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The Watcher
December 18, 2007 Vol. 8, No. 25

Year in Review Edition

Despite New Majority in Congress, Fiscal Policy Still Mostly Stuck in Neutral

A new congressional majority in 2007 promised a clean break from past practices of a Congress noted for its corruption, dysfunction and profligacy. It moved on a modest agenda and successfully enacted a few important policies, but overall, it failed to chart a new direction in fiscal policy. This failure was due in large part to the majority underestimating the ability and willingness of a coalition of conservative policymakers and the president to fiercely obstruct even the modest reform policies on the new Congress's agenda.

2007's successes were important. Congress raised the minimum wage for the first time in ten years. It vastly improved student loan programs and began to exercise increased oversight of the executive branch. Earmarks are now more transparent and will likely, for good or for ill, be far fewer in number. Perhaps most importantly, it established PAYGO budgeting rules and passed a budget resolution on time.

But overall, Congress missed opportunities to turn a corner on fiscal responsibility, taxation, and budget policy. It appears to be wavering on its promises to follow PAYGO rules and did not enact any of the modest expansions in federal investments it proposed, despite strong bipartisan majorities in favor of many of those proposals. And it failed to

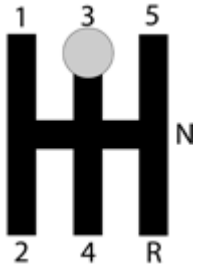
address the inadequacy of long-term revenues or the stigma often attached to taxation and government investments.

So 2007, much like 2006, belonged to a coalition of conservative Republicans in the House and Senate and a very unpopular president, who together fought back modest, fiscally responsible improvements in the tax code and sensible government investments. This coalition's obstruction ensured the new Congress would govern much like the last one, stuck in neutral or moving backward on fiscal policy — with dysfunction, rancor and instilling the public's view of the federal government with even greater cynicism. Here's to better results in 2008.

Budget and Appropriations

Congress Passes Positive Budget Resolution

Congress achieved a basic — if merely preliminary — benchmark of responsible fiscal governance: passing a final budget resolution. The final FY 2008 resolution established a $954 billion discretionary cap for the twelve federal spending bills that would be passed later in 2007, which was $22 billion higher than the president's request. This accomplishment has become somewhat of a rare event in Washington (three of the past five fiscal years did not see a final budget resolution), and the votes were close (Senate 52-40, House 214-209) in passing this one. The discretionary cap made room for modest funding increases in human needs and government investments, but those were all but eliminated in the year-end omnibus appropriations bill.



- Budget Resolution Conference Faces Key Choices on PAYGO, Taxes
- Congress Approves Budget Resolution
- Background Brief: The Budget Resolution

President, Republicans Block Appropriations Bills

The 2007 budget cycle — how the annual appropriations bills are completed — got off to a promising start. A number of bills raised funding levels for human needs programs and enjoyed bipartisan support. But the president rejected nearly all bills containing funding that went beyond his narrow request. Bush vetoed the most important human needs funding bill — the Labor, Health and Human Services, and Education appropriations bill — and enough conservative votes were mustered in the House to sustain his veto. The difference between Democrats and the president on overall domestic discretionary spending was $22 billion, and the Democrats agreed to cut this amount in half. Even though the differences between Democrats and the president amounted to less than

one percent of discretionary spending, the president was unyielding.

The resulting gridlock in Congress made a number of stopgap continuing resolutions necessary, and ultimately as we neared Christmas, Democrats capitulated on the dollar amount but not all the spending priorities. As an omnibus bill moves to completion, it appears the Democrats were able to salvage modest increases in a few top-priority areas and made cuts to some of Bush's priorities. They also added the extra $11 billion in spending they were seeking by putting some high-priority spending items, such veterans spending, into an "emergency" category.

- Congress to Send Labor/HHS Appropriations to President While SCHIP Conflict Continues
- Republicans Keep Obstructing Common-Sense Investment Initiatives
- Bush, Republicans Get Their Dream Budget

Conservatives Stop Improvements to Nutrition, Children's Health Insurance

The new majority in Congress proposed several progressive changes to entitlement programs, but only one significant change — an expansion of student loan programs — was enacted. The most ambitious of these proposals was the $35 billion funding increase for the State Children's Health Insurance Program, which would have provided insurance for an additional four million uninsured children annually. The farm bill, too, contained $4 billion in improvements to several nutrition programs, including Food Stamps. But in the end, the SCHIP bill was vetoed by the president, and that veto was sustained by the House. After Democrats revised the SCHIP bill to address the president's concerns, he vetoed it a second time. Although Senate Republicans obstructed passage of the farm bill for weeks, it was finally passed shortly before Christmas and now needs to be reconciled with the House version.

- Reauthorization of Children's Health Insurance Program Gains Momentum
- Republicans Keep Obstructing Common-Sense Investment Initiatives
- College Loan Bill Enacted!
- House Conservatives Sink SCHIP

Budget Process

Portman Quits; Nussle Appointed New OMB Director

In mid-June, Office of Management and Budget (OMB) Director Rob Portman quietly announced his resignation to spend more time with his wife and children, and President Bush nominated former House Budget Committee Chairman Jim Nussle to replace Portman. Some in Congress warned the nomination might face some trouble in the Senate, given Nussle's reputation as an ideological "bare-knuckled brawler" and poor budget steward as head of the House Budget Committee.

But the Senate Budget and Homeland Security and Governmental Affairs Committees both confirmed Nussle after perfunctory hearings, and the full Senate followed suit in a 69-24 vote, with all Republican senators voting in favor of Nussle and the Democrats split down the middle.

- Portman Out, Nussle Tapped to Head OMB
- Questions, Concerns Surround Start of Nussle Confirmation Hearings
- OMB Watch Letter to Senate Concerning Nussle's Nomination
- OMB Watch Questions and Answers for Nussle Nomination Hearings

Congress Increases Debt Ceiling Again With Hardly a Mention

In mid-September, Congress approved an increase of $850 billion in the nation's debt limit, bringing it to a total of $9.815 trillion. This was the fifth time the statutory debt limit was raised during the Bush presidency and was a direct result of the fiscal policies and practices implemented by Bush and Congress over the past six years. In that time, the national debt has increased 40 percent, from approximately $5.5 to $9 trillion — a milestone it reached on Nov. 6. There was little debate in Congress when the limit was raised and no discussion of the consequences of policies adding to the national debt, the impact on interest expenses or trade-offs in long- versus short-term budget commitments.

- U.S. Reaches Debt Limit: The Case for Long-Term Analysis
- Debt on Arrival — Take II

PAYGO(NE): Congress Institutes a Precarious Commitment to Fiscal Responsibility

One of the first official acts of the House of Representatives, whose new leadership had promised to restore fiscal discipline, was to re-institute pay-as-you-go (PAYGO) rules after a six-year absence. The Senate followed suit in March when it passed its version of PAYGO with the Senate budget resolution. Both rules throw up procedural roadblocks to

deficit-deepening tax cuts or mandatory spending increases that are not offset.

The current Alternative Minimum Tax impasse has revealed the House is sticking to its pledge to offset tax cuts, while the Senate's 88-5 vote on an offset-free AMT patch with nary a point-of-order peep indicates its somewhat muted desire for fiscal discipline barely lasted one year. Unfortunately, a paid-for AMT patch is not a likely outcome, as the president has pledged to veto any fiscally responsible bill that patches the AMT. Adherence to PAYGO is tough with a tax-cut-and-deficit president in the Oval Office, but without demonstrable intestinal fortitude by Congress, PAYGO will not survive in 2008.

- Understanding PAYGO: Questions and Answers
- Perspectives on the Senate BR; the Road Ahead
- Price of Patch too High to Go with PAYGO

President Continues Poor and Manipulative Budget Projections
When the president released his budget proposal in February, he loudly proclaimed his plan "balances the budget without raising taxes." At the heart of this claim, however, were a pair of gimmicks intended to confuse and mislead.

First, Bush's budget assumed the AMT will be patched in 2007 but not in subsequent years. He maintained the AMT is an unintended, unexpected and unwelcome tax increase, and yet he relied on this very tax increase to balance his budget. Second, the president's budget assumed war spending will be $50 billion in 2009 and will not be required thereafter. His $200 billion FY 2008 war supplemental request would punch a $50 billion hole (plus interest on incurred debt) in his five-year plan. These unrealistic — or abandoned — assumptions are an impediment to a much-needed honest assessment of the federal fiscal outlook, which has been buried under a $3 trillion increase in debt since Bush took office.

