such public scrutiny impossible.

This challenge coincides with several recent criticisms of NRC for not doing enough to protect the public with improved nuclear facility safeguards.

- The Government Accountability Office (GAO) discovered that nuclear power plant security teams failed *54 percent of the time* to defeat attackers in mock attack drills, except when the facilities artificially increased security levels above the requirements of their normal security plans.
- The Project on Government Oversight revealed that NRC allowed the nuclear energy industry's own lobby to create the mock terrorist teams used to test nuclear power plant security -- and the lobby, in turn, contracted with the same firm that already supplies security services to most nuclear facilities. In other words, the same company that secures nuclear facilities was allowed to judge its own performance and that of its competitors.
- The GAO testified that NRC's review of nuclear facility security may be lacking. NRC has visited only four or five plants to inspect security plans; for all the others, it is relying on simple check-list forms submitted by nuclear power plant owners.

Moreover, the secret DBT rulemaking is only one of several recent examples of excessive secrecy at NRC:

- NRC announced in August that it would hide all information about nuclear facility security -- even the success or failure of the new mock terrorist drills, with which the GAO discovered significant weaknesses, and NRC's enforcement of security requirements.
- The Atomic Safety and Licensing Board, the NRC's adjudicatory arm, ruled against the government for failing to disclose information about the controversial Yucca Mountain Project.
- That same board declined to allow a public hearing on environmental justice concerns about a company's attempt to expand a facility located in a low-income and minority area.

Further, it is not the only example of NRC attempting to avoid the requirements of an open, accountable regulatory process. Public Citizen and the Nuclear Information and Resource Service have recently argued a separate federal court case against NRC for issuing rules that truncate public participation in licensing decisions, by forcing concerned members of the public to file all their legal arguments simultaneously with their motion to intervene in a licensing case. The rule change, which eliminates the on-the-record, public hearings required by federal law, shortens the amount of time intervenors would have to prepare their arguments from four months to two.

About the Challenge

The petitioners argued that the Administrative Procedure Act and the Atomic Energy Act required NRC to submit DBT changes to an open rulemaking process in which the public would have an opportunity to participate. A previous court decision in *Union of Concerned Scientists v. NRC*, 711 F.2d 370 (D.C. Cir. 1983), interpreted the Atomic Energy Act requirement of a hearing before NRC may issue "rules and regulations dealing with the activities of licensees," 42 U.S.C. § 2239(a), as adopting the Administrative Procedure Act's requirements of notice-and-comment rulemaking while specifically excluding the APA's "good cause" exemptions from public rulemaking procedures.

Because NRC's DBT order specifically noted that it superseded the long-established DBT regulations in 10 C.F.R. § 73.1, the petitioners argued, and because it creates policies applicable prospectively across the board, it must be considered a regulation. The closed rulemaking process and the secret details of the rule make the entire DBT change an impermissible secret rulemaking, leaving communities in the dark about the security of nuclear facilities in their own backyards.

NRC in fact admits that it allowed the nuclear power industry, but not the public, to participate in the DBT rulemaking. The

petitioners discovered that NRC Commissioner Edward McGaffigan. Jr., addressed a conference two weeks before the order was issued and confessed that "cleared industry representatives" were allowed to shape the resulting order.

The government's arguments in response are complicated and clever, if not persuasive.

- NRC argued that the order was not a rule at all. Even though the order explicitly states that it supersedes the DBT regulations of 10 C.F.R. § 73.1, NRC attempted to back away from the breadth of that claim and offered the post hoc explanation that it only supplemented existing DBT regulations with the new order. The word "supersede" was, NRC argued, merely an "inartful" mistake.

- NRC also argued that the petitioners failed to exhaust their administrative remedies. The argument makes little sense, however, because there were no administrative processes in which the public could participate. NRC did announce a post hoc opportunity for hearings after the issuance of the order, but a previous court decision in similar circumstances held that the statute of limitations for petitions for judicial review of a procedurally defective rule runs from the date that the rule is issued. Had the petitioners waited to go through the post hoc process before filing their court challenge, they would have run down the clock and lost forever their right to petition the court. NRC argued against the relevance of that precedent by highlighting a trivial distinction that does not, ultimately, undermine the general principle of the case.

- NRC argued that the petitioners were capriciously attempting to use the courts to force NRC to adopt a notice-and-comment rulemaking process in lieu of an adjudication for the issuance of its order. This argument blurs the process by which NRC created the order with the two subsequent licensing decisions in which it reiterated and applied the new DBT order. NRC had already issued the challenged order, which it subsequently appended to its two licensing decisions, *before* the licensing hearings. Moreover, the order is a rule of general applicability to all NRC licensees, not an application of a general principle to specific factual details that is the hallmark of an adjudicatory decision.

The case was argued on Sept. 10, before a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit.

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