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The Watcher

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The 2006 Transparency Awards

For years, the Bush administration has been labeled by many as the most secretive administration to occupy the White House in decades. This penchant for secrecy has pushed the pendulum far from openness and transparency. And while the pendulum did not swing back significantly in 2006, the movement toward greater secrecy was finally challenged and slowed. The year still contained many proposals to reduce government accountability and openness. However, there were also indications that the public and certain officials had come to believe that excessive secrecy had become unmanageable and ran contrary to the stated goals of its proponents — to create a better, safer country. Such differing viewpoints often gave rise to high drama, and in recognition of that, we present the 2006 Transparency Awards.

Award for Best New Transparency Law — Federal Funding Accountability and Transparency Act

After a month of secret holds, back-room maneuvering, stall tactics and butting of heads, the Senate and House passed the [Federal Funding Accountability and Transparency Act \(S. 2590\)](#), and on Sept. 26, President Bush signed it into law. The new law will increase

government accountability and public access to federal spending data by creating a free, public, searchable website of all federal spending, including government contracts and grants. The site, to be overseen by the Office of Management and Budget, must be online by Jan. 2008. OMB Watch launched a prototype of such a website, called FedSpending.org, which uses currently collected data on contracts, grants, loans, direct payments and insurance to provide online searchable access to more than \$12 trillion in federal spending from the past six years.

Award for Biggest Secret — National Security Administration's Warrantless Spying Program

The discovery that President Bush authorized the National Security Administration (NSA) to spy, without warrants, on the international communications of U.S. citizens was perhaps the most jarring government secret that we wrestled with in 2006. The *New York Times* broke the story in Dec. 2005, but the ongoing battle that ensued between the Bush administration and Congress played out throughout this year. Many members of Congress were outraged that the White house did not inform key committees on intelligence, homeland security and judiciary matters about the program. The Bush administration vigorously fought to keep details of the program secret from such committees as they attempted to conduct oversight. Dodging questions in the Senate Judiciary Committee, Attorney General Alberto Gonzales did little to inspire confidence in the oversight process. According to a [Washington Post-ABC News poll](#) released Dec. 13, 66 percent of Americans think the federal government is spying on its citizens in the name of investigating terrorism and over half think Congress should hold hearings on this surveillance.

Award for Greatest Missed Opportunity — Lobby Reform

At the start of 2006, all of Washington was abuzz with the idea of lobby reform. On the heels of a guilty plea by lobbyist Jack Abramoff, both parties began hurriedly preparing lobby and ethics reform legislation. The Abramoff scandal brought into sharp focus, for both Congress and the public, how easily money could be used to influence government decisions. The lobby reform frenzy gave rise to numerous interesting ideas from both sides of the aisle to reign in the influence of money on the political system. Transparency and disclosure were common tools applied to the difficult issue of making lobbying and legislating more accountable. Provisions to require improved reporting of gifts and sponsored travel were common. Other offices proposed overhauling the lobbying disclosure procedures to make the tracking of lobbyists easier, or requiring the activities of conference committees to be more public and open. While a host of bills with differing combinations of such provisions were introduced in both the House and Senate, none of them were signed into law. As months passed, the spotlight faded from the lobby reform issue and so too did Congress' interest in tackling this difficult issue. According to top agenda items listed by Democratic leaders, Congress may have another chance to follow through on such reforms in 2007.

Award for Worst Reversal — Cutting Toxics Release Inventory Reporting

While officially announced toward the end of 2005, most of the fighting over these

controversial proposals occurred in 2006. The [Toxics Release Inventory \(TRI\)](#) program, operating since 1998, has long been heralded by the U.S. Environmental Protection Agency (EPA) and others as an ideal environmental program — simple, low-cost and effective. The program simply collects data on toxic pollution and makes the information public each year. The public pressure to reduce toxic releases has been so effective that in last six years, there has been an estimated decline in annual toxic waste of 2.8 billion pounds. Despite the enormous success of the TRI program, EPA has been pushing plans to significantly cut back the data by raising the threshold for detailed reporting and reducing the frequency of reporting. Opposition to these proposals has been massive. [As an OMB Watch report documented](#), more than 122,000 people wrote into EPA opposing the rollback, the agency's own Science Advisory Board voiced concerns about EPA's plans, and the Environmental Council of the States passed a resolution urging the EPA to withdraw the proposals. The House passed an amendment to bar EPA from spending money to finalize its plans. Unfortunately, since the Senate did not pass an Interior Appropriations bill, no similar amendment was possible in the Senate. Instead, New Jersey Sens. Frank Lautenberg (D-NJ) and Robert Menendez (D-NJ) placed a hold on an EPA nominee in protest of the agency's TRI proposals. As a result, EPA agreed to drop its consideration of switching annual reporting to every other year. However, EPA moved ahead with a final rule raising the threshold for detailed reporting.

