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House, Senate Pass Budget Resolutions

The House and Senate each passed their budget resolutions on April 2, mostly along party lines, before breaking for a two-week spring recess. The resolutions delineate approximately $3.6 trillion in spending for Fiscal Year 2010 and track closely with the major proposals outlined by President Barack Obama, including estimates of historic budget deficits. Those deficits could become significantly worse due to the adoption of an amendment in the Senate that calls for further cuts to the estate tax, benefiting the richest families in the country.

The House approved its version of the budget resolution on a vote of 233-196, the largest total supporting a resolution in the last twelve years, according to *The New York Times*. The House resolution calls for $1.27 trillion in discretionary spending, slightly less than Obama's budget request, and projects $3.95 trillion in deficits through 2014 – $747 billion less than if current

policies were extended, according to the Center on Budget and Policy Priorities and the Congressional Budget Office (CBO).

The House resolution also opens the door for using budget reconciliation to pass major health care and education reform later in 2009. Budget reconciliation is a fast-track procedure that limits the time for debate and amendment process for future legislation and also protects bills from filibuster in the Senate. The House budget resolution contains instructions for three committees to report legislation using reconciliation procedures.

On the other side of the Capitol, the Senate passed its resolution a few hours after the House by a 55-43 margin, with two Democrats – Sens. Evan Bayh (IN) and Ben Nelson (NE) – and all Republicans opposing the resolution. In total, the Senate plan would allocate $1.21 trillion in discretionary spending – about $60 billion less than the House – and excludes any language allowing for the use of reconciliation in 2009. It also projects $3.822 trillion in deficits through 2014, $878 billion less than if current policies were extended, according to the Center on Budget and Policy Priorities and the CBO.

The final vote on the resolution came after the Senate worked its way through hundreds of amendments, many of which were politically charged. One in particular, offered by Sens. Blanche Lincoln (D-AR) and Jon Kyl (R-AZ), would cut the estate tax for America's wealthiest heirs by increasing the size of estates that can be passed on tax-free to $10 million for a couple (and $5 million for an individual) and reducing the estate tax rate to 35 percent. The Lincoln/Kyl amendment was adopted in a close vote – 51-48. Shortly after, the Senate also passed an amendment from Sen. Richard Durbin (D-IL) that prohibits any estate tax cuts called for in the Lincoln/Kyl amendment unless an equally large tax cut is passed for Americans making under $100,000 per year. That amendment passed 56-43, with Lincoln voting for it.

Obama's budget and both the House and Senate budget resolutions already call for the extension of the 2009 estate tax levels, which allow estates valued less than $7 million for a couple (and $3.5 million for an individual) to pass tax–free, with any amount above that threshold being taxed at a maximum rate of 45 percent. The cost of this extension would not be offset in any of the budget proposals, and it is possible that the requirement to offset the additional and substantial costs of the Lincoln/Kyl amendment will be ignored. This amendment, therefore, could end up substantially increasing already historic deficit projections. The Center on Budget and Policy Priorities estimates the Lincoln/Kyl amendment could increase deficits by as much as $440 billion over the next ten years, compared with current law.

The Lincoln/Kyl estate tax amendment created more than a few seemingly contradictory statements from senators about the relative merits of deficit spending, tax cuts for the affluent, and helping those most in need during this economic downturn. Ironically, Sens. Bayh and Nelson, the two senators who opposed their own party's budget because they felt it was irresponsible, supported the Lincoln/Kyl amendment.

Because the House did not include language similar to the Lincoln/Kyl amendment in its resolution, and because Senate Majority Leader Harry Reid (D-NV) and Senate Budget

Committee Chairman Kent Conrad (D-ND) did not support the amendment, it is unlikely to appear in the final conference report of the budget resolution. That final conference report will need to be negotiated between the House and Senate, a process likely to last at least the next few weeks.

Congress Seeks to Limit National Security Letter Powers

On March 30, Congress took its first step toward reforming the USA PATRIOT Act when Reps. Jerrold Nadler (D-NY) and Jeff Flake (R-AZ) introduced the National Security Letters Reform Act of 2009 (H.R. 1800). The bill is designed to narrow the powers granted to the executive branch under the National Security Letter (NSL) provision of the Patriot Act. Public interest advocates contend that the NSL is only one component of the Patriot Act in need of reform.

