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The Watcher
September 25, 2007 Vol. 8, No. 19

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## Congress Hears Pleas for Expanded Authority and Resources at CPSC

A proliferation of children's product recalls due to potentially dangerous exposure to lead has left many turning to the federal government for answers. The Consumer Product Safety Commission (CPSC) has borne much of the brunt for the regulatory failures. Congress is considering solutions including new federal standards for lead, expanding

the agency's regulatory authority and increasing agency resources.

Currently, CPSC regulations ban the use of lead paint in many products, including toys. Children may also be exposed to lead in jewelry. CPSC has initiated a rulemaking which would ban lead in jewelry. While that rule moves through the regulatory pipeline, CPSC has begun a campaign of voluntary recalls focusing on reducing lead exposure in children's products.

However, neither CPSC regulations nor enforcement practices have kept up with a changing marketplace dominated by Chinese imports. Subsequently, a large number of children's products containing lead have found their way into American households. In these cases, CPSC has had to resort to voluntary recalls, in which the agency works with toy manufacturers and distributors in order to publicize a recall and work to remove tainted products from the market.

In 2007, CPSC has negotiated at least 43 recalls of children's products — from toys to school supplies to jewelry — containing lead, according to CPSC recall announcements. Those 43 recalls have involved approximately 10.8 million products, 84 percent of which were manufactured in China.

The product failures have spurred congressional oversight. Both the House and the Senate have held hearings focusing on children's exposure to lead from toys, jewelry and other products.

The Senate Appropriations Committee Subcommittee on Financial Services and General Government held a hearing on Sept. 12. One panel of witnesses included CPSC Acting Chairman Nancy Nord. Subcommittee members questioned Nord on a new agreement CPSC has negotiated with its Chinese counterpart. Under the agreement, the Chinese agency, the General Administration of Quality Supervision, Inspection and Quarantine, has pledged to work to eliminate lead in toys manufactured in China.

Senators inquired as to whether the agreement would yield actual benefits in the form of safer toys. Nord could not provide a straightforward answer. On multiple occasions, Nord instructed the subcommittee to "ask the Chinese."

Another panel included Mattel chairman Robert Eckert, Toy Industry Association president Carter Keithley, and Consumers Union counsel Sally Greenberg. Eckert was forthright in acknowledging his company had allowed lead-tainted products on the market and apologized for the mistakes. All witnesses expressed full-throated support for a strong and well-resourced CPSC.

During the hearing, ranking member Sam Brownback (R-KS) urged CPSC to "pull out the heavy club" and do a better job enforcing current regulations. Sen. Richard Durbin ☼ (D-IL), chairman of the subcommittee, closed the hearing by saying that China, the CPSC and Congress had failed, and he encouraged greater federal involvement: "There are

moments when we need government, when we need someone to make certain that the products on the shelves are always going to be safe for our families and our kids. We need to step up to that responsibility."

On Sept. 19 and 20, the House Energy and Commerce Committee Subcommittee on Commerce, Trade and Consumer Protection held a two-day hearing on lead paint in children's toys. Congressmen from both parties were critical of CPSC and the toy industry. Committee Chair John Dingell (D-MI) scolded Nord for being too trustworthy of China, saying, "We have a fistful of promises from China."

Congressmen and witnesses also discussed legislative solutions. One proposed solution would require toys be certified for safety by an independent third party before the products could be sold. Gary Knell, president of the Sesame Workshop, announced his company would begin the process voluntarily.

Sen. Mark Pryor ☼ (D-AR) has introduced the CPSC Reform Act of 2007 (S. 2045). The bill would mandate third-party certification for children's products. It would also ban the presence of lead in children's products and tighten the standard for lead in all paints to 0.009 percent from the current 0.06 percent standard.

The legislation goes beyond children's products and lead issues and addresses some of the broader problems plaguing CPSC. Pryor's legislation would also provide CPSC expanded ability to assess civil penalties for parties in violation of CPSC standards. The legislation would also mandate an expansion in appropriations for CPSC.

CPSC's eroding resources have been cited as a reason for the agency's inability to properly ensure product safety. The agency's budget is half of what it was in the 1970s when accounting for inflation. CPSC's staff, once near 1,000, is now 420.

President George W. Bush's proposed budget for FY 2008 would exacerbate this problem. CPSC's budget for FY 2007 was $62,728,000. Bush has proposed a new funding level of $63,250,000 for FY 2008, a cut when taking inflation into account. Bush's budget proposes a cut in staff down to 401.

Congress is attempting to counter the president on his proposed cuts. In their respective versions of the Financial Services and General Government Appropriations bills, the House proposed $66,838,000 for CPSC, and the Senate proposed $70,000,000 for FY 2008. Bush has repeatedly indicated he will veto appropriations bills exceeding his requests.

Pryor's legislation would mandate an increase in staff to at least 500 full-time employees by the beginning of FY 2014. It would also mandate an increase in appropriations to $141,725,000 by FY 2015. The legislation has not yet been considered by the Senate Commerce, Science and Transportation Committee.

# New White House Guidelines Fit into Broad Attack on Federal Protections

The White House has issued new guidelines for federal agencies in conducting risk analysis. Risk analysis, of which risk assessment is a central factor, is a process by which agencies identify and evaluate risks such as toxic exposure or structural failure. Risk analysis often lays the scientific or technical foundation for public health and safety rulemakings.

Susan Dudley, administrator of the Office of Information and Regulatory Affairs, and Sharon Hays, associate director of the Office of Science and Technology Policy, issued the guidelines in the form of a Sept. 19 memo titled, "Updated Principles for Risk Analysis."

The memo updates a 1995 memo on risk analysis. The 1995 memo divided broad principles for risk analysis into five parts: General Principles, Principles for Risk Assessment, Principles for Risk Management, Principles for Risk Communication, and Principles for Priority Setting Using Risk Analysis. Clinton-era OIRA administrator Sally Katzen issued the 1995 memo.

The new memo keeps these five categories as well as each individual principle. The new memo includes additional text with each original principle. In some cases, the explanatory text is brief. In other cases, it includes detailed discussions of certain aspects of risk analysis such as the treatment of scientific uncertainty or analyzing effects on sensitive subpopulations.

In the memo, Dudley and Hays announced they issued the document in lieu of the controversial Proposed Risk Assessment Bulletin. The Bulletin contained a set of guidelines to govern all risk assessments and included technical standards for all federal agencies to use when conducting risk assessments, as well as other scientific documents.

However, the standards in the Bulletin were too prescriptive and represented an unrealistic one-size-fits-all approach toward all federal risk assessments. Public interest groups and lawmakers criticized the Bulletin when OMB proposed it.

OMB requested that the National Research Council, part of the National Academies, review the bulletin. The NRC review found the Bulletin to be "fundamentally flawed." NRC suggested the Bulletin be withdrawn completely. Following the release of the report, OMB announced it would go back to the drawing board to "develop improved guidance for risk assessment."

The memo marks the official withdrawal of the Bulletin. "OMB Watch applauds the decision to withdraw the Risk Assessment Bulletin," the organization said in a statement.

The risk analysis memo is an improvement over the proposed bulletin. It imposes no

new requirements on agencies, nor does it give OMB additional reviewing powers. The memo is also broader. While the Bulletin focused on risk assessment, the memo more expressly covers other aspects of risk analysis including management, communication and prioritization.

However, the memo does raise significant concerns. The memo fits into a pattern of changes to the regulatory process enacted by OMB during the Bush administration. Although the memo updates the 1995 risk analysis principles, it places these principles in the context of those broad regulatory changes.