- President's Budget Full of Cheap Rhetoric, Wrong Priorities
- FY08 Budget Encounters GOP Skepticism in Congress
- OMB Releases Flawed Mid-Session Budget Review

Federal Tax Policy

AMT Reform: a Rough Patch for Congress

At the beginning of 2007, House Ways and Means Committee Chair Charles Rangel (D-NY) said his number one priority was to address the Alternative Minimum Tax (AMT). A year-long discussion and debate of whether and how to eliminate or reform the AMT culminated in the introduction of Rangel's long-awaited "mother of all tax bills." The ten-year, $845 billion bill would eliminate the AMT, add a four percent surtax for those earning over $200,000 a year, reduce the corporate tax rate by four percent, and cut out a raft of business deductions, all on a revenue-neutral basis, redistributing the tax burden away from lower- and middle-class taxpayers and toward the wealthy beneficiaries of the Bush tax cuts of 2001 and 2003.

But Congress did not have time or inclination to take up the Rangel bill — which may not see any action until a new administration is installed in 2009. Instead, it focused on a hold-harmless patch to keep 19 million Americans from paying the AMT for the first time. It also focused on whether and how to pay for the $50 billion cost of that legislation. The struggle over whether or not the AMT patch should comply with Congress' recently self-imposed PAYGO rules extended debate and inaction on the issue to the point where ten of millions of Americans will experience delays in receiving their tax rebate checks from the IRS. As of this writing, there is still not a solution to the AMT issue for 2008.

- OMB Watch Background Brief: The Alternative Minimum Tax
- AMT: Prospects for Reform and the PAYGO Challenge
- AMT: Mother of All Tax Bills and Progeny

Carried Interest — Clears House Despite Massive Lobbying Effort

In early June, Rep. Sander Levin☼ (D-MI) introduced a bill to close the "carried interest" loophole permitting wealthy fund managers to claim compensation based on the performance of the stocks they manage — but do not own — as capital gains rather than ordinary income. A long struggle ensued over the next several months as the Senate Finance Committee held three hearings on the loophole, K Street lobbyists waged a campaign to preserve it, and various progressive advocacy groups — including OMB Watch — sought to educate the public about it and urged Congress to close it.

In the end, the Levin bill was attached to the House version of the AMT patch as a way to pay for the lost revenue. But the Senate vowed not to pay for the patch, and the carried interest provision was dropped. It was included, however, in the "mother of all tax bills" as an offset to the cost of

repealing the AMT, so it's possible that the carried interest provision could get taken up in 2008.

- Wall Street Tax Break Comes under Scrutiny
- OMB Watch Sign-on Letter to Congress Supporting Closing the Carried Interest Tax Loophole
- Addressing Objections to H.R. 2834 — the Levin Carried Interest Bill

Buffett Sets Tone in Muted 2007 Estate Tax Debate

Reform of the currently chaotic statutory estate tax law became increasingly necessary as the one-year full repeal approaches in 2010 and then reverts to the tax policies prior the 2001 Bush tax cuts. In 2006, the estate tax played a leading role in congressional debates throughout the year and came up for repeated votes in the Senate. Ironically, by contrast, the issue received only scant attention in Congress in 2007, with only one hearing held in mid-November, almost as an afterthought. At that hearing, star witness Warren Buffett stole the thunder of those advocating for repeal of the estate tax and reframed the debate by comparing the less-than-one-percent of Americans who pay the tax with the 23 million families who earn less than $20,000 annually. It is safe to say estate tax repeal is no longer a threat in this Congress, but a need for a common sense, revenue-neutral reform still exists. And it is by no means a certainty Congress would pass a reform that is revenue neutral.

- OMB Watch Statement for Senate Finance Committee Hearing on the Uncertainty of Planning under Estate Tax Law
- OMB Watch Statement on the Estate Tax
- Estate Tax Repeal No Longer on the Table

Wealth and Income Inequality

Inequality Continues to Expand

The economic news for Americans not at the top of the income distribution was mixed at best this year. The Census Bureau's 2006 income and poverty report noted the poverty rate declined to 12.3 percent from 12.6 percent in 2005, and household median income reversed course and increased year-over-year by 0.7 percent. These positive developments are tempered by the figures for individual worker wages, which for both men and women declined for a third year in a row. And, as the CBO recently reported, shares of income for each of the bottom four income quintiles continued their historical decline.

- Census Releases 2006 Income, Poverty, and Health Insurance

Numbers
- Census Report Shows Working Americans Falling Behind
- Higher Tax Rates = Higher Income Inequality

Low-Income Workers Get Some Relief with Minimum Wage Increase
After a circuitous route to the president's desk, a meager minimum wage increase to $7.25 per hour was signed by Bush in May. The wage increase was ultimately attached to a $120 billion supplemental spending package and was accompanied by a $4.8 billion tax break for small businesses.

The wage increase is historic for a number of reasons. Prior to this year's increase, the value of the minimum wage, adjusted for inflation, was at a fifty-year low. And not since World War II has the minimum wage sunk below 31 percent of the average wage in the United States. With the increase, some 5.6 million workers will see a raise in their pay.

- Squabbling Over Tax Cuts Continues to Delay Minimum Wage Increase
- Congress Passes Supplemental; Cease-Fire in the Capital

Accountability and Transparency in Federal Spending

After Arduous Implementation, USASpending.gov Launches
In a groundbreaking collaboration, OMB and OMB Watch teamed up to launch a free, searchable, downloadable website of all federal spending. Based on the underlying software of our FedSpending.org, the government site (USASpending.gov) provides a solid foundation to allow the American public to better understand and investigate federal spending. Although this site represents an important step forward for government transparency, more still needs to be done, including proper maintenance and significant data improvements for the site in the years ahead.

- OMB Watch Applauds Important Step Forward for Government Transparency
- USASpending.gov Launched!

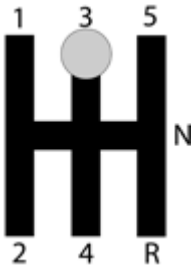
FedSpending.org Continues to Set the Standard for Access to Spending Data
Despite helping to design and implement the government's spending database, OMB Watch continued to push the envelope in proving what is possible with federal spending transparency in 2007 through significant upgrades and expansion of the FedSpending.org website. To celebrate the one-year anniversary of FedSpending.org, OMB Watch released a new and

improved version of the website, with a complete data set through FY 2006 for both contracts and federal assistance spending. This new version also includes major functionality upgrades, including the addition of a mapping feature on all searches, creation of a streamlined and powerful SuperSearch for all advanced searching needs, and increased flexibility in getting data more quickly through expandable summary views. OMB Watch intends to continue to operate and expand FedSpending.org in 2008 and beyond.

- OMB Watch Celebrates One Year of FedSpending.org with New Version of Site
- OMB Watch Updates Data, Features on FedSpending.org
- OMB Watch Launches Upgraded FedSpending.org Website

Earmark Disclosure Procedures Instituted

One of the new reforms enacted in the lobbying and ethics reform bill passed by Congress in 2007 concerns earmark transparency and disclosure. Under the new rules, all earmarked spending items and tax expenditures in bills, resolutions, conference reports and managers' statements must be identified and posted on the Internet 48 hours before a vote. In addition, legislators must also certify that they will not financially benefit from any earmarks they've requested, and extraneous earmarks (i.e., not approved by either chamber) are now subject to a 60-vote point of order in the Senate. These reforms are critical because they allow for the underlying bill to continue to be considered, even when striking a specific provision, and gives the public greater access to the behind-the-scenes deal-swapping that often happens in Congress.



While these reforms cover new legislation moving forward, OMB began a process of publishing past and current earmarks in a searchable, online database. Posting both earmarks in the FY 05 appropriations bills and in the current FY 08 bills as they move through Congress, OMB pushed the federal government to be far more transparent in presenting spending information to the public.

- Congress Passes Sweeping Lobbying and Ethics Reforms
- House Passes PAYGO and Earmark Disclosure Rules
- Senate Passes New Rules on Earmark Disclosure
- OMB 2005 Earmarks Database Up and Running
- Earmarks II: OMB "Database" Tracks FY08 Bills

Government Performance and Management

Final Round of PART Scores Continue Biased Performance Reviews

With the release of the president's FY 08 budget, OMB completed reviews of almost every federal program using its review mechanism — the Program Assessment Rating Tool (PART). To date, nearly 1,000 federal programs, representing 96 percent of all programs, have received at least one review with the PART.

Unfortunately, the PART continues to be an ineffective tool for objectively evaluating program performance, has little to do with even the president's own budget proposal, and adds additional burdens and distractions to program management and implementation. The PART system has created a duplicative and only marginally useful system that many agency program staff treat merely as a compliance exercise.

- OMB Wraps Up First Complete Round of PART Reviews with Little to Show
- OMB-OMB Watch Collaboration Improving Results?
- White House Releases Next Round of PART Scores

Bush Attempts to Codify PART in Executive Order

The White House issued an executive order (E.O. 13450) on Nov. 13 in an attempt to entrench the PART within federal agencies long after President Bush leaves office. The order would create a point person within agencies responsible for program performance, allow OMB more leverage over specific aspects of program implementation and solidify the PART program review process as the evaluator of government programs. While OMB has made commendable strides in making the PART process more transparent, unfortunately, this commitment to transparency is not enough to make up for the fact that the information being provided is of limited value.