The use of NSLs dates back to the Right to Financial Privacy Act of 1978, which gave the Federal Bureau of Investigation (FBI) authority to demand records about American citizens without judicial oversight. When it passed the Patriot Act in 2001, Congress greatly expanded executive branch authority to use the letters. Under the Patriot Act, the federal government may use the letters to collect information on individuals simply because those individuals may be relevant to an investigation. The letters are generally submitted to telephone companies, Internet providers, and financial institutions and effectively serve as subpoenas without the need for a warrant.

NSL Problems

Since the Patriot Act expanded the NSL authority, there have been allegations that the executive branch has abused the power, including imposing gag orders. Department of Justice (DOJ) Inspector General reports released in 2007 and 2008 concluded that the FBI both sought and obtained information "outside of the normal approval process" and that the FBI understated problems concerning the law enforcement agency's compliance with NSL restrictions. In hundreds of cases, poor record keeping prevented the inspector general from being able to tell if proper legal procedure had been followed.

Although the FBI attempted to reform its use of the letters by adding extra review processes and increasing personnel training, the efforts failed to effect any change. The 2008 inspector general report, which reviewed NSL activities for 2006 and assessed the FBI's corrective actions, still found eleven blanket NSLs that did not comply with Bureau policy and eight letters that imposed unlawful nondisclosure requirements. Further, the FBI failed to comply with the narrowed use of gag orders required by the Second Circuit Court of Appeals' ruling in *Doe v. Holder*.

Reforming the Patriot Act

The new legislation would increase judicial oversight of NSLs by limiting the gag order to 30 days and requiring that FBI requests for extensions of gag orders be made to a district court within any district that the investigation is taking place. Gag order extensions would be limited

to a total of 180 days. The legislation also requires that the FBI specially demonstrate how lifting the gag order would endanger evidence, the safety of an individual, or the national security of the United States. Moreover, anyone receiving a NSL would have the right to petition a court to modify or set aside the letter or to suppress the evidence gathered as a result of the letter. The legislation goes even further to require the destruction of information that is wrongly obtained by the FBI pursuant to an NSL request.

Similar legislation was considered by Congress in 2007. That bill was introduced in the Senate by Russ Feingold (D-WI) but never came up for a vote.

Civil liberties and government accountability groups have called for further reforms of the Patriot Act that go beyond addressing the NSL problems. The American Civil Liberties Union (ACLU) recently issued a report, *Reclaiming Patriotism: A Call to Reconsider the Patriot Act*, that calls for reform of the Material Support Statute that criminalizes various activities regardless of whether they are intentionally meant to further terrorist goals. Opponents of the material support statue complain that the provisions have reduced humanitarian aid to the Middle East as charities worry about possible prosecution if some individuals helped are in some way connected to terrorism. Also, the ACLU has sought to remove the ideological exclusion section of the law, which denies admission to foreign nationals who support political or social groups that endorse acts of terrorism. The contention is that such support is an expression of freedom of speech, not an illegal act.

New Energy on TRI at National Conference

The U.S. Environmental Protection Agency (EPA) is taking steps toward improving public access to pollution information and is seeking ideas from the public for improving the Toxics Release Inventory (TRI) program. During a national conference on TRI the week of March 30, the EPA presented several new tools for accessing and analyzing pollution data that will soon be available to the public. The TRI, a bedrock right-to-know program, has not been expanded since 2000, and EPA has been heavily criticized for its management of the program in recent years.

The EPA and the nonprofit Environmental Council of the States (ECOS) held the 2009 Toxics Release Inventory National Training Conference in Maryland. The theme of the conference was "Expanding Partnerships/Expanding Knowledge," and the agency repeatedly sought ideas from the attendees on how to enhance the TRI program, which collects and publishes data on the release or transfer of toxic chemicals by numerous industries nationwide. Discussions at the conference included adding new industries and new chemicals to the TRI program, releasing raw TRI data earlier, and restoring EPA's role as an advocate for reducing pollution.

For the first time since the creation of the TRI program, the EPA administrator addressed the conference. Administrator Lisa Jackson announced that EPA is "back on the job" and spoke to the importance of an open and transparent EPA. Jackson's presence underscored the agency's new attitude toward right-to-know issues.

In her remarks, Jackson mentioned the December 2008 *USA Today* articles that investigated potential health risks from toxic emissions near schools. Jackson presented the newspaper's use of TRI data as an example of the important impact the right-to-know program can have. EPA announced it will begin air monitoring around selected schools, partly in response to the reports. "People need knowledge so that they have the power to effectuate change at home," said Jackson.

Sean Moulton, OMB Watch's Director of Federal Information Policy, delivered the keynote address on the first public day of the event. Moulton outlined three tracks where the TRI program is ripe for improvement.