The memo reaffirms the new requirements for agency "guidance documents" set out by the Good Guidance Practices Bulletin and amendments to Executive Order 12866, Regulatory Planning and Review. The changes subject agency guidance documents to an OMB review period, although neither the Bulletin nor the revised E.O. define guidance documents clearly. The memo indicates OMB considers risk assessments to be a form of guidance. Sweeping risk assessments into OMB's review of guidance raises concern because risk assessments are not just documents but processes of scientific or technical evaluation.

The memo also places risk analysis in the context of economic assessments. The memo encourages agencies to refer to OMB's Circular A-4 — a document describing the process by which agencies prepare cost-benefit analyses for regulatory activities — when evaluating or choosing risk management strategies. This is the latest example of OMB attempts to make economics the preeminent criteria in rulemaking.

OMB also uses the memo to promote its 2002 Information Quality guidelines. For example, the memo states, "The agency also should identify the sources of the underlying information ... and the supporting data and models, so that the public can evaluate whether there may be some reason to question objectivity." While OMB Watch supports transparency and objectivity, this statement may be an attempt to promote Data Quality Act challenges. The guidelines allow these challenges, which are public requests for agencies to reevaluate technical or scientific data or reassess conclusions. Industry representatives often use the challenges to delay agency regulatory activity.

"The practical effect of this new memo is probably not very significant," said Rick Melberth, Director of Regulatory Policy at OMB Watch. "Agencies will probably stick this in a desk drawer because this doesn't change much in the way that agencies conduct their regulatory analyses." Nonetheless, OMB Watch remains concerned about how the memorandum may be used to fit into a broader pattern of "less regulation is better regulation" promoted by the Bush administration.

# Senate Reviews Agencies' Attempts to Preempt Congress and the States

The Senate Judiciary Committee held a hearing Sept. 12 about federal agencies' practice of inserting into regulations language that removes consumers' ability to sue under state tort law those corporations whose products cause harm. In addition, the use of this preemption language limits the ability of state and local governments to protect the health, safety and welfare of their citizens. Federal preemption removes the targeted policy area from state and local jurisdiction and makes it almost exclusively a federal policy issue.

According to the legal website USLegal,

> Preemption is the rule of law that if the federal government through Congress has enacted legislation on a subject matter it shall be controlling over state laws and/or preclude the state from enacting laws on the same subject if Congress has specifically declared it has "occupied the field." Preemption can occur by Congress passing a law, preempting state or local law. If Congress has not clearly claimed preemption, a federal or state court may examine legislative history to determine the lawmakers' intent toward preemption.

As this definition clearly states, preemption usually is done through congressional action and intent. Current legislative proposals show Congress struggling with the question of preemption in diverse policy areas. For example, BNA reports ($) that the House and Senate versions of the Mental Health Parity Act of 2007 reflect different views on preemption, but that the Senate's bill is moving toward the House version by removing preemption language that would have prevented states from having stronger mental health laws.

In another BNA summary, this time about the reauthorization of user fees to fund U.S. Food and Drug Administration (FDA) drug approval activities, the Senate's version included a provision that would have jeopardized consumers' ability to sue drug companies for harm from drugs like Vioxx. This provision was removed from the final legislation.

In the absence of a clear indication from Congress about preemption, the courts are left to determine congressional intent when federal and state laws conflict. At the hearing, witnesses pointed out numerous occasions when federal agencies inserted preemption language into regulations, thereby usurping both expressed congressional intent and state law.

Donna D. Stone, a Delaware state representative and president of the National Conference of State Legislatures, provided numerous examples in her testimony in which the Center for Medicare and Medicaid Services (CMS) tried to change Medicaid statutory intent in 2007 by issuing rules without congressional authorization or consultation with

state and local governments.

In his written testimony, David Vladeck, a Georgetown University law professor and OMB Watch board member, described three cases of agencies inserting preemption language into rules directly impacting consumer safety:

- In 2006, FDA "announced that its approval of a drug's label immunizes the manufacturer" from claims by consumers that they were inadequately warned of dangers from using the drug.
- "The National Highway Traffic Safety Administration [NHTSA] now routinely claims that its regulatory actions preempt state law — both state statutory and regulatory law and state damages actions."
- In 2006, the Consumer Product Safety Commission inserted language into the preamble of a regulation on mattress flammability standards. "As with the FDA and NHTSA, nowhere does the CPSC explain why it has reversed field and, for the first time in the agency's history, taken the position that its regulatory action extinguishes tort law remedies."

These agency preemptions have real consequences according to an attorney who brought claims on behalf of consumers. Collyn Peddie described two consumers who suffered harm, a 62-year-old woman from Vioxx and a toddler from an injection of a faulty vaccine. In both cases, judges prevented the claims from going forward due to preemption language even when, in the case of the toddler, Congress expressly upheld the right to seek damages under the Vaccine Act. Traditionally, judges give great deference to agencies' rulemakings, so they may not look beyond the regulation.

The panelists proposed solutions to this growing trend of agencies' use of preemption. Recommendations included 1) an increase in congressional oversight of agencies like FDA, 2) use of explicit language indicating Congress's intentions regarding preemption, and 3) federal legislation limiting and advising state court judges' interpretations of the preemption doctrine. No specific proposals have been introduced in Congress.

The hearing is an important first step according to Gerie Voss, regulatory counsel for the American Association for Justice. "The Senate Judiciary's preemption hearing shed light on what appears to be a coordinated effort by Bush Administration agencies to take away the rights of Americans to hold negligent corporations accountable for dangerous products," she told OMB Watch.

## Congress Expands FDA User Fee Program, Reforms Drug Safety Process

Congress has passed legislation which will reauthorize a program allowing the U.S. Food and Drug Administration (FDA) to collect fees from pharmaceutical companies in order to conduct drug approvals. The bill will also dramatically expand FDA's regulatory

authority in response to recent controversy. President George W. Bush is expected to sign the bill into law soon.

In 1992, Congress passed the Prescription Drug User Fee Act (PDUFA). PDUFA gives the FDA the authority to collect fees from pharmaceutical companies for the safety review and approval of new drugs. Under the original legislation, Congress must reauthorize PDUFA every five years. PDUFA is set to expire Sept. 30.

The Food and Drug Administration Amendments Act of 2007 (H.R. 3850) will renew and expand the user fee program. FDA will increase the amount of user fees it collects to almost $400 million, up from approximately $300 million. User fees will fund approximately half of the agency's drug review program and a fifth of the agency's overall budget.

While user fees account for a significant portion of FDA's funding, critics say the program ties the interests of FDA's drug approval office too closely to those of the pharmaceutical industry. In an open letter, the public interest group Public Citizen tells Congress, "The agency has become dependent for its funding upon the very industry over which it has regulatory authority." Due to the dependence on user fees, the letter says, "pharmaceutical companies are increasingly seen as stakeholders, customers or even clients."

However, because user fees account for such a large portion of FDA funding and expiration of PDUFA is looming, the reauthorization bill was considered must-pass legislation.

In addition to reauthorizing PDUFA, the bill will expand the regulatory authority of the FDA. Recent controversies concerning the safety of the food and drug supply have subjected FDA to increased public and congressional scrutiny. PDUFA reauthorization provided a vehicle for lawmakers to address public concerns and to begin to solve FDA's problems. Subsequently, the legislation morphed into a broad-based FDA reform measure.