- White House Attempts to Entrench PART at Federal Agencies
- Bush Attempts to Secure His Legacy

Problems Remain In Government Contracting/Privatization

More contracting scandals emerged this year, from Blackwater to IRS outsourcing, while Congress moved to make some small but needed reforms of the contracting process. Chief administrators at both the General Services Administration (which handles most general government procurement) and the Department of Housing and Urban Development faced accusations of politicizing federal resources and playing favorites in the contracting process. Meanwhile, Congress passed legislation to set up

a commission to investigate abuses in wartime contracting and to end a wasteful IRS program that uses private debt collectors to track down tax debts. The commission proposal was eventually enacted while repeated efforts to end the dangerous IRS program fell short.

- Wartime Commission Would Investigate Contracting Abuses in Iraq and Afghanistan
- Congressional Hearing Reveals Flaws in Outsourcing Tax Debt Collection
- Another Attempt at Ending IRS Privatization Program Moves Forward
- OMB Watch Questions GSA's Approach to Accountability
- Research Questions Cost-Efficiency of Privatization
- Jackson: Stretching the Truth at HUD

Information Magic Eight-Ball

Over the past year, there has been a great deal of activity on issues related to government transparency and secrecy, but it can remain difficult to figure out exactly what all the discussions, reports and hearings actually mean. To try to get to the bottom of this murky issue, we are breaking out our Magic Eight-Ball of Information Policy to ask a few key questions about the past year — the progress and setbacks, laid out in simple terms. We wish there was a better approach, but unfortunately, 2007 was that kind of year for government transparency, with vague and unclear answers for most questions.

Q: Have we come to our senses and restored the full reporting of toxic pollution?

A: Reply hazy; try again later

Just before the beginning of the year, the U.S. Environmental Protection Agency (EPA) made it more difficult to get complete answers on questions about toxic pollution when it raised the reporting threshold for detailed information under the Toxics Release Inventory (TRI). Since then, there have been plenty of efforts to change the answer on this issue. The New York Attorney General's office filed a Nov. 28 lawsuit on behalf of 11 other states contending the EPA has violated the law. California's magic Eight-Ball came up yes when Governor Arnold Schwarchenegger (R) signed a state law on Oct. 13 to require facilities to report toxic pollution at the old levels. At the federal level, bills have been introduced in the House and

Senate to restore the TRI program, and a recent Government Accountability Office (GAO) investigation concluded that EPA deviated from its rulemaking procedures and did not perform adequate analysis of the reporting change that will have a significant impact on ability of communities to get complete information about toxic pollution production. The GAO report recommended that Congress pursue legislation to restore the TRI program. Besides California's new law, there has been no reversal of EPA's ill-conceived change to the TRI program. However, with so many efforts underway opposing the agency's new reporting thresholds, it seems like it is only a matter of time before this answer switches to yes.

Q: Are scientists able to freely discuss findings without industry or political interference?

A: Don't count on it

Scientists may not be fans of the unempirical Magic Eight-Ball, but even they would have a hard time arguing with this answer. The year saw enough examples of gagged scientists, manipulated findings and suppressed information that it approached becoming a statistically relevant sample. A deputy assistant secretary at the U.S. Fish and Wildlife Service used her influence to manipulate endangered species findings. After Vice President Cheney demanded that the Department of Interior "get science on the side of farmers", they found sufficient evidence to divert water during a drought, in the process causing the largest fish kill in history. OMB edited scientific language in EPA's cost-benefit analysis to downplay the economic benefits of a rule to tighten the standard for human exposure to ground-level ozone, also known as smog. A media policy at EPA prevented agency scientists from discussing the impact of climate change on polar bears and their habitat. In fact, a report charged that political officials throughout the Bush administration have edited and manipulated climate science communications to the media and Congress. EPA also began a process to review and consolidate its laboratory network that set off great concern among scientists, since the agency's library effort from the previous year resulted in closures and discarded information. Scientists throughout the government are hoping that next year, they'll be free to provide the public clearer and more accurate answers.

Q: Have the courts been a good check on government secrecy?

A: Better not tell you now

Throughout the year, the government has used the state secrets privilege in an attempt to dismiss claims against it, on the grounds they involve information which, if revealed, would be dangerous to national security. The states secrets privilege is being invoked in the approximately 50 lawsuits against the government and telecommunications companies alleged to be involved in the National Security Administration's Terrorism Surveillance Program (TSP). The Ninth Circuit ruled that a document detailing that TSP targeted an organization for surveillance was a state secret but that the subject matter of the suit itself was not. Because the government has openly admitted the existence of the program, the courts should stop accepting claims of state secrets to dismiss or block TSP cases from moving forward through a fair judicial process. The Sixth Circuit, on the other hand, dismissed a suit against the government because the plaintiffs failed to demonstrate specific harm caused by TSP. The plaintiffs failed to meet the requirement primarily because the government used the state secrets privilege to block access to details about the program, which may have more clearly demonstrated harm to the plaintiffs in the form of monitored communications. There are plenty of cases still pending, and likely more on the way, so the courts will have an opportunity to reverse this trend in the new year. However, it is unclear what might prompt such a change.

Q: Did the White House provide all the requested information to Congress (or the public) relating to important investigations such as those dealing with government surveillance, interrogation methods, or classification of documents by the vice president?

A: No

Whether it be secret memoranda on the legality of questionable interrogation techniques or documents relating to the government's warrantless wiretapping programs, Congress was hard-pressed and persistently thwarted in its attempts to gain access to information held by the White House. In a staggering display of constitutional hubris, Vice President Dick Cheney argued that the Office of the Vice President was not a part of the executive branch because he is endowed with legislative responsibilities of presiding over the Senate. He took such a leap of logic in order to avoid being subject to a law requiring him to release information on the number of documents he had classified, which he has been avoiding since 2002. The executive branch also managed to evade much of the oversight of its own inspectors general (IGs). NASA's IG was found to be working with the agency to avoid overly intrusive investigations, allegedly destroying records, creating a hostile environment for whistleblowers and interfering with investigations.

Q: Can I get clear information on how the federal government is spending our tax dollars on contracts and financial assistance?

A: Surprisingly, yes

Implementing a law can be murky business, but the White House's Office of Management and Budget (OMB) was able to announce USASpending.gov, created to meet the mandates of the Federal Funding Accountability and Transparency Act (FFATA), almost a month ahead of time. The site allows users to easily search trillions of dollars worth of federal contract and financial assistance spending. OMB said the site would update the spending data every two weeks and would push agencies to improve the data quality of the information. The site is modeled after OMB Watch's precedent-setting FedSpending.org software platform. Between the two sites, the public now has two different Magic Eight-Balls on federal spending to consult when they have questions. The year also included a series of contractor scandals relating to Katrina response and Iraq reconstruction. The House is looking at the next step in transparency with a variety of measures in the 2008 defense authorization bill that would greatly increase oversight of the federal contracting industry.

Q: I have lots of questions for agencies; has it gotten easier to get quick, helpful responses to requests for information?

A: Reply hazy; try again later

Unfortunately, it seems agencies have not made huge strides in responding to inquires. Reviews of FOIA performance during the year demonstrated the need for a significant overhaul of the process and secrecy continues to cast a large shroud over much government information. For the third year in a row, transparency champions on the Hill, such as Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX) and Rep. Henry Waxman☼ (D-CA), pushed to mandate improvements in agency compliance with the Freedom of Information Act (FOIA), the country's most fundamental access law. Congress was able to push the legislation through before the end of the session. Now the bill goes to the president, who will decide whether or not to sign it into law. If the president vetoes the bill, it will be a safe bet that we'll see a fourth year of effort on this issue, hopefully with a better answer at the end of it.

Q: Can we count on the federal government to tell us when we are in danger from a *known* toxic or other environmental hazard?

A: No

You would think that when the government knows the answer, it would provide the information openly, especially when it relates to a health hazard. Unfortunately, you'd be wrong. The year had several examples of major environmental hazards about which the government knowingly withheld important information from the public. Congressional oversight about asbestos and other contaminants in the air after the 2001 World Trade Center attacks underscored that EPA did not have enough evidence for its claims that the air was safe and manipulated the public's impression of the air quality by being unclear about *where* the air was allegedly safe. An April 19 court decision (*Lombardi v. Whitman*) acknowledged the misinformation but absolved EPA of responsibility for resulting illnesses because it found that the misinformation was not enough of a "shock to the conscious." When a court rules that the government lying to people about their safety from air pollution is not shocking enough, the bar has fallen very low in what we expect from our government. The Federal Emergency Management Agency (FEMA), unfortunately, proved the court's point by housing Hurricane Katrina victims in trailers so

shoddily constructed that they released dangerous levels of formaldehyde. FEMA was aware of the possibility of formaldehyde poisoning but attempted to avoid responsibility by refusing to test the trailers. On another front, the Nuclear Regulatory Commission (NRC) covered up a March 2006 spill of uranium by labeling documents about the event For Official Use Only. Public outrage and congressional admonishments prompted the NRC to release specifics in September. Let's hope the government does a better job of coming clean with the public about environmental hazards in the new year.