- First, EPA should increase the amount of information provided through TRI.
- Second, TRI data should be linked to other data, such as health impacts of chemicals and enforcement actions against companies.
- Third, EPA must reinvigorate its role as a pollution prevention advocate.

More details about these recommended enhancements will be available on OMB Watch's blog, *The Fine Print*, beginning April 7.

The risk screening model that EPA uses to identify important emission situations for follow-up action received a lot of attention at the conference. Several commenters, especially among industry representatives, emphasized limitations of the computer-based model. An oil industry-funded study seemed to identify inconsistencies between the model's analyses and real-world measurements. Other attendees appealed to the agency to meet its responsibility to use such tools, however flawed, to find and address potential public health hazards. The EPA administrator seemed to concur with the latter point when she cited favorably the *USA Today* reports, which used the same computer model to analyze TRI data.

New Access Tools

The EPA revealed several new features designed to expand the public's ability to examine and process TRI data.

The EPA has begun a multi-year arrangement with ECOS to develop a new online forum for TRI users to share analyses of TRI and other environmental data. The site, ChemicalRight2Know.org, will be launched publicly later this spring. According to previews of the website available at the conference, ChemicalRight2Know.org will showcase research and analyses using TRI data, new web applications, and "real world stories of people using TRI information." EPA also hopes the website will facilitate collaboration "on solving community chemical-related problems."

Two other new technical tools presented at the conference also look promising. The new TRI.net is a downloadable "data engine" that will allow advanced, ad hoc searches of TRI data and includes extensive mapping capabilities. The TRI Chemical Hazard Information Profile (TRI

CHIP) is a searchable database that contains toxicity data on TRI chemicals from multiple sources.

The EPA also announced plans to begin releasing TRI data much earlier than the agency has in prior years. In the past, it was common for the agency to release the data 15 to 18 months after the end of the calendar year. However, with 97 percent of TRI facilities submitting reports electronically, along with the agency separating the data release from its official analysis, the EPA hopes to release newly reported raw TRI data in late summer, just 7 or 8 months following the calendar year for which the data applies. The agency would update the data several times before it is finalized and processed for analysis. The early release should allow the public to identify troubling releases at local facilities much sooner.

In 2008, EPA surveyed certain public stakeholders about their information access needs. EPA's resulting Information Access Strategy highlights the calls for improving the public's ability to find and understand data and the need for more tools to use the data. EPA cited these responses as a driving force behind its new TRI efforts.

The new TRI-related websites and applications, the early release of raw data, and the outreach to interested groups and individuals signify a major change in the agency's posture toward public access. The Obama administration seems to have broken from the previous administration's approach and is making improving public access to environmental information a high priority.

High Court Rebuffs Environmentalists, Permits Cost-Benefit Analysis

The U.S. Supreme Court recently ruled 6-3 that the U.S. Environmental Protection Agency (EPA) can weigh costs against benefits under parts of the Clean Water Act. The court said EPA was not required to impose the most environmentally protective requirements on power plants that inadvertently kill millions of fish.

Writing for the majority, Justice Antonin Scalia concluded that EPA "permissibly relied on cost-benefit analysis" and noted that "whether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits."

The April 1 ruling allows for the possibility that EPA could apply cost-benefit analysis to future Clean Water Act judgments. In the near term, the Obama administration will be responsible for implementing the Clean Water Act consistent with the ruling.

The EPA rule in question required existing power plants that use natural waters to cool their facilities to reduce the number of fish killed during water intake. In fleshing out the details of its rule, EPA weighed the benefits of fish conservation against costs industry would bear in meeting the new requirements.

In part because EPA attempted to balance costs and benefits, the rule was not as strict as conservationists had hoped. Those calling for a stricter standard cited the Clean Water Act, which calls on EPA to require facilities to adopt "the best technology available for minimizing adverse environmental impact" and faulted the agency for not requiring closed-cycle cooling systems, a technology that would save more fish.

When power plants withdraw water from natural sources, fish can become trapped on a plant's intake screen and die there from lack of oxygen and movement. "Every day, power plants in the United States withdraw over 214 billion gallons from U.S. water bodies to cool their facilities, and kill billions of fish and aquatic creatures in the process," according to Riverkeeper, an environmental group that brought the suit against the EPA.

Closed-cycle cooling systems, which EPA explicitly rejected, "reduc[e] the amount of water withdrawn and the number of fish killed by over 95 percent," according to Riverkeeper. Industry groups objected to a closed-cycle mandate, citing high costs.