In response to controversy over the arthritis drug Vioxx and other high-profile FDA missteps resulting in drug recalls, the bill includes provisions to strengthen FDA's regulatory authority for drugs already on the market. The legislation will expand FDA's ability to require drug companies to perform post-market safety studies and perform "risk evaluation and mitigation" for drugs exhibiting adverse effects.

The bill will also give FDA more authority to regulate direct-to-consumer advertising of pharmaceuticals, an arena over which FDA has held scant regulatory authority. However, the bill does not go as far as some drug safety advocates desired because it will not give FDA the authority to ban direct-to-consumer advertisements found to be false or misleading.

The legislation will also allow FDA to promptly order drug companies to change the labeling for a drug, a process which industry has been able to delay. The bill will also expand FDA's ability to assess civil penalties if drug companies violate any of these provisions.

Other post-marketing provisions include the creation of a publicly-available clinical trials database. Under the bill, the National Institutes of Health will administer a database where the public can search the results of clinical trials of drugs and medical devices. Drug safety advocates believe — by allowing individuals to examine separate studies of the effects of individual drugs or medical devices — the database will facilitate the ability of medical researchers to detect adverse effects.

While the primary focus of the bill is on improving FDA's regulatory regime for drugs, the bill includes some provisions related to food safety. The bill will give FDA the authority to better regulate, and recall if necessary, pet food. This comes in response to the contaminated pet food outbreak which occurred in March 2007.

On May 9, the Senate had passed its version of the PDUFA renewal and FDA reform legislation (S. 1082). The House had passed its version (H.R. 2900) June 21.

However, negotiations between the two chambers stalled, and Congress did not form a conference committee to reconcile the two bills. Because of the need to finalize the legislation by Sept. 30, Rep. John Dingell ☼ (D-MI) introduced Sept. 19 the Food and Drug Administration Amendments Act of 2007, which was based on the two original bills. The House and the Senate voted favorably on an identical version of Dingell's bill. On Sept. 19, the House approved the bill 405-7. On Sept. 20, the Senate approved the bill by unanimous consent.

Two provisions proved contentious during the final days of negotiations. One provision concerned conflicts of interest on FDA advisory panels. Advisory panels are composed of governmental and non-governmental experts and provide recommendations on a variety of topics such as the safety of a particular drug. Federal law prohibits individuals with conflicts of interest from serving on FDA advisory panels; however, the FDA commissioner may grant waivers allowing individuals to serve regardless of the degree or nature of the conflict.

A provision in the original House bill would have capped at one the number of waivers the commissioner could grant per advisory panel. The Senate voted on a similar provision but, in a 47-47 tie vote, did not adopt it. Lawmakers could not reconcile the issue. Instead, the final bill includes language which will limit conflicts by assessing the sum of conflicts on all FDA advisory committees. FDA will reduce by five percent each year the number of waivers granted. Currently, about 25 percent of panel members receive waivers, according to the Center for Science in the Public Interest.

The other contentious provision would have required pharmaceutical companies to

receive FDA approval before changing a drug's labeling. Currently, companies may make changes without FDA approval and often do so when discovering new information about a drug's side effects.

The American Association for Justice and some congressional Democrats opposed the provision which Sen. Richard Burr ☼ (R-NC) introduced. Those critics said, if the bill forced drug companies to receive FDA approval for label changes, companies may be able to avoid liability in cases where victims of a drug's negative side effects would seek damages. The bill would have preempted state tort law, the critics argued. The provision was not included in the final bill.

President Bush is expected to sign the bill into law in the coming days. If the bill does not become law by Sept. 30, FDA will face funding shortfalls and may be forced to begin reducing staff levels.

## Wartime Commission Would Investigate Contracting Abuses in Iraq and Afghanistan

Sens. Jim Webb (D-VA) and Claire McCaskill (D-MO) have sponsored a bill (S. 1825) that would set up a commission to investigate and reform wartime contracting. It is likely the bill will be introduced as an amendment to the Defense Reauthorization Act that is currently being debated in the Senate.

OMB Watch has sent a letter of support to Congress urging adoption of Webb's potential amendment. The Project on Government Oversight, Government Accountability Project, and Taxpayers for Common Sense also support the bill.

The commission, modeled on the Truman Committee that exposed $15 billion of waste and fraud in World War II contracting, would be given subpoena powers and a broad and ambitious mission. The proposal would also expand the powers of the Special Inspector General for Iraqi Reconstruction (SIGIR), which has a proven record of exposing waste, fraud and abuse. If enacted, the commission will have the opportunity to focus more attention on reforming the government contracting process generally.

The commission would perform three essential functions:

- Investigate wartime contracting and procedures
- Recommend changes to reform and improve contracting procedures
- Expand the authority of the SIGIR

Oversight of wartime contracting is one of the most critical tasks facing Congress. Much of the military functions in Iraq and Afghanistan have been performed by contractors. Yet, the public and policymakers know little about how well contractors have performed and the full extent of contractor waste, fraud and abuse. Recent problems with private

contractors that provide security in Iraq, such as Blackwater, USA, have brought to light additional reasons why a comprehensive look at contracting during the wars is necessary.

Furthermore, contract oversight is becoming increasingly important outside of Iraq and Afghanistan operations. Total funding devoted to contracting by all federal agencies has doubled since 2000.

Senate leaders have not yet agreed to allow a vote on the Webb/McCaskill bill as an amendment to the Defense Authorization Act.

## FY 2008 War Funding Could Top $200 Billion

In May, Congress passed a $99.5 billion supplemental war spending bill that expires on Sept. 30. The next supplemental bill for FY 2008 war spending is expected to total close to $200 billion. That total, however, is an estimate based on speculation in Washington and continuously changing conditions in the wars in Iraq and Afghanistan.

When the president submitted his FY 2008 budget request to Congress in February, he included two war supplemental requests: $93.4 billion for FY 2007 (approved by Congress with $5.1 billion in additional funding in May) and $141.7 billion for FY 2008. The budget request also contained a caveat that "[a]s activity on the ground evolves, the Administration may adjust the requested amount..."

By July, the administration was already beginning to lay the groundwork to expand their FY 2008 supplemental request. Testifying before the House Budget Committee on July 31, Deputy Defense Secretary Gordon England told his interlocutors that the Pentagon would be requesting an additional $5.4 billion to pay for the acquisition of some 1,520 Mine Resistant Ambush Protected vehicles. England stipulated at the time that additional war funding requests were not confined to those cited in his testimony.

> The forthcoming Iraqi Security Forces Assessment Commission Report, and the President's September Report on Iraqi Benchmarks, are likely to provide additional input and analysis relevant to GWOT requirements in FY 2008. The nature and scope of adjustments to the GWOT request will depend on these new insights, on the evolving situation on the ground...

At the time of England's testimony, the FY 2008 war supplemental request was expected to be $147 billion, but there were also expectations that it would grow larger as the situation in Iraq evolved.

On Aug. 29, the *Washington Post* reported the White House would be requesting "up to $50 billion" in additional war funding, which bring the total FY 2008 supplemental war funding request to almost $200 billion. The *Post* story cited an anonymous White House

source, but White House spokesperson Gordon Johndroe refused to comment on the figure.

Johndroe did indicate funding decisions would not be made until Gen. Petraeus reported to Congress on the status of the so-called surge strategy (this was the president's September Report on Iraqi Benchmarks referred to by England in his July testimony). Petraeus testified Sept. 10, but the White House has not confirmed any details about the additional $50 billion request. It is possible Defense Secretary Robert Gates will give Congress more details on Sept. 26 when he is scheduled to testify before the Senate Appropriations Committee.