Q: Can we be sure that our communications aren't being illegally monitored and that any surveillance programs are being overseen to ensure our civil rights are protected?

A: Don't ask me

The Magic Eight-Ball might be reluctant to answer this one because the answer might be tapped. Congress has, so far, been unable to pass legislation to guarantee the protection of people's rights to privacy and due process. In August, President Bush signed the Protect America Act of 2007 (PAA), granting the government the authority to wiretap anyone, including U.S. citizens, without any court approval as long as the "target" of the surveillance is located outside the U.S. After passing the bill, Congress immediately began efforts to reform the president's broad authority. The House passed the RESTORE Act (H.R. 3773), which would require a finding of probable cause for surveillance targeting American citizens, including Americans located overseas. Two Senate committees are split on whether or not to include telecommunications immunity provisions to forgive companies that handed over client information to the government in the Senate's reform bill, the FISA Amendments Act of 2007 (S. 2248). The Senate was expected to pass a PAA reform bill by the end of the year, but Senate Majority Leader Harry Reid (D-NV) pulled the bill on Dec. 17 as it became clear that the telecommunications immunity provision was creating an insurmountable backlash. Even if the Senate is able to pass the indemnity provision, no one is sure what it will end up looking like once it is reconciled with the House bill.

Q: Should we worry about exposure to toxins in consumer products and in the environment?

A: Better not tell you now

As biomonitoring research (human toxicity testing) becomes increasingly popular, reports

indicate that no one has avoided chemical contamination in the industrial era. What is most alarming is what we don't know, as research confirming or refuting the chemical causation of health problems is woefully inadequate. New nanochemicals are already being used in products and remain virtually unregulated by the government. And the chemical contents of everyday products, including personal care products we and our children use, remain largely unknown. The year demonstrated an increasing awareness about this issue but without much movement to address or correct the problems. The National Nanotechnology Coordination Office released a list of research objectives in August that might someday result in a call to regulate these new substances. Bills were introduced in the Senate and House (Healthy Communities Act of 2007, S. 1068, and Coordinated Environmental Public Health Network Act of 2007, S. 2082/H.R.3643) that specifically provided money for biomonitoring projects but made little progress through the legislative process.

Q: In this information age, can we expect new information sources on the many environmental hazards we face?

A: Outlook is good

The good news is that Congress put in some promising efforts to provide the average citizen with new environmental and health information in 2007. Sen. Dianne Feinstein☼ (D-CA) tucked a provision into the Interior appropriations bill funding a greenhouse gas inventory, and Sens. Amy Klobuchar (D-MN) and Olympia Snowe (R-ME) sponsored the National Greenhouse Gas Registry of 2007 (S.1387), which would have added greenhouse gases to the list of substances that facilities are required to report under the Toxics Release Inventory (TRI). Rep. Eliot Engel☼ (D-NY) innovatively used the Securities and Exchange Commission in the Greenhouse Gas Accountability Act of 2007 (H.R. 2651) that required all publicly traded companies with emissions of significance to report to the EPA and include such information in their annual reports. The Raw Sewage Right-to-Know Act (H.R. 2452) required public water treatment plants to quickly notify the public and others when untreated sewage overflows into natural waters. Though none of these are likely to pass before the end of this session, they are good indications that Congress is looking at what new environmental and health information we need.

Q: Has the government set up a good system to ensure the security and safety of the nation's thousands of chemical facilities?

A: Don't count on it

The Department of Homeland Security (DHS) finalized interim chemical security regulations in April. But the rules contain so little public accountability and access to information that citizens would do better to ask their own Magic Eight-Balls about the security of the plant next door rather then depend on the agency to answer the question. The new regulations also fail to require consideration of inherently safer technologies by facilities reporting to DHS, so the agency won't even know the best practices to minimize risks. The program will mostly be conducted in secret, preventing the public from finding out which chemical facilities are even covered by the program, much less what facilities are lagging behind. Moreover, DHS finalized high chemical thresholds for the program, meaning that the majority of chemical facilities will not have to comply with DHS's chemical security protocols. The effort to establish stronger chemical security measures suffered a significant setback in May with the loss of a provision from the Iraq supplemental spending bill that would have prohibited DHS from preempting state law on matters of chemical security. We fully expect Congress to be asking plenty of questions on this program in 2008, but there are no indications yet on what the answers will be or if we will get a more robust chemical security program that will have enough information to actually let people know they are safe or if they should be concerned.

A Year for Failure: Regulatory Policy News in 2007

In 2007, new regulatory policies and the inability of federal agencies to protect the public made headlines more so than at any time in recent memory. Four themes dominated regulatory policy this year: an increase in White House influence over agency rulemaking activity and discretion, which added a perception of more political manipulation; the inability of the federal government to protect the public by ensuring the safety of imported goods; the voice of some industry groups calling for regulation; and the Bush administration's refusal to regulate in the face of overwhelming scientific evidence, as in the case of climate change. At best, government has attempted to respond to crises instead of getting ahead of the curve. This has left the public uncertain about whether we can count on our government to provide adequate safeguards.

White House Interventions

Part I: Systemic Regulatory Changes

On Jan. 18, President George W. Bush issued Executive Order 13422 (E.O.), which amended

Executive Order 12866, Regulatory Planning and Review. The same day, the White House Office of Management and Budget (OMB) issued its *Final Bulletin for Agency Good Guidance Practices*. The two executive directives work in concert to alter the ways federal agencies develop and enforce regulations.

These changes could dramatically impair the ability of agencies to protect the public. The Bush E.O.:

- requires agency regulatory policy officers to be presidential appointees and gives them new power to start and stop regulations;
- shifts the focus for promulgating regulations from the identification of a problem like threats to public health to the identification of a "specific market failure"; and
- in conjunction with the *Final Bulletin*, allows the White House to exert control over agency guidance documents — subjecting a new class of information to political considerations and possible delay.

Despite significant media attention and two congressional oversight hearings, many questions about Bush's E.O. remain unanswered. It is unclear why President Bush waited until the seventh year of his presidency to issue the changes. Also, it is unclear what existing problems the new policies sought to address.

Vague language in the directives has also created uncertainty as to the practical effects. For example, only an agency regulatory policy officer (RPO) may allow agency staff to "commence" a rulemaking, and the RPO may also end a rulemaking at any time. However, neither E.O. 12866 nor E.O. 13422 provides a definition of when a rulemaking commences. Currently, the limits of RPO power remain undefined. An alarming lack of transparency in the rulemaking process keeps the public from knowing the RPOs' roles in the process.

The new policy on guidance documents also raises more questions than answers. Agencies issue guidance documents in order to clarify regulatory obligations to the public and private sectors, explain complex technical issues or otherwise offer clarification or guidance on agency policies. Unlike a regulation, guidance is not legally binding, and therefore imposes no mandates on regulated entities.

E.O. 13422 requires review of guidance documents by OMB's Office of Information and Regulatory Affairs (OIRA). There is a timeframe to complete this process, but it includes a potentially dangerous caveat: "OIRA will complete its consultative process within 30 days or, at that time, advise the agency when consultation will be complete." OIRA is not planning to hire additional staff to manage the influx of guidance, so it is unclear how OIRA plans to review and approve guidance in a timely fashion.

Congress tried to mitigate the impact of the E.O. On June 28, the House passed the Financial Services and General Government Appropriations Act for Fiscal Year 2008. The bill contained an amendment that would have prevented the White House from expending any funds to implement the E.O. and the *Final Bulletin*. The Senate also considered

defunding language for its version of the FY 2008 appropriations bill but never brought the bill to the Senate floor. Instead, all domestic spending bills have been wrapped into one omnibus spending bill. The omnibus bill currently does not contain the defunding language.

The person charged with implementing E.O. 13422 is the new OIRA administrator, Susan Dudley. Prior to her appointment to OIRA, Dudley worked for the industry-funded Mercatus Center, an anti-regulatory think tank at George Mason University. Dudley is ideologically opposed to government regulation, and her nomination faced opposition from public interest groups including OMB Watch, Public Citizen, the Natural Resources Defense Council and the United Auto Workers.

Bush appointed Dudley April 4 while Congress was in recess and shortly after the Senate announced a nomination hearing for her. Nonetheless, Bush chose to install Dudley by recess appointment and was widely criticized for circumventing the Senate's usual confirmation process. Dudley is the only OIRA administrator in history (other than those operating in a temporary, acting capacity) not to have been confirmed by the Senate.