Riverkeeper and others charged the rule was further weakened by a provision that would exempt individual facilities if they could show the costs of complying would significantly outweigh benefits to aquatic life. The provision set up a sort of case-by-case cost-benefit analysis.

Richard Lazarus, who argued the case on behalf of environmental groups, said the EPA's cost-benefit strategy was prohibited by the Clean Water Act: "Congress did not authorize EPA to decide that the benefits of minimizing adverse environmental impact did not justify the cost of available technology." He added, "EPA has no authority in any circumstance to decide that fish aren't worth a certain amount of cost."

The Court disagreed, ruling that cost-benefit analysis is an appropriate criterion for determining which technology is the "best" technology. "In common parlance one could certainly use the phrase 'best technology' to refer to that which produces a good at the lowest per-unit cost, even if it produces a lesser quantity of that good," Scalia wrote.

The Court did not rule that cost-benefit analysis is required under the Clean Water Act, only that it is not prohibited.

Scalia was joined in the majority by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, Samuel Alito, and in part by Justice Stephen Breyer. The case is *Entergy Corp. v. Riverkeeper, Inc.*

Although the court upheld EPA's use of cost-benefit analysis, the agency will still have to write new regulations to minimize the intake of fish. The Supreme Court's opinion overturned only a portion of an appellate court ruling that sent the rule back to the agency in January 2007. In response to the appellate ruling, EPA suspended the original rule.

Since the Supreme Court ruled that EPA maintains discretion over whether a cost-benefit analysis should guide the regulatory outcome, the Obama administration will have a significant

degree of latitude in deciding what new requirements to impose. "The current administration will now have to issue a new regulation that conforms to the 2007 decision of the U.S. Court of Appeals for the Second Circuit, as modified in one limited respect by [the April 1] Supreme Court ruling," according to Riverkeeper.

The use of cost-benefit analysis in regulatory decision making, especially in the field of environmental regulation, is contentious. Critics say cost-benefit analysis cannot effectively measure the benefits of regulation, especially those that cannot be translated into dollars and cents, while proponents say it prevents the government from moving forward on regulations that aren't worth the cost of compliance.

In an *amicus brief* filed by OMB Watch, Temple University law professor Amy Sinden wrote, "The application of formal CBA to environmental regulation rests on the untenable assumption that complex effects on ecological and human health can be quantified and expressed in dollar terms."

For the fish kill rule, "EPA had no way of valuing most of these broader ecological impacts, both because they involve processes that are only dimly understood by science, and because they involve goods and services not traded in markets," Sinden wrote. "Accordingly, EPA simply left most of these values off the balance sheet altogether."

In a dissenting opinion, Justice John Paul Stevens wrote, "Instead of monetizing all aquatic life, the Agency counted only those species that are commercially or recreationally harvested, a tiny slice (1.8 percent to be precise) of all impacted fish and shellfish."

Deferring to EPA's judgment

In deferring to EPA's judgment that cost-benefit analysis is allowed, the majority cited *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a landmark case in judicial review of agency regulations, in which the Supreme Court decided that, if a statute is not clear, the Court should not substitute its judgment for that of the agency.

The majority determined that since the Clean Water Act does not expressly prohibit reliance on cost-benefit analysis, EPA deserves what has come to be known as *Chevron* deference. *Chevron* deference is predicated on the ideas that Congress delegates authority to agencies, with some understanding that agencies will need to decipher statutory ambiguity, and that agencies, not courts, possess relevant expertise on substantive policy issues.

However, the rulemaking record indicates that EPA may not have been the decision maker on the fish kill rule. EPA originally intended to require more stringent closed-cycle cooling systems for the nation's largest power plants, but the White House Office of Information and Regulatory Affairs (OIRA), which reviews and approves draft rules, stripped the requirement. OIRA also pressed EPA to include the provision that would allow facilities to opt out of complying with the rule if costs exceed benefits.

When the appellate court heard arguments in the case, OMB Watch argued, in an *amicus brief* by former Georgetown University law professor Lisa Heinzerling, that EPA deserved no deference. Heinzerling wrote, "The paper trail in this case makes clear that the Office of Information and Regulatory Affairs foisted on EPA an interpretation of the Clean Water Act that EPA itself had not developed." She added, "EPA should not be given *Chevron* deference for an interpretation that simply caves in to the will of [OIRA]."

OIRA's role was not mentioned in oral arguments before the Supreme Court or in the Court's opinions. The failure to consider the contentious atmosphere in which the rule was developed allowed the majority to grant EPA deference.