It is doubtful Congress will pass any FY 2008 supplemental funding prior to Oct. 1, but instead will include some war spending in the long anticipated FY 2008 continuing resolution (CR) that will be debated this week in Congress. Exactly how Congress will fund the wars in the CR is unknown, but one option gaining favor would be to fund the wars at the same rate that was approved in the FY 2007 defense appropriations bill. This would be a slightly lower level than was spent per month in FY 2007, but would sustain the war effort until Congress has time to pass the FY 2008 defense appropriations bill later this year. It also buys Congress additional time to debate war policy through consideration of the president's supplemental war request while avoiding the appearance of cutting off funding for soldiers in the field.

Discussions concerning the CR will take place this week in Congress, and unknown details about war spending, such as funding levels and duration, will need to be resolved before Oct. 1. Although details of war spending for the next fiscal year are far from firm, it appears the eventual bottom line will fall somewhere between $150 billion and $200 billion.

| Composition of Anticipated FY 2008 War Supplemental Request (*billions of dollars*) | | |
|---|---|---|
| **Date** | **Occasion** | **Amount** |
| | | |
| February | President's FY 2008 Budget Request | 141.7 |
| July 31 | Deputy Defense Secretary England's congressional testimony | 5.3 |
| August 29 | Unnamed White House source cited in *Washington Post* | 50.0 |
| **Total anticipated FY 2008 war supplemental request**: | | **197.0** |

## Congress to Vote on Compromise SCHIP Package

House and Senate negotiators have agreed to an expansion of the State Children's Health Insurance Program (SCHIP) that closely mirrors the earlier Senate version. The House is scheduled to vote on the package today, Sept. 25, with the Senate voting later in the

week. President Bush has promised to veto the bill.

The agreement is nearly identical to a version of the expansion the Senate passed in August. It provides an additional $35 billion in funding over five years. This additional money will enable states to sign up an estimated four million additional children, almost all of whom are already eligible for SCHIP but were not enrolled because of lack of funding.

The new agreement will be financed by a 61-cent increase in the federal tobacco tax, as the original Senate version called for. Furthermore, it would replace guidance recently issued by the Centers for Medicare and Medicaid Services (CMS) that prevented states from insuring children in families above a certain threshold unless they reach unrealistically high enrollment rates among children from the lowest-income families eligible for SCHIP. The new guidance would be less restrictive, according to a press release from House Speaker Nancy Pelosi (D-CA).

During negotiations, senators would not accept a number of provisions the House passed earlier this year because they believed the full Senate would not approve them. The original House version contained cost-reducing reforms of the Medicare Advantage program, which consistently costs more than traditional Medicare partly because it relies on private insurance companies. The House bill's increase in the tobacco tax was less steep, at 45 cents, and it included a $50 billion funding increase that would have extended coverage to five million children.

The president has promised to veto the expansion, on the basis of misleading arguments. If the president does veto the bill, it will likely force Congress to vote on whether to override the veto. The override vote should be close, and therefore, it is critical as many people as possible contact their congressional representatives to urge them to vote for the new package and to override a presidential veto.

The conflict between Congress and the president will be even more tense as the SCHIP program's authorization expires on Sept. 30. If it is not reauthorized in time, everyone in the program will lose their health insurance. Most likely, Congress and the president will not resolve their differences by then, so they will have to approve a temporary extension of the program's authorization. If funding levels remain unadjusted for the rising cost in health care, a temporary extension would result in fewer children covered by the program.

## U.S. Reaches Debt Limit: The Case for Long-Term Analysis

The Senate will vote soon on legislation to raise the ceiling on the national debt to nearly $10 trillion. This action is imperative as the statutory limit of $8.965 trillion on the United States' level of public debt will be reached by Oct. 1, according to Treasury

Secretary Henry Paulson.

The national debt, which has increased 40 percent during the Bush presidency, is the total accumulation of annual budget deficits. If the debt limit is not increased, the U.S. Treasury would be unable to pay interest on existing notes and bonds or borrow more funds needed to keep the federal government operating. The United States has never defaulted on a single debt payment.

On Sept. 12, the Senate Finance Committee approved a bill to increase the debt limit by $850 billion, to a total of $9.815 trillion. The bill will now move to the Senate floor, where adoption is almost assured. Despite this assurance, there may be a lack of debate on why the United States must continue to take on increasing levels of debt. The last time the statutory debt limit was increased, in March 2006, the Senate debate was strictly partisan and the vote was close to party-line, 52-48, with all Democrats and only three Republicans voting against the measure. This time around, the situation will likely be reversed, with Democrats supporting the increase and Republicans voting against it.

But the issues involved in raising the debt ceiling are serious ones that transcend party politics. Policymakers have debated for decades the relative merits of deficit financing in a macroeconomic context, focusing mostly on the trade-offs involved in incurring debt to stimulate the economy and what is the optimal or acceptable level of national debt as a percentage of GDP.

Largely absent from debates about the national debt, especially congressional ones, are dynamic considerations such as the impact on interest expenses of policies that add to the national debt, trade-offs involved in long- versus short-term budget commitments, and the necessity or merits of extending the Bush tax cuts.

Some voices in the debt and deficit debate this year are bringing overdue attention to the larger questions of long-term budget priorities and how dynamic analysis can illuminate the costs involved. For example, Sen. Tom Coburn (R-OK) told Senate Minority Leader Mitch McConnell (R-KY) last week:

> Congress should be required to make the same difficult choices about financial priorities that are made every day by American families. It's no wonder that only 11 percent of the American public has a positive view of Congress... The debate over whether to increase the debt limit provides Congress with yet another opportunity to show American taxpayers that it has the courage to make tough decisions about spending priorities.

In testimony before the House Ways and Means Committee on Sept. 6, Jason Furman of the Brookings Institution brought these questions into greater focus:

> Although some of these financing costs will likely fall on future generations, many of them will fall on the exact same households that receive the tax cuts

today. For example, a person might get a $500 tax cut today but lose $700 in present value terms in future Medicare benefits. It is common in dynamic analysis to explicitly specify how tax cuts are financed in order to calculate the impact of the tax cuts on economic performance. These same financing assumptions have major implications for the distribution of the tax cuts that should also be presented in these analyses.

Setting aside the differences in these perspectives — Coburn would address the debt by spending reductions, while Furman looks at the effects of tax cuts — they both support an analysis which the Joint Committee on Taxation (JCT) and the Congressional Budget Office (CBO) might do well to perform when they "score" legislative tax and spending proposals: an analysis of the impact of a given proposal on the national debt, estimating the additional interest expense to the federal government if proposals are deficit financed, and also any benefits to the country over the long-term due to the investment.

For example, a proposal to invest an additional $100 billion over ten years on rebuilding the nation's infrastructure might obviate emergency spending for repairs during that period that could end up costing more in the long-run if not spent on preventative measures. In Furman's example about tax cuts, a deficit-financed tax cut may not appear as attractive when policymakers realize families will end up paying more in the long run than they will receive in a tax cut.

Requiring such a deficit impact analysis by the JCT (in the case of tax proposals) and CBO (for spending proposals) would help policymakers make comprehensive assessments of tax and spending proposals and facilitate efforts to set national priorities. If successful, it may also have the long-term impact of fewer increases to the national debt ceiling.