Dudley's first significant public action as administrator was to revise executive branch policies on agency risk analysis. Working with the White House Office of Science and Technology Policy, a memo entitled "Updated Principles for Risk Analysis" was released Sept. 19.

The memo updates a 1995 memo on risk analysis and came in lieu of a 2006 proposal that would have imposed overly prescriptive, one-size-fits-all standards on agency risk assessments. In January, the National Research Council (NRC), part of the National Academy of Sciences, urged the White House to abandon that effort — the "Proposed Risk Assessment Bulletin." The bulletin proposed scientifically questionable standards that would have governed the risk assessment process of all federal agencies.

The memo is an improvement on the proposed bulletin. It is not mandatory and may not have a substantial impact on agency practices. However, the memo does reaffirm existing OMB policies, such as the primacy of cost-benefit analysis in OIRA decisions, which diminish agency discretion.

Part II: Manipulating Agency Rulemaking

Beyond systemic regulatory changes, the White House also had a busy year meddling with agencies' individual regulatory actions. In June, before the U.S. Environmental Protection Agency (EPA) published a proposed rule to set the national air quality standard for ozone (smog), OIRA solicited the input of industry representatives and significantly edited EPA's economic analysis to downplay the rule's potential benefits.

Two National Oceanic and Atmospheric Administration (NOAA) rules have also suffered at OIRA's hand. A rule to protect the North Atlantic right whale from being struck by ships has been held up at OIRA since February. OIRA should have completed the review in June.

OIRA also rejected a NOAA proposal to protect krill — a shrimp-like crustacean that serves as an important link in the marine food chain. In a letter to NOAA, Dudley accused the agency of failing to provide adequate rationale for pursuing the policy and questioned NOAA's legal authority.

OIRA also reviewed EPA's Endocrine Disruptor Screening Program, a scientific assessment that may form the basis of future EPA regulations of endocrine disruptors. OIRA's decision to review the screening program may be in response to the aforementioned new policy on agency guidance. It also is consistent with industry efforts; as early as 2002, the Center for Regulatory Effectiveness, Kansas Corn Growers Association and the Triazine Network used the Data Quality Act to challenge EPA's use of endocrine disruption screening and research protocols.

In 2007, Vice President Cheney renewed the role of the Office of the Vice President (OVP) in rulemaking. Representatives from Cheney's office attended several meetings related to a Department of Homeland Security regulation on chemical security. The regulation was later criticized for not going far enough in protecting the U.S. from potential terrorist attacks on chemical plants.

The influence of OVP in the chemical security rule is part of a recent trend in the Bush administration. According to information posted on the OMB website, OIRA has held more than 550 regulatory review meetings since February 2002. A representative from OVP has been present at only 11, about two percent. However, eight of those 11 meetings have occurred since February, including the four meetings on the DHS chemical security rule.

The OVP is focusing attention mainly on environmental and homeland security rules. The 11 meetings pertained to eight separate rulemakings, four of which were EPA rules (including EPA's ozone rule and upcoming rules on greenhouse gas emissions), and three of which were DHS rules.

Import Safety

A second major regulatory theme in 2007 was the inability of the U.S. government to ensure the quality of the rising tide of imported goods. Toys, tires, toothpaste and a variety of food products made headlines this year for the risk they posed to consumers. Federal agencies responsible for regulating these products are plagued by declining resources and authority. While the agencies bear the brunt of the criticism for individual failures, the common link among the failures is Bush's seven-year war on regulatory protections.

In March and April, contaminated pet food sickened and killed pets across the country. The pet food contained ingredients, imported from China, tainted by the chemical melamine. A pet food recall was organized, but the melamine was detected in animal feed which led to human exposure. Federal scientists concluded the human risk to be low.

In May, the U.S. Food and Drug Administration (FDA) began to warn of Chinese-made

toothpaste contaminated with diethylene glycol, which is commonly found in antifreeze.

In June, the National Highway and Traffic Safety Administration (NHTSA) ordered a New Jersey tire importer to recall 450,000 defective Chinese-made tires. A defect in the tires caused them to explode and was responsible for at least two deaths. The importer, Foreign Tire Sales, recalled the tires and later declared bankruptcy.

Also in June, FDA announced an import ban on five different types of Chinese farm-raised seafood products. While no illnesses have been reported, the agency "repeatedly found that farm-raised seafood imported from China were contaminated with antimicrobial agents that are not approved for this use in the United States."

Recalls of children's products made national news throughout the year. Excessive levels of lead — a toxin known for decades to pose a danger to children — were found in toys, clothes and children's jewelry. The RC2 Corporation recalled more than 1.5 million Thomas and Friends wooden train toys due to high lead levels in the paint. In September, Mattel recalled 675,000 Barbie toys for the same reason.

As of Dec. 13, 104 recalls of lead-contaminated children's products had been announced. The recalls cover more than 17 million individual products, 95 percent of which were manufactured in China. The number of products recalled in 2007 increased nearly six-fold compared to 2006.

RC2, Mattel and many other companies recalled their products in cooperation with the Consumer Product Safety Commission (CPSC), the federal agency responsible for ensuring product safety and for recalling products found to be dangerous. Because of the recalls, CPSC's policy of negotiating recalls with companies and encouraging voluntary compliance has come under fire from the public and Congress.

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

FDA's failure to ensure import safety also corresponds to declining agency resources. In November, an FDA advisory panel released a report titled *FDA Science and Mission at Risk*. Among other things, the report found FDA has "experienced decreasing resources in the face of increasing responsibilities" and must receive additional resources in the future if the agency is to ensure food and drug safety.

Bush's response to Americans' increasing dissatisfaction with product safety came July 18 when he signed Executive Order 13439, Establishing an Interagency Working Group on Import Safety. The working group, made up of cabinet-level officials, released its final report Nov. 6 on ways to improve the safety of food and consumer products imported into the U.S. The report calls for limited increases in some federal agencies' responsibilities but

does little to change the current voluntary regulatory scheme that governs some $2 trillion worth of products, 800,000 importers and more than 300 ports-of-entry.

Congress made limited progress in addressing these issues. The Senate Commerce Committee in October advanced legislation which would expand the resources and authority of CPSC. Among other things, the bill would dramatically increase the budget and staffing at CPSC, require third-party testing and certification of children's products, ban lead in children's products, and enable CPSC to levy greater fines on noncompliant manufacturers. Both chambers of Congress are considering legislative solutions to FDA's problems with import safety as well. However, none has gained momentum.

Industry Influence

Industry interests also played a major role in shaping regulatory policy in 2007, sometimes in surprising ways.

A new program launched by the Small Business Administration's Office of Advocacy provides industry with a new vehicle to voice their complaints with federal regulations. The program, the Regulatory Review and Reform Initiative, or "R3," includes uniform recommendations for the conduct of agency reviews. More significantly, the Office of Advocacy will solicit from the business community recommendations on which existing rules agencies should review and will transmit those recommendations to the appropriate agency. The R3 program is reminiscent of the anti-regulatory "hit list" compiled by OMB from 2001-2004. That list included rules recommended by industry groups and conservative think tanks.

In a surprising trend, businesses and trade groups began asking for regulations, albeit in ways that often emphasize voluntary standards and third-party certification. Hoping to restore consumer confidence after a spate of defective product recalls and consumer product scandals, a number of industry groups recognized the need for federal regulations and even called for enhancing agencies' authority.

For example, the Toy Industry Association recently asked the CPSC to adopt a mandatory testing system to help ensure toys are safe, and the Grocery Manufacturers' Association proposed that FDA adopt a foreign supplier quality assurance program. Recent evidence showing diacetyl, a chemical used to give microwave popcorn its butter flavor, causes terminal lung disease in factory workers and at least one consumer prompted the Flavor and Extract Manufacturers Association to support a U.S. Occupational Safety and Health Administration (OSHA) standard to limit exposure. Meanwhile, major popcorn companies began to voluntarily phase out the use of diacetyl.

Ignoring Science

The Bush administration also continued its record of refusing to regulate in the face of overwhelming scientific evidence and manipulating scientific conclusions in order to

achieve ideological outcomes.

For example, despite scientific evidence describing the dangers of diacetyl exposure, in September, OSHA denied a labor union petition asking the agency to develop an emergency temporary standard. In denying the petition, Edwin Foulke, the head of OSHA, wrote, "OSHA does not have sufficient evidence that a grave danger currently exists in microwave popcorn manufacturing facilities to support the issuance of an emergency temporary standard (ETS) for diacetyl." Instead, OSHA has chosen to pursue its standard rulemaking procedure, which often takes years.

Congress is considering legislation that would force OSHA to issue a temporary diacetyl standard. The Popcorn Workers Lung Disease Prevention Act (H.R. 2693) would mandate an immediate interim standard and then give the agency time to develop a final rule. This two-step plan gives workers at least a modicum of protection in the short term while long-term strategies are developed. The bill passed the House in September but no companion bill has been introduced in the Senate. President Bush opposes the bill.