Failures in OSHA Program Linked to Workplace Fatalities

A new Department of Labor report is highly critical of a Bush administration program designed to improve workplace safety. The report links poor enforcement to the deaths of workers at high-risk facilities – the specific targets of the special program. Poor quality data and inadequate training, inspections, and enforcement plagued the program.

Labor's Office of Inspector General (OIG) conducted the program audit and prepared the report dated March 31, entitled *Employers with Reported Fatalities Were Not Always Properly Identified and Inspected Under OSHA's Enhanced Enforcement Program*. The focus of the report was the Occupational Safety and Health Administration's (OSHA) Enhanced Enforcement Program (EEP), initiated in 2003 to target employers who put their employees at risk of injury and death by being "indifferent" to their safety responsibilities. In 2008, the Bush administration modified the program criteria, resulting in fewer facilities being targeted by the program despite their past histories of indifference.

The program originally targeted the facilities because they committed violations that were serious and related to fatalities, they received citations repeatedly, or they failed to abate previously cited hazards. Once the facilities "qualified," they were to be the subjects of additional enforcement actions, such as more inspections and more stringent settlements with OSHA.

The OIG audited 325 federal inspections in the Atlanta, Dallas, and Chicago regions between Oct. 1, 2003 and March 31, 2008. Of those, 282 fell under the enhanced inspection program. The audit also included an analysis of OSHA's inspections from Jan. 1, 2008, through Nov. 19, 2008, after the 2008 criteria modifications.

The report contains nine findings regarding problems with OSHA's enforcement. For example:

- OSHA personnel did not properly classify 149 of 282 (53 percent) facilities in the audit, meaning that the facilities would not receive the proper range of actions under the EEP program, such as additional inspections.
- "OSHA generally did not inspect related worksites when company-wide safety and health issues indicated workers at other employer worksites were at risk for serious injury or

death. OSHA did not properly consider related worksite inspections for 226 of 282 (80 percent) sampled EEP qualifying inspections." Thirty-four of these employers were responsible for an additional 47 deaths at other facilities.

- OSHA failed to conduct required follow up inspections at 52 percent of the 282 qualified facilities. Five of the worksites had subsequent fatalities.

The OIG report addressed the question of whether the 2008 modified criteria actually had an adverse effect on providing worker protections. Under the modified program, the criteria for defining a facility that qualified for the EEP program was changed to include information about past violations and fatalities. Under the modifications, however, the number of facilities included in the EEP program actually dropped "and increased the risk that employers with multiple EEP qualifying and/or fatality cases may not be properly designated due to the lack of quality history data." The report states:

> Analysis of 2008 fatalities revealed 260 cases would not have been designated under the 2008 criteria, but would have qualified under the original EEP criteria. Because the fatalities occurred in 2008, 260 employers would not be subject to EEP activities and their employees may be at risk for injury or death before company-wide safety and health issues are addressed through OSHA enforcement.

According to an April 2 *Washington Post* article, the director of enforcement programs at OSHA sent a memorandum to OSHA's acting director March 19 indicating that the 2008 modifications resulted in a drop in the number of companies targeted by the program, from the peak of 719 in FY 2007 to 475 in FY 2008.

The OIG report concluded that overall, "full and proper application of EEP procedures" may have stopped or deterred hazards in facilities of 45 different employers where 58 deaths occurred. According to the report, an average of 5,680 workplace fatalities occur each year, citing these statistics from the Bureau of Labor Statistics (2008):

Year	**Fatalities**
2003	5,575
2004	5,764
2005	5,734
2006	5,840
2007	5,488

The report recommends the next OSHA administrator establish a task force to improve the program across the range of issues raised, provide better training to OSHA personnel involved in the program, and improve the agency's internal data management systems.

The OIG report should provide a significant benchmark against which to evaluate the Obama administration if OSHA continues the EEP. President Obama has not yet nominated a candidate

to lead the agency.

Recovery Act Memo May Restrict Free Speech Rights

On March 20, President Barack Obama issued a memorandum stating that federally registered lobbyists cannot verbally communicate with executive branch officials regarding specific projects to be funded through the American Recovery and Reinvestment Act of 2009. Instead, lobbyists must submit their views in writing. The goal of preventing stimulus funds from being spent based on influence or "on the basis of factors other than the merits" is widely seen as laudable. However, many are charging that the rules are a violation of lobbyists' First Amendment right to petition the government.