## Wiretapping Law the Focus of House Hearings

The House Committee on the Judiciary and the House Permanent Select Committee on Intelligence held several hearings the week of Sept. 17 on the implications of the Protect America Act (PAA) and its revisions to the Foreign Intelligence Surveillance Act (FISA). Director of National Intelligence (DNI) Mike McConnell argued that the changes need to be made permanent, while others argued that PAA unnecessarily violates civil liberties.

On Aug. 5, President Bush signed the Protect America Act of 2007 (PAA), granting the government the authority to wiretap anyone, including U.S. citizens, without court approval as long as the "target" of the surveillance is reasonably believed to be located outside the country. The legislation expires February 2008, but the House Judiciary and Intelligence committees held hearings this week to consider immediate changes. Public interest organizations and many members of Congress are seeking revisions to address the invasion of privacy and erosion of civil liberties they believe provisions of the act

represent.

DNI McConnell strongly argued before the House Committee on the Judiciary and the House Permanent Select Committee on Intelligence for the importance and necessity of PAA. "The Protect America Act, passed by Congress and signed into law by the President on August 5, 2007, has already made the nation safer by allowing the Intelligence Community to close existing gaps in our foreign intelligence collection," said McConnell. "After the Protect America Act was signed we took immediate action to close critical foreign intelligence gaps related to the terrorist threat, particularly the pre-eminent threats to our national security."

Kenneth Wainstein, Assistant Attorney General, National Security Division of the Department of Justice, argued for three changes in law. "First, the Protect America Act should be made permanent. Second, Congress should provide liability protection to companies that are alleged to have assisted the nation in the conduct of intelligence activities in the wake of the September 11 attacks. Third, it is important that Congress consider and ultimately pass other provisions in our proposal." Among the specific provisions included in the third request are streamlining of the FISA application process and modifying the definition of "agent of a foreign power."

James Dempsey of the Center for Democracy and Technology argued for revisions in PAA's amendment to FISA. Dempsey asserted that because the PAA permits searches and wiretaps that are presumptively unconstitutional, "it is highly likely that a search under the PAA of international communications of US persons would be unconstitutional."

Dempsey went on to note that the intelligence community can be provided with the tools necessary to collect intelligence without infringing on rights to privacy. "The legitimate goal of providing the NSA with speed and agility in targeting persons overseas can be accomplished in a way that builds on the constitutional system of judicial review."

Kate Martin and Lisa Graves of the Center for National Security Studies also argued that, "the far-reaching changes written into FISA [by PAA] are unconstitutional. They are unnecessary because there are alternatives that would provide additional flexibility to the intelligence community and increase its effectiveness while preserving Americans' constitutional rights, and constitutional checks and balances."

The House Committee on the Judiciary and the House Permanent Select Committee on Intelligence are expected to consider legislation on FISA as early as Oct. 4. "For more than 200 years we have managed to have both liberty and security," stated Rep. Silvestre Reyes (D-TX), Chairman of the House Permanent Select Committee on Intelligence, "and I intend to do my part to ensure that we continue to maintain this careful balance for years to come."

# Secrecy on the Rise, Reports OpenTheGovernment.org

OpenTheGovernment.org released a report in September detailing an increase in government secrecy in the realms of national security, government contracting, and state governments, among other areas. The *Secrecy Report Card 2007* is the latest report in an annual series by the coalition that analyzes objective measurements of secrecy in government.

## National Security Information

The report notes that from 2002 to 2006, the average number of original classification decisions was 258,824; this is a 47 percent increase from the average number of original classification decisions from 1995 to 2000. Once information has been designated as classified by an original classifier, many other documents can be derivatively classified. Hence, an increase in original classification decisions can have an exponential increase in classified information writ large.

The report also explores the vast amount of money spent to keep information classified and secret, which has also increased in recent years. In 2006, the government spent $8.2 billion, a 7.5 percent rise from 2005. The *Secrecy Report Card* also notes that for every dollar spent in 2006 on declassifying documents, the government spent $185 to keep information secret. Despite a new requirement to declassify documents 25 years old or older, the resources devoted to declassification dropped by 22.6 percent from 2005. The number of pages declassified, though, increased 27 percent from 2005.

The *Secrecy Report Card* also notes that between 2003 and 2005, the government issued 143,074 National Security Letters, which are secret mandatory requests for personal information. Approximately 50 percent of these requests were directed at U.S. persons.

## Government Contracting

Using data from FedSpending.org, the *Secrecy Report Card* documents a 166 percent increase, after adjusting for inflation, in the amount of money spent on federal contracts from Fiscal Year 2000 to Fiscal Year 2006, $208 billion to $415 billion, respectively. Contracts awarded without full and open competition rose from 55 percent of all federal contracts in 2000 to 66 percent in 2006. Between 2000 and 2006, $1.3 trillion was spent on contracts awarded without full and open competition.

## State Governments

The report states that since 2001, 339 bills pertaining to the restriction of access to previously public information have been introduced in state legislatures, and 266 of these have passed. In particular, the *Secrecy Report Card* notes that 64 bills were introduced and 61 passed relating to the restriction of access to information on

previously publicly available vulnerability assessments, energy and public utilities information, building and architectural plans and information relating to mass transit and telecommunication systems. The report indicates that 114 bills were introduced, of which 52 passed, relating to the increase of executive powers and the closure of previously public government meetings.

## NRC to Release Documents on Spill

The Nuclear Regulatory Commission (NRC) has revoked a three-year-old secrecy policy and plans to release documents from two nuclear fuel processing plants in response to congressional demands. This about-face was precipitated by a congressional inquiry into a uranium leak kept secret from the public for more than a year.

An Aug. 31 memorandum directed the release of "Sensitive Unclassified Non-Safeguards Information" (SUNSI) documents from the nuclear fuel facilities Nuclear Fuel Services (NFS) in Tennessee and BWX Technologies (BWXT) in Virginia.

The March 2006 spill of nine gallons of highly enriched uranium found pooling near an elevator shaft at NFS prompted immediate action. Closing the factory for seven months, NRC completed an investigation resulting in a licensing change legally subject to a public review. The required notification never became public, however, when all documents relating to the affair were classified as Official Use Only (OUO). This information lockdown resulted from an August 2004 policy, also stamped OUO, in which all documents regarding the two plants were automatically to be considered secret. Congress learned of the spill in April from a report on "abnormal occurrences" and demanded more information. The House Energy and Commerce Committee called upon NRC to justify its broad secrecy and to fine-tune its policy distinguishing between information truly security sensitive and publicly releasable information. The Aug. 31 memorandum is part of NRC's response.

The OUO designation is one of the sensitive but unclassified (SBU) categories increasingly used by the government to justify concealing information without clear explanation or justification. OMB Watch and numerous other public interest groups advocating for transparency in government have consistently decried such broad information controls as vulnerable to overuse.

NRC's new policy, which should release nearly 2,000 documents before March 2008, appears to be a good faith effort to balance security concerns with public accountability and disclosure. Whether it will serve as an example for NRC and other agencies how to shift away from the post-9/11 secrecy obsessed policies remains unclear. The memo does not change the policies for nuclear reactors and ultimately impacts only two facilities.

NRC held two public meetings in Erwin, TN, to discuss the NFS incident, providing safety assurances and unveiling a new website for public education purposes. The agency

intends to continue monitoring NFS beyond the core inspection program.

## Don't Go into the Water: It's Not the Jellyfish, It's the Sewage

Jellyfish aren't the reason U.S. beaches are being closed — it's sewage, and legislation in the Senate and House seeks to ensure that people know when sewage is in their water.