The Bush administration delayed action on perchlorate, an ingredient in rocket fuel and fireworks. In April, EPA announced that it would not regulate perchlorate despite a National Academy of Sciences (NAS) conclusion that perchlorate is commonly present in public drinking water supplies and that ingesting it inhibits human thyroid function. EPA cited the need for further investigation in its decision not to regulate perchlorate. According to the Natural Resources Defense Council, the White House and the Department of Defense have been engaged for years in a coordinated campaign to downplay the human health risks associated with perchlorate exposure.

In March, a Department of Interior investigation found Julie A. MacDonald, the deputy assistant secretary for fish, wildlife and parks, allowed political considerations to taint a number of decisions in which the Fish and Wildlife Service (FWS) decided not to consider certain species endangered. Among the transgressions, MacDonald leaked internal agency documents to industry lobbyists and intimidated agency staff in order to manipulate scientific evidence. MacDonald resigned in April as a result of the scandal.

In response to public pressure and the scrutiny of the House Natural Resources Committee, FWS decided to review eight endangered species decisions by MacDonald. In November, FWS announced it had confirmed impropriety in seven of the eight decisions and is now reviewing them.

In July, former Surgeon General Richard Carmona accused senior administration officials of interfering with his work. In one example, a senior official in the Department of Health and Human Services (HHS) blocked the release of a report Carmona and his staff had prepared. The report, *Call to Action on Global Health*, identifies the link between poverty and global health problems, calls for citizens and corporations to take action to address these problems, and recommends America make the issue of global health a primary aspect

of its foreign policy.

An investigation by Sen. Edward Kennedy☼ (D-MA) supported Carmona's claims. In August, Kennedy released e-mails related to Carmona's accusation. In one, HHS's White House liaison wrote, "He needs to be the SG [Surgeon General] with specific speeches, on specific topics addressing the Secretary's and the president's agenda — which will become more political as the re-elect gets underway."

The Bush administration also had a busy year downplaying scientific evidence of global climate change. In April, the U.S. Supreme Court found greenhouse gas emissions could be considered an air pollutant under the Clean Air Act, an assertion previously rejected by the administration. The Court's decision clarifies EPA's statutory authority to regulate these emissions. EPA had argued that it did not have that authority, and even if it did, it was a bad idea to do so. Bush has directed the EPA to propose its program to regulate emissions by the end of 2007.

In light of the Supreme Court decision, California renewed its efforts to enact a state-level program to reduce greenhouse gas emissions from tailpipes. In December 2005, California petitioned EPA for permission to enact its program, as it is required to do under the Clean Air Act. If EPA grants California's petition, at least 12 other states would follow California's lead.

However, in the two years since California filed its petition, EPA has not announced a decision. Administrator Stephen Johnson has pledged to announce the agency's decision by the end of 2007. Meanwhile, an investigation by the House Oversight and Government Reform Committee uncovered an administration-wide campaign involving White House and cabinet officials to lobby congressmen and governors, urging them to oppose the waiver for California. In November, California sued EPA for its refusal to make a decision.

In October, Julie Gerberding, head of the Centers for Disease Control and Prevention (CDC), testified at a Senate hearing about the public health effects of global warming. However, while reviewing Gerberding's testimony, OMB removed seven pages, or about half, of the testimony. The deleted sections included information on extreme weather events and food and water-borne disease, among other things.

A December report by the House Oversight and Government Reform Committee's majority staff revealed more examples of the Bush administration suppressing climate science. The investigation found the White House refused to allow certain administration scientists to speak publicly about climate change and edited multiple government reports. The committee concluded, "The Bush Administration has engaged in a systematic effort to manipulate climate change science and mislead policymakers and the public about the dangers of global warming."

Conclusion

In 2007, Americans became trenchantly aware of the positive role government can play and the consequences that can be wrought when regulatory protections break down. But these past 12 months may only be the beginning of a new chapter in American domestic policy. Many problems have been identified, but few have been solved. Dangerous imports, workplace hazards and environmental degradation may dominate headlines to an even greater extent in 2008.

But will mounting evidence be enough to tip the scales in favor of regulation in the face of the Bush administration's obstructionist policies? Federal agencies like EPA and OSHA may continue to drag their feet on issues such as diacetyl exposure and greenhouse gas emissions, and the White House will likely continue to meddle with agency regulations and may find new ways to enact even more damaging systemic changes.

Will a Democratically controlled Congress be able to move with the urgency necessary to pass new laws that respond to public needs? Despite the increased attention given to resource shortfalls at agencies like CPSC and FDA, Congress has been unable to approve appropriations bills that would make funding and staffing at those agencies commensurate with regulatory responsibility. Legislative measures, like those to improve import safety or reform our nation's energy policy, are constructive but have gained little traction in a Congress seemingly without a sense of national priorities — a Congress which prefers partisan bickering to positive governing.

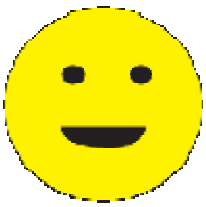
Most importantly, will the public continue to look to government to play a positive role in society? If regulatory failures do indeed continue through 2008 and beyond, will the public succeed in imploring government intervention where circumstance has not? If our leaders continue to disregard science, govern on the cheap, and make politics a higher priority than policy, the public must hold those leaders accountable and demand change.

The Good, the Bad and the Ugly for Nonprofit Speech Rights

While ethics reform and the U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life* were among federal developments in 2007 that strengthened citizen voices, threats to donor privacy and vague, inconsistent IRS enforcement of the ban on partisan activities by charities and religious organizations were among events that went from bad to just plain ugly. Here is a roundup:

The Good

The Supreme Court decision in *Wisconsin Right to Life*



The Supreme Court heard oral arguments on April 25 in *Federal Election Commission vs. Wisconsin Right to Life, Inc.*. Wisconsin Right to Life

(WRTL) challenged the constitutionality of the electioneering communications rule, part of the Bipartisan Campaign Reform Act of 2002 (BCRA), that prohibited corporations, including nonprofits, from funding broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary. The issue before the Court was whether the law was unconstitutional as applied to the facts of WRTL's 2004 grassroots lobbying radio ads, which encouraged listeners to contact their U.S. senators on the issue of judicial filibusters. Because Sen. Russell Feingold☼ (D-WI) was running for reelection at the time, WRTL had to discontinue the ads when the 60-day blackout period began, even though the ad was not about support or opposition to Feingold's election.

OMB Watch led a group of 17 charities to file an amicus brief in the case, urging the Court to protect the right of charities to broadcast grassroots educational and lobbying communications.

On June 25, the Court announced its decision, ruling 5-4 that the federal electioneering communications ban is unconstitutional when applied to genuine issue ads. The WRTL ads were found not to be the equivalent of express advocacy (which generally is considered electioneering). The decision was considered a free speech victory for nonprofit organizations and those that believe issue advocacy (taking action on public policies, but not on support or opposition to a candidate) should be permitted even in the days before an election.

Ethics and lobby disclosure reform in Congress

After almost nine months of frustration and disputes, President Bush signed the Honest Leadership and Open Government Act of 2007 into law on Sept.14. OMB Watch advocated for action to keep the 110th Congress true to their pledge of fundamental ethics and lobbying reform. The first step in the right direction came when the House overwhelmingly approved new gift and travel rules. After that, efforts to end the "culture of corruption" became much more problematic.

Building off a theme of transparency and disclosure, the Senate passed a package of ethics reform measures, the Legislative Transparency and Accountability Act (S. 1) during the first month of the 110th Congress.

Then focus turned to the House. Behind-the-scenes debate delayed introduction of a bill, but on May 24, the product was complete when the House passed the Honest Leadership and Open Government Act (H.R. 2316). The most contentious part was reconciling the differences between the House and Senate bills. As time passed, pressure mounted, but Republican senators continued to block the appointment of Senate conferees while seeking a guarantee that the conference would keep strong earmark disclosure provisions.

The solution was to pass identical bills in the House and Senate to avoid a conference. After much negotiation, Congress successfully passed the Honest Leadership and Open Government Act. While not an ideal set of reforms, the new law is the most significant

lobbying and ethics reform in a decade and should make important advances in increasing accountability and transparency in Washington.

Publication of *Seen but not Heard: Strengthening Nonprofit Advocacy*

The much anticipated book, *Seen but not Heard: Strengthening Nonprofit Advocacy*, written by Gary Bass, Kay Guinane and Matt Carter of OMB Watch, and David Arons, formerly of the Center for Lobbying in the Public Interest, was released in the fall. It offers a comprehensive analysis of advocacy by charities and provides recommendations for strengthening nonprofit policy participation. It is a vital piece of reading for any nonprofit that wants to increase their advocacy and ultimately get their issues heard. The book argues that lobbying must not be left to the well-heeled special interests. Unfortunately, many nonprofits are unaware of how much lobbying the law permits and often do not take advantage and lobby as much as they can or should.