Many advocates say the intentions of the memo are understandable and commendable, ensuring that public funds are spent responsibly and in a transparent manner. On March 20, President Obama announced, "Decisions about how Recovery money will be spent will be based on the merits. They will not be made as a way of doing favors for lobbyists. Any lobbyist who wants to talk with a member of my administration about a particular Recovery Act project will have to submit their thoughts in writing, and we will post it on the Internet for all to see. [. . .] And this plan cannot and will not be an excuse for waste and abuse."

Section 3 of the memo states that executive department or agency officials cannot consider the view of a lobbyist registered under the Lobbying Disclosure Act of 1995 (LDA) regarding "particular projects, applications, or applicants for funding under the Recovery Act unless such views are in writing." In addition, all written communications from a registered lobbyist must be posted publicly by the agency on its recovery website. If a person has not registered under the LDA, he or she is not subject to the provisions of this memo and can communicate in person or over the phone regarding funding under the Recovery Act.

Government officials may communicate verbally with registered lobbyists only if it addresses the Recovery Act generally, meaning that the discussion does "not extend to or touch upon particular projects, applications, or applicants for funding, and further that the official must contemporaneously or immediately thereafter document in writing: (i) the date and time of the contact on policy issues; (ii) the names of the registered lobbyists and the official(s) between whom the contact took place; and (iii) a short description of the substance of the communication. This writing must be posted publicly by the executive department or agency on its recovery website within three business days of the communication."

In response, outrage has grown over the rules for lobbyists seeking stimulus funds, with some alleging that the memo could violate lobbyists' First Amendment rights to petition the government and, in fact, not reduce improper influence on spending decisions. Those who are not registered lobbyists could have the same conversations that lobbyists are prohibited from having and yield influence, but such contacts would not even have to be disclosed.

On March 31, several groups called on the administration to revise its memo to instead require disclosure of all contacts with private interests seeking government funding. The American Civil Liberties Union (ACLU), Citizens for Responsibility and Ethics in Washington (CREW), and the American League of Lobbyists (ALL) sent a letter to White House Counsel Gregory Craig asking him to rewrite new lobbying rules for the stimulus package.

Specifically, the organizations' letter asks that Section 3 be withdrawn because it "is an ill-advised restriction on speech and not narrowly tailored to achieve the intended purpose." The letter notes the counterproductive nature of the memo, referencing "non-lobbyists employed by potential recipients of Recovery Act funds, who are permitted oral contact with executive branch officials, may well have contributed significant funds to the presidential campaign and/or to the campaigns of members of Congress who sit on the committees with oversight jurisdiction over the Department of the Treasury, the Federal Reserve and the expenditure of Recovery Act funds."

The letter goes on to suggest, "A better alternative would be to require disclosure of any and all communications with executive branch officials regarding a particular project, application, or applicant for funding. [. . .] The name and business affiliation of the individual who engages in an oral communication about such a matter, the name of the official contacted, the date of the contact, and the subject of the contact could all be publicly available, perhaps on the Treasury Department's website."

The letter also notes that the rules in the memo ignore the role played by lawmakers, corporate executives, and other non-lobbyists who are free to talk to officials about specific stimulus projects without disclosure requirements. While disclosure is the ultimate goal, the new rules do not catch those who need to be included, such as unregistered lobbyists.

An ALCU press release further illustrated the point. Caroline Fredrickson, the organization's Washington director, said, "If the aim of this provision is government transparency, the focus should not be on those who already disclose their activities publicly. This directive wholly excludes the Goliaths of Wall Street from its applicability and instead restricts the speech rights of those who are dutifully filing quarterly reports of their contacts with the administration and Congress."

Meanwhile, it is unclear how useful the new disclosure rules will be when LDA requirements are currently not abided by and are not entirely understood by those who must report. A report released April 1 from the Government Accountability Office (GAO), entitled *Observations on Lobbyists' Compliance with Disclosure Requirements*, found that some lobbyists had a misunderstanding of the reporting requirements, lobbyists were only "generally able to provide some documentation" for their reports of lobbying activity and political contributions, and some lobbyists had trouble backing up their filings.

As required by the Honest Leadership and Open Government Act of 2007, GAO reviewed a random sample of 100 lobbyist disclosure reports filed during the first three quarters of 2008 and selected a random sample of 100 reports of federal political contributions filed in the middle

of 2008. The report found that "in approximately 14 percent of cases, the documentation provided either was incomplete or contradicted the reported amount of income or expense" and that a dozen filings had to be amended by lobbyists. "Some small firms and sole proprietors indicated they did not understand the requirement for both firms and individual lobbyists to file reports on financial contributions," according to GAO.