The Raw Sewage Overflow Right-to-Know Act (H.R. 2452), introduced by Reps. Tim Bishop (D-NY) and Frank LoBiondo (R-NJ) on May 23, requires sewage treatment facilities to notify the public, public health officials and any other downstream "affected entities" when there is a sewage overflow within 24 hours of the incident. A Senate companion bill (S. 2080) was introduced by Sen. Frank Lautenberg ☼ (D-NJ) on Sept. 20.

The long-standing but little-known problem of sewage spillage in waterways is a major cause of illnesses stemming from waterborne contaminants. American Rivers, a national advocacy organization, estimates that over 850 billion gallons of raw sewage are released every year. Rainstorms easily overwhelm sewage systems, and broken or clogged pipes contribute to the 23,000-75,000 raw sewage overflows every year. Federal clean water funding has plummeted under the Bush administration, and the already strained sewage systems further deteriorate every year. EPA estimates between 1.8 million and 3.5 million people become sick due to recreational contact with sewage-contaminated water. With no national requirement for public notification, the majority of states do not have regulations or policies in place, and most Americans have no idea when it is not safe to be in the water.

The Sewage Overflow Right-to-Know Act requires that the public be afforded the same notifications that state environmental agencies already receive and increases current reporting requirements. Applicable to publicly owned water treatment plants, the act requires:

- Facilities to institute a program to monitor overflows constituting a potential human health hazard and alert facility managers in a timely manner
- Notification of overflow within 24 hours to the public, public health officials and other affected entities
- A report (oral or electronic) to state officials within 24 hours
- A written report to state officials within five days (previously required) of steps taken or planned to reduce the impact and prevent future occurrences and explaining the cause of the overflow with the new specific requirements of duration and volume
- A monthly report of all sewage overflows, (previously required), including a new provision of overflows that do not reach U.S. waters
- Annual summary report to the U.S. Environmental Protection Agency of

overflows not reaching U.S. waters

The bill, a positive step toward increasing public awareness of toxins in the environment, is missing one important element according to public access advocates — easy access to the detailed reports submitted to government officials. Public access to the Toxics Release Inventory database has been a crucial element to the success of pollution prevention efforts around the country. Without an extensive public database for sewage overflows, the collected information could go nowhere and get used by no one. OMB Watch supports the clarification that all reported information will be compiled into a database that is publicly accessible and usable.

A hearing for H.R. 2452 is scheduled for Oct. 5.

## Lobby and Ethics Reform Bill Becomes Law

On Sept. 14, President Bush signed into law the Honest Leadership and Open Government Act, S. 1. The new law amends some provisions of the federal Lobbying Disclosure Act (LDA) to make the relationship between lobbyists and lawmakers more transparent by requiring increased public disclosure of funds spent by lobbyists and of the actions of members of Congress. Because of rumors that President Bush would veto the measure, it was sent to him after Labor Day to avoid a veto while Congress was in recess.

After signing the bill, President Bush stated, "I am concerned that there are potential loopholes in some of the earmark reforms included in this bill that would allow earmarks to escape sufficient scrutiny. This legislation also does not address other earmark reforms I have called on Congress to implement, such as ending the practice of putting earmarks in report language."

After S. 1 was signed into law, Senate Majority Leader Harry Reid (D-NV) commented, "This important law will help change the way that business is conducted in Washington — banning gifts and travel from lobbyists and companies who hire lobbyists, dramatically increasing public disclosure of the activities of lobbyists, slowing the revolving door between Congress and the lobbying world, requiring transparency in the earmark process, and increasing penalties for corruption."

All lobbying activity beginning January 1, 2008, will be subject to the new rules, including increased disclosure of lobbying activities by paid lobbyists, more restrictions on gifts for members of Congress and their staff, new restrictions on lobbying after working in the government, and greater transparency in the internal legislative process, such as earmark disclosure. As *Congressional Quarterly* explained, "Life in the Senate is about to change."

The Honest Leadership and Open Government Act is a first step to enhance government

fairness and transparency. The next step is implementation. Officials in charge of creating draft forms and guidance to meet new lobbyist reporting requirements have been working since the end of August and should be finished by the end of November. The Federal Election Commission (FEC) will also have to conduct a rulemaking to implement the new bundled campaign contributions requirement.

Congressional officials and law offices must be ready to handle technical questions. For example, a few days after the bill was signed into law, the *Politico* reported on the demand for lawyers who will have to explain the new changes. "While money and politics watchdog groups applauded the new ethics law signed by President Bush last week, bigger cheers rang out in the tight-knit community of lawyers who are experts on campaign finance and lobbying regulations."

One of the most significant successes for government transparency is the required online posting of lobbying materials. Through a searchable and downloadable database, the Clerk of the House and Secretary of the Senate are required to make the information required in the lobbying registrations and reports publicly available for free over the Internet. This information will be kept for six years and also be linked to FEC databases.

A few important changes relevant to nonprofits:

- Organizations that engage in federal lobbying activities will now have to report quarterly as opposed to semiannually
- The registration threshold for these organizations dropped to $10,000 quarterly, which could increase the number of organizations that now must report their federal lobbying activities
- If an organization contributes more than $5,000 to a coalition and actively participates in the planning, supervision or control of the coalition's lobbying activity, the organization's name, address and principal place of business must be disclosed by the coalition
- Reporting organizations have to certify that they have not provided a gift or travel to a member of Congress or staff in violation of House or Senate rules

## IRS Ends Two-Year Probe of California Church's Anti-War Sermon

All Saints Episcopal Church in Pasadena, CA, recently announced that the Internal Revenue Service (IRS) investigation which began in June 2005 has now been closed. The IRS will not revoke the church's tax-exempt status because of a 2004 anti-war, anti-poverty sermon delivered by its former pastor Rev. George F. Regas on the Sunday before the 2004 presidential election. However, the IRS concluded that the church in fact intervened in the election. While churches and other tax-exempt organizations are prohibited from endorsing or opposing political candidates, the 2004 sermon did not

urge anyone to support either President Bush or Sen. John Kerry ☼ (D-MA).

All Saints released the Sept. 10 letter from the IRS, which concluded without explanation that "the Church intervened in the 2004 Presidential election campaign. We note this appears to be a one-time occurrence and that you have policies in place to ensure that the Church complies with the prohibition against intervention in campaigns for public office." In response, the church has demanded an investigation of the IRS and an apology.

The church has asked the Treasury Department to determine whether the investigation was politically motivated and whether officials from the Justice Department had become involved in the matter. Through Freedom of Information Act requests, e-mails obtained by the church prove that Justice Department officials were involved in the case before the IRS made any formal referral.

The unfortunate impact of this finding is that it increases uncertainty about what is and is not allowed for charities and religious organizations, who are left unsure of when the IRS may come knocking at their door after public discussion of important social issues. The *Los Angeles Times* reports that "[Rev. J. Edwin Bacon Jr.] predicted that the vague, mixed message from the IRS after its nearly two-year investigation of the All Saints case would have a continued 'chilling effect' on the freedom of clerics from all faiths to preach about moral values and significant social issues such as war and poverty." Leaders of all faiths preach about social issues to get congregants to understand and act on religious teachings. The IRS must provide some guidance and explain which activities violate the rules against intervening in a political campaign.

All Saints is located in the district of Rep. Adam Schiff ☼ (D-CA), who has expressed support for the church. In 2005, Schiff unsuccessfully sought a Government Accountability Office (GAO) investigation into the IRS' scrutiny of churches and other nonprofits, including All Saints. The *Los Angeles Times* quoted Schiff as saying, "They thought that All Saints would fold up the tent and admit it was wrong . . . but instead they found a church that would stand up for itself."