As Gary Bass reiterated in an editorial titled "Advocacy Is Not a Dirty Word," "Americans have fought wars to defend our constitutional right to lobby. The First Amendment says it is 'the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' It is among the most cherished of democratic principles: the right to organize and advocate for policy changes."

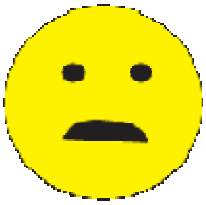
To buy a copy of the book, click here.

Nonprofit Voter Registration Efforts

Nonprofits have traditionally played a leadership role in working to register and mobilize voters, especially with low-income and minority populations. There have been some notable efforts in many states during the past few years to prevent nonpartisan, nonprofit organizations from conducting effective voter registration drives. The good news is that nonprofits are not standing idly by, but are challenging these voter registration laws. The. Department of Justice has been asked to reject a recently passed law in Florida that would discourage nonprofit voter registration drives by making it more difficult for third parties, including charities, to conduct such drives. And separately, a lawsuit was filed Sept. 18 challenging a requirement that all voter registration applications match Social Security or driver's license numbers. For more on nonprofits' electoral engagement, read the OMB Watch publication, *How Nonprofits Helped America Vote: 2006*.

The Bad

Grassroots Lobbying Disclosure Defeated



Although a significant lobbying and ethics bill became law, there was an unfortunate defeat when grassroots lobbying disclosure was not included.

During the early efforts to pass effective lobbying and ethics reform, OMB Watch diligently worked for inclusion of a federal grassroots lobbying disclosure requirement so the public could know who is behind big-dollar lobbying campaigns. Our educational efforts were met with vocal opposition from groups that felt disclosure would restrict free speech. We believed this increased transparency would help to level the political playing field and that it would not limit free speech.

An amendment sponsored by Sen. Bob Bennett☼ (R-UT) to strip grassroots lobbying disclosure from the Senate bill passed. Then, chances that grassroots lobbying disclosure would pass appeared better in the House. However, even though the House provision was slightly narrower, in the end, the same misinformation campaign continued to mislead many into believing the proposal was an effort to silence criticism of Congress.

Small nonprofits cannot compete with the expensive mass media grassroots campaigns carried out by firms hired by private industry. Despite public support, grassroots lobbying disclosure was overwhelmingly defeated in 2007.

Violating Donor Privacy

The Federal Election Commission (FEC) decided to establish a rule to implement the Supreme Court's *WRTL* decision, issuing a proposal with two alternatives and a safe harbor for grassroots lobbying ads. One alternative would have required that the sponsors of the now exempt non-electoral broadcasts file disclosure reports on their funding sources to the FEC. The other approach would have amended the definition of electioneering communications to allow issue advocacy without requiring disclosure. OMB Watch submitted comments, and after considering all public comments, the FEC issued regulations that require donor disclosure for these non-electoral messages, violating donor privacy for issue advocacy unrelated to federal elections.

Donor disclosure has also been used as a "poison pill" to kill a Senate bill addressing transparency of campaign contributions. The chances that the Senate Campaign Disclosure Parity Act (S. 223) will pass have been greatly hurt by an incessant effort by one senator to block the measure. The good government bill would require campaigns for the U.S. Senate to file their campaign finance reports electronically, a procedure already employed in the House. There have been repeated attempts to derail the bill. First, there were two anonymous holds, and the latest effort came in the form of an amendment from Sen. John Ensign☼ (R-NV). It would require donor disclosure by groups that file ethics complaints, infringing on donor privacy rights. In response to this latest obstacle, a group of very diverse nonprofits sent a letter to Ensign asking that he drop his "poison pill" amendment. Ensign refuses to remove the controversial measure from the bipartisan bill, turning an effort to make Senate campaigns more transparent into one that would violate privacy guaranteed to donors by the Supreme Court long ago in *NAACP v. Alabama*.

Barriers to Citizens E-mailing Congress

Many congressional offices maintain certain barriers that prevent constituents' e-mail from getting through to their offices. The Congressional Management Foundation (CMF), a nonpartisan nonprofit organization, held a forum on communications with Congress to find ways to make it easier for citizens to effectively express their views. E-mailing Congress is a very common way for nonprofits to get people involved in a campaign and has enhanced grassroots advocacy. Unfortunately, a solution to this problem remains elusive.

The Ugly

Vague Rules and Laws Make Advocacy Communications Risky

The vagueness in the new FEC rule on electioneering communications means the FEC will rely on past examples to help determine whether an ad is permissible. This ad hoc approach could eventually develop the same kinds of problems charities and religious organizations experience with the Internal Revenue Service's (IRS) "facts and circumstances" standard for enforcing the tax code's ban on partisan intervention in elections. This "facts and circumstances" test allows the IRS to apply its interpretation of the standard on a case-by-case basis.

Since the 2004 election, the IRS has increased enforcement of the ban on partisan electoral activity by charities and religious organizations through a program called the Political Activities Compliance Initiative (PACI). In June, the IRS released a report on the 2006 PACI program and Rev. Rul. 2007-41, with further guidance to charities and religious organizations as to what is and is not permissible under the prohibition on partisan intervention. The ruling includes 21 examples with IRS commentary on why the IRS does or does not consider the situation described to constitute a violation. While the new guidance is helpful, it does not establish badly needed safe harbors or bright-line rules.

On Aug. 3, OMB Watch sponsored a panel discussion to address the pros and cons of creating a bright-line rule defining what is and is not prohibited partisan intervention in elections by charities and religious organizations. Action the nonprofit sector can take to propose and promote a bright-line test was also discussed. OMB Watch released a report after the panel titled *Overcaution and Confusion: The Impact of Ambiguous IRS Regulation of Political Activities by Charities and the Potential for Change*.

An example of this unclear standard was highlighted in the case of a church that was investigated for two years. In September, All Saints Episcopal Church in Pasadena, CA, announced that 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, to make the rules more confusing,

the IRS concluded that the church in fact intervened in the election. This seems at odds with the IRS finding that the NAACP did not violate the ban for a very similar speech. These mixed messages from the IRS are likely to have a chilling effect on organizations and their willingness to speak up about social issues. While it is good news that All Saints did not have its tax exemption revoked, the case increases uncertainty about what is and is not allowed for charities and religious organizations.

Surveillance of Nonprofits: Attempts to Suppress Dissent Continue

Information on the government surveillance of nonprofit, peace, anti-war, and other groups for counterterrorism purposes grew once again in 2007. Even though the Pentagon announced in August that the Threat and Local Observation Notice (TALON) anti-terrorism database was being shut down, the damage was still done, and any long-term ramifications are unknown. The worst case scenario would be the creation of a civil society where organizations become fearful of getting involved in public policy. Some news from 2007 reported that before the 2004 Republican National Convention in New York City, surveillance was conducted nationwide on groups planning lawful protests or events.

USAID Proposals: Restrictions to Grant Programs

The United States Agency for International Development (USAID) and the Department of Health and Human Services (HHS) issued guidelines on July 23 for grantees that require separate "management and governance" and complete physical separation "between an affiliate which expresses views on prostitution and sex-trafficking contrary to the government's message ..." and the grantee. The guidelines are even more restrictive than similar requirements for legal services programs that are the subject of a constitutional challenge. These draconian guidelines require an extraordinary amount of separation between the organization that receives federal funds and the privately funded affiliate.

These regulations appear to be an attempt to ruin a constitutional challenge to a requirement that all grantees in an HIV/AIDS prevention program adopt formal policies against sex trafficking. Passed by Congress in 2003, the Global AIDS Act requires all organizations receiving funds under the act to pledge they oppose prostitution. The government's approach benefits from a February federal appeals court ruling in *DKT International v. USAID*, in the U.S. Circuit Court for the District of Columbia, overturning a lower court's voiding of the pledge requirement.

The Impacts of the "War on Terror" on Charities

During 2007, nonprofits had no rights when accused of association with terrorists. This problem has become so "ugly" that we devoted an entirely separate article to the issue. Click here to learn more.

Charities and National Security: Growing Awareness of Need for Reform

In 2007, the effects of the ineffective and counterproductive legal regime governing counterterrorism programs and charities demonstrated that the current system, based on a short-term emergency response to the 9/11 attacks, needs to be reassessed and reformed for the long term.

Misleading Congress and the Public about Nonprofits

Grantmakers Without Borders Challenges Treasury's Senate Testimony June 26, 2007

In May, the Director of the Treasury Department's Office of Strategic Policy for Terrorist Financing and Financial Crimes told the Senate Homeland Security and Governmental Affairs Committee that Treasury's revised Voluntary Anti-Terrorist Financing Guidelines are "based on extensive consultation between Treasury and the charitable and Muslim communities." This is despite the fact that in December 2006, more than 40 U.S. charitable sector organizations called for withdrawal. Grantmakers Without Borders (Gw/oB) sent a letter to the committee leadership correcting Treasury's portrayal of its relationship with nonprofits. The letter noted that the committee had no non-governmental witnesses, although this would have provided a more accurate, complete description of the negative impact Treasury's counterterrorism procedures have had on charitable programs. The Guidelines remain in place despite consistent calls from the nonprofit sector for their withdrawal.