In his Jan. 21 executive order on ethics, Obama called upon the Ethics Office and the Office of Management and Budget to identify "steps the executive branch can take to expand to the fullest extent practicable disclosure of ... executive branch procurement lobbying..." Section 4(c)(4) of the order calls for identifying immediate actions the executive branch can take and, if needed, recommendations for legislative changes.

The new Recovery Act lobbying rules could act as an example for future lobbying disclosure reform as envisioned by the ethics executive order. For example, by establishing rules for everyone to disclose their lobbying with the executive branch without regard to whether an individual or entity is registered under the LDA, the public will have a much better picture of special interests influencing implementation of the Recovery Act. The alternative is that lobbyists will be more inclined to send those who are not required to register under the LDA, which will ultimately discourage accurate reporting.

Citizens United Case Offers Insight on Court's Approach to Campaign Finance Law

On March 24, the U.S. Supreme Court heard oral arguments in *Citizens United v. Federal Election Commission* (FEC), a case that could overturn or limit portions of the Bipartisan Campaign Reform Act (BCRA), commonly called the McCain-Feingold campaign finance law. Citizens United, a 501(c)(4) organization, produced a 90-minute film, *Hillary: The Movie*, which was highly critical of then-presidential candidate Hillary Clinton. The case challenges as unconstitutional FEC electioneering communications rules as applied to the movie and to ads promoting the movie. It also challenges as unconstitutional donor disclosure rules as applied to the ads.

BCRA prohibits corporations, including nonprofits, from airing broadcasts that refer to a federal candidate 30 days before a primary election and 60 days before a general election. This electioneering communications rule was modified by the Supreme Court in *Wisconsin Right to Life v. FEC* (*WRTL*) in 2007 to limit the prohibition to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."

The *Citizens United* lawsuit charges that the ads for the Hillary Clinton film should not be subject to donor disclosure and disclaimer requirements because they are purely commercial. It also argues that the film itself is no different from other journalistic documentaries and therefore is not a political communication. Furthermore, it argues that the film did not

specifically tell viewers how to vote in the 2008 presidential election and thus, the film and its ads should be exempt from any type of regulation.

Citizens United wanted to make the film available for free via a video-on-demand service during the presidential primary campaign and accepted some for-profit corporate funding. Citizens United also sought an order declaring that ads for the movie were not "electioneering communications" within the meaning of Section 203 of BCRA.

The federal district court ruled that the film was not a constitutionally protected discussion of issues, under the test the Supreme Court established in the *WRTL* case, because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." Thus, the film and its ads were deemed "electioneering communications." The FEC wants the Supreme Court to uphold the federal district court's ruling, asserting that the film was clearly an appeal against then-presidential candidate Clinton. The government brief also states that a video-on-demand program is nothing more than a political "infomercial," which is banned by BCRA. Oral arguments, however, seemed to indicate that the Court may reject the lower court's ruling.

According to *The New York Times*, "It seemed at least possible that five justices were prepared to overturn or significantly limit parts of the court's 2003 decision upholding the McCain-Feingold campaign finance law, which regulates the role of money in politics."

Furthermore, *SCOTUSblog*, a blog that focuses exclusively on the U.S. Supreme Court, highlighted some of the issues that specific justices raised during oral arguments. Several justices seemed to think that the government's view of the current law could be interpreted to expand beyond ads, to possibly restrict using corporate funding for books.

The justices appeared incredulous when Deputy Solicitor General Malcolm Stewart said, "The government could ban an advocacy group from using its own funds to pay for a 90-minute documentary if only the first minute was devoted to urging voters whom to choose, and the rest was a recital of information about the candidate without further direct advocacy." The justices could possibly create an exception for documentaries. Congress did not specifically address documentaries in BCRA.

SCOTUSblog also mentions that Justice Antonin Scalia outlined that "the First Amendment provides 'heightened' protection when a campaign message involves an exchange between someone wanting to speak and someone willing to listen – as, for example, Citizens United's 'Hillary' film when offered as video-on-demand on cable television." Questioning during oral arguments suggests that the Court could end up adopting this position.

Several justices did question Citizens United's attorney Ted Olson about the movie and expressed the view that the movie is designed to tell viewers how to vote and thus, the implication is that they would be open to regulation. These justices, however, seemed to be in the minority.