The All Saints Sept. 23 press release states, "In response to a letter closing the two-year old IRS examination, All Saints Church, Pasadena announced today that it has formally referred the numerous procedural and legal errors of the exam to the Commissioner of the Internal Revenue Service and demanded correction and an apology."

## Nonprofits Challenge Two Florida Laws Regulating Voter Registration

Nonprofit groups have launched two separate efforts to challenge voter registration laws passed by the Florida legislature that would suppress voting, especially among minority populations. First, the U.S. Department of Justice has been asked to reject a recently

passed law that would discourage nonprofit voter registration drives by making it difficult to collect and submit completed registration forms in batches. Second, a lawsuit was filed Sept. 18 challenging a requirement that all voter registration applications match Social Security or driver's license numbers. When spelling errors or other glitches occur, voters are required to go through a complicated process that discourages voting.

Voter registration, and the proper role for nonprofits in that process, has been the source of heated debate in Florida for the last several years. The Florida legislature began to revise voter registration regulations after 2004. During that year, third-party registrants, the majority of which were charitable organizations, signed up an unprecedented number of Florida voters.

On Sept. 6, the Brennan Center and the Advancement Project sent a letter appealing to the Civil Rights Division of the U.S. Department of Justice to reject the third-party registration provisions, which would make it more difficult for third parties, including charities, to conduct voter registration drives. The new requirements were passed as part of a larger election bill signed by Florida Governor Charlie Crist (R) in May that includes funding for optical scan voting machines that provide a voter-verified paper trail. Similar restrictions for third-party registration were declared unconstitutional by a federal court in Florida last year in *League of Women Voters v. Cobb*.

Like the legislation overturned by the courts last year, the new law imposes fines on charities for each voter registration not submitted within ten days of its completion. For each late registration, a nonprofit conducting a voter registration drive would be fined $50. If a nonprofit fails to turn in a completed registration by the book closing deadline, the fine increases to $100. According to the Florida Department of State, the book closing deadline is normally the 29th day before an election. For example, Oct. 6, 2008, is the book closing date for Florida's 2008 general election. If a nonprofit completely fails to turn in completed registrations, the fine is $500 per registration. For charitable organizations that have registered hundreds of voters in past campaigns, these fines represent a strong disincentive to conduct voter registration drives in the future. In a recent statement, the Florida chapter of the League of Women Voters said the provisions are "anti-voter" and "stifles voter registration efforts by grassroots organizations."

The Brennan Center and the Advancement Project are protesting the provisions on the grounds that they will have a retrogressive effect on the voting rights of minorities in Florida. According to the Voting Rights Act, Florida has to demonstrate to the Department of Justice that any law regulating their voting process does not have "the effect of denying or abridging the right to vote on account of race or color" through a process of "preclearance." In their letter, the Brennan Center and the Advancement Project argued that because minorities in Florida are twice as likely as whites to register through third parties, the provisions will negatively affect the electoral participation of Floridians who are minorities.

In a separate challenge to Florida's voter registration laws, a Florida chapter of the

NAACP and a Miami-based nonprofit group called Haitian-American Grassroots Coalition filed a federal lawsuit on Sept.18 asking a U.S. District Court to overturn a Florida law that requires all voter registration applications to be matched with either a Social Security number or driver's license number. The Florida legislature's rationale for passage of the law was that the new requirement is necessary in order to comply with the Help America Vote Act (HAVA).

However, HAVA does not require this methodology to verify voter registrations. In fact, one federal court has found it to be unconstitutional. In *Washington Association of Churches v. Reed*, the Brennan Center sued to prevent implementation of a similar procedure. The group won a preliminary injunction in August 2006, and in March 2007, the court issued an order blocking enforcement of the law. The plaintiffs argued that the Washington state law violated HAVA, as well as the Voting Rights Act and the National Voter Registration Act.

In the current lawsuit, the plaintiffs argue that as a consequence of not "matching," perhaps due to misspellings or typos, "voters will not be allowed to cast a valid ballot unless they overcome a series of burdensome bureaucratic hurdles that deprive them of their fundamental right to vote." According to the lawsuit, 20,000 registrations were denied or delayed in 2006 due to the matching process. The groups that filed the lawsuit are receiving legal support from the Brennan Center.

Sec. 303 of HAVA requires states to develop computerized databases of registered voters with unique identification numbers. However, states cannot impose illegal preconditions. A Brennan Center issue brief says, "Federal law asks states to try to match registration information to other government databases in order to validate the unique number assigned to every individual in the statewide registration system. However, the law allows states to set flexible standards for determining when a match is found. And federal law requires states to register an eligible voter even if the state cannot locate matching information elsewhere."

In a statement quoted in *The Miami Herald*, the president of the Florida State Conference of the NAACP, Adora Obi Nweze, expressed her frustration with Florida election laws. "With the elections approaching, we should be doing everything we can to ensure that eligible citizens can register to vote and have it count. But Florida's Draconian registration law won't give many citizens that chance." Nweze continued, "We are particularly concerned about the impact of this law on African Americans with unique names and spellings."

In a statement released in response to the lawsuit, Florida Secretary of State Kurt Browning expressed confidence in the legality of the legislation and asserted, "If a discrepancy arises, every Florida voter has the opportunity to provide verification of eligibility."

# Holy Land Jury Deliberates When Aid is Support for Terrorism

On Sept. 20, a Texas jury began deliberations on criminal charges of supporting terrorism brought against the Holy Land Foundation (HLF) and five of its leaders, nearly six years after the charity was shut down and its assets seized by the U.S. Department of Treasury. The two-month long trial was the first opportunity the charity had to hear the evidence against it and present evidence in its own defense. The government did not claim HLF provided direct support of Hamas or a terrorist group. Instead, it argued that charitable aid that provides a public relations benefit to Hamas is a crime, even though the local charities involved are not on any government lists of terrorist organizations. A conviction on these facts will leave many international aid organizations in the impossible position of guessing about the political beliefs of their grantees and the potential political impact of their programs.

The defense argued that HLF and its leaders did not provide support to Hamas and are being prosecuted for their political beliefs and associations on the basis of faulty evidence. HLF and five of its leaders were indicted in 2004 on charges of providing material support for terrorism, money laundering and conspiracy. At the trial, the prosecution said HLF sent $12.4 million in aid to local charities, known as zakat committees, in the West Bank and Gaza Strip.

The government argued that HLF officials knew the zakat committees were controlled by Hamas and directed aid to families of suicide bombers and prisoners. Most of the government evidence consisted of documents, videos and surveillance materials seized from HLF offices and supporters' homes. Some show the defendants making speeches supporting Palestinian rights or participating in events where Hamas officials were present. One video involved a defendant acting in a skit and pretending to kill an Israeli. A defense attorney pointed out that many of these events occurred before 1995, when Hamas was designated as a terrorist organization by the U.S. government and constitute protected First Amendment political speech.

Prosecution witnesses included:

- FBI Special Agent Robert Miranda, who said HLF used known Hamas activists to speak at fundraising events. On cross-examination, he admitted that these speakers were not listed as terrorists, and it was not illegal to have them as speakers. Miranda also testified that family connections establish a link between some HLF leaders and Hamas. Defendant Ghassan Elashi's cousin is married to a high-ranking Hamas leader who is on the government lists.
- FBI Special Agent Lara Burns testified about an HLF letter referring to the zakat committees as "ours" and said that HLF contacts with the committees were Hamas leaders. On cross-examination, Burns admitted that most of these individuals are not on any government watch list.
- Two Israeli agents were allowed to testify anonymously in a closed courtroom.