Treasury Posts Risk Matrix for Charities April 17, 2007

Further evidence of the inaccuracy of Treasury's claims to have close cooperation with the nonprofit sector is seen in its failure to respond to a June 2006 letter from nonprofits that asked for a public comment period on a risk matrix that was in development. Instead, in March, the Treasury's Office of Foreign Assets Control (OFAC) published the Risk Matrix for the Charitable Sector on its website, without public announcement or comment. The matrix has been criticized by groups such as Gw/oB, which has called for the matrix to be withdrawn because it stigmatizes international grantmaking.

Charities Respond to Treasury's Overbroad Allegations of Terrorist Ties June 12, 2007

In June, nonprofits challenged a report from the Treasury Inspector General for Tax Administration (TIGTA) that claimed charities are a "significant source of alleged terrorist activities." A group of charities called upon Treasury to retract this claim as lacking evidence, saying, "Treasury needs to recognize that charities are part of the solution and not part of the problem."

House Hearing on Nonprofits Sees the Positive Aug. 7, 2007

The House Ways and Means Subcommittee on Oversight held a hearing on tax-exempt charitable organizations in July, where Rep. Bill Pascrell☼ (D-NJ) challenged the Department of Treasury's assertion that charities are a "significant source of terrorist funding," observing that Treasury seems to be "painting the sector with a wide brush."

Seized Charitable Funds Remain Frozen Indefinitely

Nonprofits Call for Release of Frozen Funds

Treasury did not respond to a November 2006 letter from a group of 20 charities seeking a meeting to discuss releasing the frozen funds of shuttered charities to alternative charitable programs until a member of Congress expressed concern. It now appears a meeting will be held in January 2008.

Definition of Support for Terrorism Expands to Association, Non-listed Charities

New Executive Order on Iraq Expands Problems for Charities July 24, 2007 and Congress Misses Oversight Opportunity on Charities and Anti-terrorism Financing Laws Oct. 10, 2007

The range of activities and associations constituting illegal support for terrorism expanded in two instances. In both cases, clear definitions are lacking, and behavior far removed from the actual illegal act, such as charitable relief provided in disaster areas where terrorist groups operate, could result in criminal sanctions. First, Executive Orders on Iraq and Lebanon extended the criteria for sanctions to a "threat to national security."

Second, in October, Congress approved an amendment to the International Emergency Economic Powers Enhancement Act (IEEPA) that includes vaguely defined conspiracy and aiding and abetting language that could lead to unpredictable results for the unwary. Once again, there were no non-governmental witnesses in the Senate hearing on the bill, and the House did not hold a hearing.

Court Upholds Islamic American Relief Agency Asset Freeze Feb. 21, 2007

In February, a federal appeals court upheld OFAC's designation and asset seizure against the Islamic American Relief Agency because of the group's past relationship with a Sudanese group that was designated as a terrorist organization in 2004. There was no finding or allegation that the U.S. group used funds to support terrorist activities, and no criminal charges have been filed.

No Conviction, Mistrial for Holy Land Foundation Oct. 23, 2007

In October, a federal jury in Texas deadlocked on all charges against the Holy Land Foundation (HLF), most of the charges against five of its leaders, and acquitted another of

31 of 32 charges. The defendants were charged with money laundering, material support of terrorism and conspiracy. The prosecution did not claim HLF provided support to Hamas or paid for violent acts. Instead, it said the charitable aid was delivered in partnership with local charities that were controlled by Hamas, even though the government has never designated them as terrorist supporters.

A conviction on this legal theory would mean no U.S. charity could protect itself from prosecution by using government watchlists for guidance about who to work with. The government has indicated that it will retry the case.

Watchlists: Inaccuracies, Unintended Consequences

IRS Urged to Use Terror Watchlists to Check Nonprofits May 30, 2007

A May report by the TIGTA said the Internal Revenue Service (IRS) should check nonprofit tax filings against the FBI's Terrorist Screening Center's (TSC) consolidated watchlists, despite the fact that a 2005 Justice Department Inspector General report confirmed many deficiencies with the TSC.

The proposal could cause unnecessary damage if and when false positive matches are found. A report by the Lawyer's Committee for Civil Rights of San Francisco Bay Area (LCCR) demonstrates how use of watchlists by private companies has caused innocent people to be flagged as terrorists, creating problems with everything from buying a car to getting a job. The IRS has accepted the recommendations, including one that it meet with key stakeholders. However, to date, the sector has not heard of any organizations that have been solicited to provide input.

Scrutiny of Anti-Terrorism Watchlists Increases Nov. 20, 2007

Both the House and the Senate have been paying increased attention to problems within the watchlist system. At a House Homeland Security Committee hearing in November, Chairman Bennie Thompson (D-MS) expressed concerns about the quality of watchlist data and the overall growth in the number of watchlist names. He said, "We can do better — and we have to do better..."

A draft report from the Council of Europe legal committee reviewed procedures similar to those in the U.S. It said the methods used for sanctioning individuals and organizations that do not include any "procedures for an independent review of decisions taken, and for compensation for infringements of rights" constitute a human rights violation.

USAID Temporarily Delays Implementation of Partner Vetting System

In July, the U.S. Agency for International Development (USAID) announced a new Partner Vetting System (PVS), that would "[ensure] that neither USAID funds nor USAID-funded activities inadvertently or otherwise provide support to entities or individuals associated

with terrorism." All nonprofits applying for grants would be required to collect and give the government highly detailed personal information about employees, executives, trustees, subcontractors and others associated with the organization. USAID would check the information against watch lists. Charities filed comments objecting to the program as unwarranted and asked that it be withdrawn.

InterAction, a coalition of U.S.-based foreign aid groups, including many that receive USAID funding, said the proposal could put international aid workers at increased risk, saying, "If they are perceived to be extension of the U.S. intelligence community, terrorist attacks against them can only increase." It also said there is no statutory basis for the PVS. Because USAID said it "cannot confirm or deny whether an individual 'passed' or 'failed' screening," OMB Watch submitted comments that said, "PVS will more than likely result in the creation of a secret USAID blacklist of ineligible grant applicants, based on PVS results."

The program was proposed without any consultation with relief and development organizations with experience in international aid. USAID temporarily delayed implementation of a new database but is moving forward with a pilot program for aid recipients working in the West Bank and the Gaza Strip.

The Right to Dissent: Chilling Impact of Counterterrorism Policies

Study Commission or Thought Police? Dec. 4, 2007

A proposal to create a commission and research center to study "violent radicalization" and "extremist belief systems" that can lead to homegrown terrorism passed the House in October and has been introduced in the Senate. The American Civil Liberties Union (ACLU) and other groups are raising concerns that its vague definitions, broad mandate and minimal oversight could lead to ethnic profiling and censorship based on personal, religious or political beliefs.

Since 9/11, the Federal Bureau of Investigation, Joint Terrorism Task Force and Department of Defense have been using anti-terrorism resources and databases to track and sometimes interfere with groups that publicly and vocally dissent from administration policies. Anti-war groups have suffered from these abuses the most, but it is not limited to them. See our companion article on nonprofit speech rights for details.

Reasons to Hope for Positive Changes

The State Department's *Guiding Principles on Non-Governmental Organizations*
December 2006

In early 2007, we learned that the State Department published a set of principles that set out ten standards for government treatment of nongovernmental organizations (NGOs). One of the standards says, "Criminal and civil legal actions brought by government against NGOs, like those brought against all individuals and organizations, should be based on

tenets of due process and equality before the law."

The principles recognize the essential role NGOs play in "ensuring accountable, democratic government" and cite the UN Universal Declaration of Human Rights and other international standards that support "the right of freedom of expression, peaceful assembly and association..." Nonprofits hope that in the future, this vision of the appropriate approach to counterterrorism and charities policy will prevail over the secrecy and lack of due process in the Treasury Department's procedures for shutting down charities.

What's Needed in 2008

In the coming year, Congress needs to provide more oversight over the current system and assess its negative consequences. The nonprofit sector itself needs to be ready with a consensus on reform proposals. Most importantly, millions of dollars in frozen funds must be used for charitable purposes.

Key questions for congressional oversight in 2008 include:

- How has Treasury treated charities under Bush's Patriot Act-era executive orders?
- Why does Treasury refuse to meet with charities about ways to release frozen funds for genuine charitable programs?
- Why is there no independent review of designation of charities?
- Why do charities get shut down, but companies like Chiquita pay fines that are small relative to their assets?

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