Rick Hasen, a Loyola University law professor who runs the *Election Law Blog*, said in a blog posting that the disclosure rules appear to be safe. The only instance Hasen highlighted concerning the disclosure rules was when "Chief Justice Roberts questioned whether the *Brown v. Socialist Workers* exemption for disclosure requirements was too harsh on those seeking an exemption. Under the exemption, a person or group claiming they face threats of harassment if their contributors were disclosed must demonstrate a likelihood of actual harassment. The Chief questioned whether this standard was too harsh on some groups." This, however, was not a topic that the other justices seemed to grasp onto. Citizens United's attorney did not mention the disclosure rules at all during oral arguments.

The Court is expected to rule on the case in late spring or early summer of 2009.

James Madison Center Files Suit Against IRS over Electioneering Rules

The James Madison Center (the Center) filed two federal lawsuits on April 3 challenging the Internal Revenue Service (IRS) definition of "political intervention." In *Christian Coalition of Florida v. USA*, the Center charges that the Christian Coalition of Florida (CC-FL) was denied 501(c)(4) status by the IRS because the agency claimed CC-FL engaged in activities that constitute political intervention. In the second lawsuit, *Catholic Answers and Karl Keating v. USA*, the Center is assisting a 501(c)(3) organization that is challenging a fine imposed by the IRS after the agency determined two "e-letters" posted in 2004 were "political expenditures" that might have influenced the presidential election.

501(c)(3) tax-exempt organizations – charities, educational institutions, and religious organizations, including churches – are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. These organizations cannot endorse candidates, make donations to candidate campaigns, engage in political fundraising, distribute campaign-related statements, or become involved in any other activities that, directly or indirectly, may be beneficial or detrimental to any particular candidate. Activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria also violate the political campaign prohibition governing 501(c)(3) organizations. According to IRS Revenue Ruling 2007-41, "Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case."

According to a press release from the Center, "This vague IRS test has been exploited by some liberal groups to threaten and harass churches and other non-profits, causing many of them to be fearful of IRS retribution if they discussed moral or public policy issues. Non-profits have even shied away from legitimate grass roots lobbying activity in fear that it will be considered political intervention. As a result, the legitimate speech activities of many non-profits have been chilled and their free speech rights infringed."

In *Catholic Answers*, the IRS determined that the two "e-letters" posted by the group's president might have influenced the 2004 presidential election. The IRS assessed a tax on the 501(c)(3) organization for the blog entries and required that organization president Karl Keating reimburse Catholic Answers $900 for the expenditures incurred. Catholic Answers is demanding that this tax be repealed and calls on the court to rule that the group should reimburse Keating. Catholic Answers charges that the blog post was a discussion about who should receive Holy Communion and should not be considered political intervention.

In *Christian Coalition of Florida v. USA*, the group is challenging the IRS determination that the group is not a 501(c)(4) tax-exempt organization. The IRS claimed that the organization's newsletters, voter guides, and legislative scorecards constituted political intervention. According to the complaint, the IRS issued a final determination letter on July 31, 2008, stating the group does not qualify as a social welfare organization. "The IRS summarily concluded that CC-FL is engaged in activities that primarily constitute political intervention on behalf of or in opposition to candidates for public office. The letter fails to indicate how much political intervention is 'too much' and even concedes that CC-FL engages in 'extensive lobbying activities.'" The IRS has not defined how much of an activity constitutes "the primary activity" of an organization.

CC-FL claims that its newsletters, voter guides, and legislative scorecards are educational and do not expressly advocate the election or defeat of any candidate. Furthermore, CC-FL argues that 501(c)(4)s may engage in some partisan activity and that their work was not extensive enough to be their "primary activity."

Both cases argue that IRS rules are far too vague and restrict the First Amendment free speech rights of nonprofits. The groups want the IRS rules and regulations on "political intervention," and the agency's "facts and circumstances" test, to be ruled unconstitutional or "narrowly construed to only encompass speech which expressly advocates the election or defeat of a clearly identified candidate." This appears to be an attempt to move the IRS toward new rules as set forth after the U.S. Supreme Court case in *Wisconsin Right to Life v. Federal Election Commission*. In that case, the Court ruled that an ad can be considered express advocacy "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

OMB Watch has also reported some inconsistencies with IRS enforcement on the ban on partisan activities by charities. In a report, OMB Watch noted, "For charities concerned with the policies of the government – whether their focus is on the environment, taxation, children's welfare, or gun laws – the vagueness of the IRS 'facts and circumstances' criteria has left the line between acceptable policy advocacy and unlawful political intervention extremely hazy. Nonprofit leaders' confusion has intensified as the increasing cost of political campaigns has forced many legislators to double as candidates for much of their tenure in office."