One, called "Avi," is an agent in Shin Bet, the Israeli domestic security agency. He testified that Hamas funding comes primarily from international groups like HLF and that the zakat committees are staffed by known Hamas members. He said the Israeli military found materials praising suicide bombers in searches of zakat committee offices.

The defense presented evidence to discredit prosecution witnesses and establish that HLF's funds were spent for charitable purposes. Defense attorney Nancy Holland asked why the zakat committees were not listed by the government if they really are linked to terrorism. They also showed a video of staff from HLF's Gaza office delivering food to the family of an ambulance driver killed while attempting to assist a child wounded in a shoot-out between Israelis and Palestinians. The HLF paperwork referred to him as a "martyr."

The five defense witnesses were:

- Edward Abington, former U.S. consul general in Jerusalem and a second-ranking intelligence official in the State Department. He testified that while posted in the Middle East, he received daily intelligence reports from the CIA and never was told zakat committees had links to Hamas. He said Israeli intelligence is unreliable. He also described visits to zakat committee offices and described conditions in refugee camps.
- Attorney and former member of Congress John Bryant, who represented HLF between 1997 and 2000. He testified about his attempts to get guidance from the FBI and State Department on what groups were legal for HLF to fund; he got no response to his inquiries. He was never told HLF could not work with zakat committees.
- George Washington University Professor Nathan Brown, who said the testimony of "Avi" relied too heavily on press accounts and other documents without any context. He supported Abington's assertion that posters praising suicide bombers were not evidence of terrorist ties, since, on a trip to the Palestinian territories, "every blank wall was plastered with posters of martyrs," noting that Hamas is a political party with broad public support.
- Former HLF administrative assistant Natalia Suleiman, who testified about food aid and clean water programs the organization operated in Turkey, Albania, Jordan and Lebanon, as well as the West Bank and Gaza Strip. She described the expense documentation process.
- Former HLF accountant Mohammad Wafa Yaish testified that HLF operated its programs without regard to political affiliation and that employees were not allowed to visit political websites while at work.

In the closing arguments, the issues boiled down to whether the defendants' political beliefs and activities transform charitable aid into material support for terrorism and whether the public can rely on government watch lists to know who it is legal to do

business with.

## Comments Urge IRS to Take Time with Form 990 Revisions

On Sept. 14, the Internal Revenue Service (IRS) closed comment on its proposed revisions to Form 990, the annual information return filed by nonprofits. A host of organizations have weighed in with extensive recommendations, and many are calling on the IRS to delay implementation until a second draft can be published for further comment and nonprofits have time to adjust their recordkeeping systems to track the new information that will be required. OMB Watch's comments focused on flaws in proposals for reporting advocacy-related activities. Other organizations, such as the Alliance for Justice, addressed problems with proposed collection of governance information that is beyond the IRS' regulatory authority. The IRS is expected to act on the comments by the end of 2007.

**Advocacy Related Issues**

The proposed reporting of advocacy-related activities is primarily in proposed Schedule C, which combines reporting related to lobbying and political campaign activities. OMB Watch, as well as the Alliance for Justice, the Center for Lobbying in the Public Interest (CLPI), the National Council of Nonprofit Association (NCNA), and the National Committee for Responsive Philanthropy, called for separating Schedule C into two parts: one for 501(c)(3) organizations on lobbying activities, and another for other types of nonprofits that covers both political campaign and lobbying activities.

The OMB Watch comments said, "Proposed Schedule C is a trap for the unwary. Mixing lobbying and political campaign activities in one form is likely to cause substantial confusion, especially when the form does not clarify what direct and indirect political campaign activities are....The likely result is that permissible nonpartisan voter education and mobilization activities will be reported here, generating unnecessary burdensome disclosure." The comments warned that the combined Schedule will confuse the public and result in inaccurate reporting.

The IRS was also called on to drop a Schedule C question asking 501(c)(3) organizations that do not use the expenditure test to measure their lobbying limit and to determine if their lobbying makes them ineligible for tax-exempt status. The OMB Watch comments called this an "unfair question." The CLPI comments said, "Given that there is no statutory or regulatory definition of the amount of activity that would constitute a 'substantial part' of an organization's activity and case law only provides limited guidance, we believe this question would place filers in the untenable position of having to speculate on how the IRS would assess their overall activities."

Both OMB Watch and CLPI objected to a proposed requirement to report lobbying payments to non-employees in functional expense categories as part of the core Form

990. OMB Watch told the IRS, "Not only does this impose an unnecessary burden on nonprofits, it is unclear how to allocate such expenses." The instructions for completing this section create a more serious problem, which is a definition of lobbying that is far more expansive than current IRS regulations. It includes "legislative liaison" work, which is not defined, as well as advocacy before administrative bodies and the executive branch. Because of these flaws, OMB Watch and CLPI both called on the IRS to drop this proposal.

The Alliance for Justice (AFJ) comments objected to Schedule C lobbying reporting requirements for non-501(c)(3) organizations, such as action organizations exempt under 501(c)(4), labor unions and trade associations. AFJ said, "There is no statutory authority for this significant expansion of the reporting obligations of IRC § 501(c)(4) and other IRC § 501(c) organizations, nor is there any tax-administration reason for requiring such organizations to maintain records and report on their lobbying activities. Unlike non-electing IRC § 501(c)(3) organizations, which may engage only in an insubstantial amount of lobbying, there is no limit on how much other IRC § 501(c) organizations may spend on lobbying nor is there any restriction on the kinds of lobbying activities they may undertake."

Many groups also objected to a proposal to require groups to report the number of volunteer hours for political campaign activity. OMB Watch said, "This requirement has no regulatory basis that we can see, is impractical if not impossible to comply with, and would discourage civic participation by forcing nonprofits and their volunteers to keep time sheets."

**General Issues**

Independent Sector's (IS) comments "identify many areas that need significant revision." The group called on the IRS to separate questions about governance practices that are required and those that are recommended. Both IS and the NCNA noted that one size does not fit all, and many of the governance practices identified by the IRS may not be appropriate for small organizations and could impose undue administrative burdens.

AFJ's comments provide a detailed explanation of the flaws in these additional governance questions. They say, "With limited exceptions, these questions address policies and procedures which are not required by federal or state law or regulation. Moreover, while some of these policies and procedures may be useful for some organizations, they are not universally beneficial and may, in some instances, be counterproductive.... These problems should be sufficient to deter the Service from inserting itself into the area of organizational governance and management. It is also significant that the Service has little or no experience or expertise in determining appropriate mechanisms for nonprofit governance and that Congress itself has refrained from entering into this arena."

**Expanded Reporting and Inconsistent Definitions of Political Activity**

The AFJ comments also pointed out that "the expanded reporting of political activities in the redesign relies on confusing and inconsistent definitions which, in some critical ways, are inconsistent with current interpretations of the IRC." Attorney Rosemary Fei of Silk, Adler and Colvin in San Francisco told the IRS there is a "lack of clarity of the term 'political campaign activity' as used in the draft forms, instructions, and Glossary." Her comments recommended that the IRS adopt the definition it uses for 501(c)(3) organizations for those purposes in order "to demonstrate compliance with the 'primary activity' requirement that applies to their tax-exempt status....Starting from a single, relatively clear definition will enhance transparency and promote compliance by providing a reporting framework that is compatible with the practice and understanding of the full range of relevant organizations."



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