Award for Most Overdue Effort — FOIA Improvement

The Freedom of Information Act (FOIA) was originally passed in 1966, amended in 1974, and bolstered with the Electronic Freedom of Information Act in 1994. In the past few years, there had been little effort to improve the nation's safety net for access to government information. However, in 2006, both the House and Senate seriously considered legislation to speed up FOIA and relieve agency backlogs, and agencies implemented an Executive Order to improve FOIA. Two FOIA bills, sponsored by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT), were well received in both the House and the Senate. The [Openness Promotes Effectiveness in our National \(OPEN\) Government Act](#) and the [Faster FOIA Act](#) contained provisions to allow the public to recoup legal costs for challenging FOIA denials in court; mediate disputes between those requestors and federal agencies; and establish a commission to study FOIA backlog problems and recommend improvements. July brought FOIA Improvement Plans from all the federal agencies, as required by [Executive Order 13392](#), issued in 2005. While the improvement plans met with considerable criticism, the executive order is still widely viewed as a significant acknowledgement of the importance of FOIA. Openness advocates hope the progress made on the bills in the Senate in 2006 indicates that similar legislation will advance in 2007.

Award for Most Obvious Bad Idea — Closure of EPA Libraries

President Bush's budget proposal, released in early February, included a whopping 80 percent cut in EPA's library budget from 2006 funding levels, dropping it from \$2.5 million to only \$500,000. The EPA libraries are a vital component of the agency, providing scientists, government personnel, and the public with access to important

environmental and health information. Opponents of the measure said that there was no logical reason to hit such a fundamental and worthwhile arm of EPA with such a drastic budget cut except to cripple the agency's libraries. In response to the cuts, [EPA has started closing regional libraries around the country](#), including the agency's Headquarters library. The agency also plans to discontinue the Online Library System, an electronic catalogue, without which regional libraries will be unable to locate individual holdings.

Award for Most Confusing — Proliferation of Sensitive But Unclassified Information Categories

Despite there being no government-wide policies or procedures on "sensitive but unclassified" (SBU) information, more than 100 different SBU designations have been created by federal agencies to restrict public access to government information. Federal agencies lack uniform rules governing who makes such decisions and how such information is then handled, making the management of SBU information confusing even to them. In a [GAO report](#) issued this year, first responders "reported that the multiplicity of designations and definitions not only causes confusion but leads to an alternating feast or famine of information." The government has finally recognized the seriousness of the problem and begun efforts to create an Information Sharing Environment to ensure easier management and facilitate faster sharing of information between agencies and different levels of government. A substantial project within this effort will be to reign in the large number of SBU designations.

Honorable Mention for Most Confusing — National Archives' Reclassification

On Feb. 21, Matthew M. Aid of the National Security Archive [disclosed](#) the scope of a multiple-agency reclassification program. The extensive reclassification program appears to be a backlash to a 1995 executive order by President Clinton that required government agencies to declassify all historical records that were 25 years or older, with national security exceptions. Dissatisfied with the results of this order, government agencies began removing declassified documents from the shelves of the National Archives and considering them for reclassification. What made the matter even more confusing was that many of the documents did not contain any sensitive information. Some of the reclassified documents dated back to World War II, others contained embarrassing details about the government, and still others were easily available to the public — such as some that were published by the State Department and for sale at Amazon.com. Over 55,000 pages of documents were reclassified, of which the National Archives estimates that one-third should not have been removed. Once the program became known, the reclassification was suspended and an audit was conducted. The National Archive now plans to implement procedures to ensure that "re-review and withdrawal actions are rare."

Award for Most Offensive Stonewalling — Congressional Review of Katrina Response

Committees in both the House and Senate held more than 15 hearings in 2006 to

investigate exactly what went wrong in the preparation for and response to Hurricane Katrina. Determining the timeline of what officials knew and when they knew it, relative to actions taken, were essential to those investigations. The Bush administration, however, refused to disclose relevant communications and prevented key officials, like Homeland Security Advisor Frances Fragos Townsend and White House Chief of Staff Andrew Card, from testifying before Congress. The lack of cooperation from the White House made it nearly impossible for Congress to exercise effective oversight of the federal government's preparedness, whether in response to natural disaster or terrorist attack. The White House claimed throughout the hearings that it was protecting the confidentiality of presidential advisors.

Award for Worst Fumble — Chemical Security

Despite ongoing bipartisan efforts to craft balanced chemical security legislation, which had made progress through appropriate committees in both the House and Senate, Congress passed a chemical security amendment to the 2007 DHS spending bill. The language is a retreat from stronger, bipartisan bills pending in both houses. The agreement exempts approximately 3,000 drinking water and waste water facilities, keeps DHS from requiring safer technologies, and fails to preserve state and local governments' authority to set stronger security standards than the federal government (such as those currently in place in New Jersey). In addition, the appropriations provisions failed to allow any substantive public accountability, meaning people living near chemical facilities won't be able to get answers to simple and reasonable questions such as: "Is my family safe?" and "What risks are there in living here?"

Award for Best Court Decision — Dismissal of Data Quality Act Case

An appeals court decision dealt a blow to what many consider frivolous challenges to sound science made under the Data Quality Act (DQA). On March 6, the U.S. Court of Appeals for the Fourth Circuit [dismissed a lawsuit](#) brought by the Salt Institute and the U.S. Chamber of Commerce under DQA. DQA has been used by industry to slow action on important health and safety regulations and pressure agencies to remove or revise information. The Fourth Circuit found that the act does not allow for judicial review and that the plaintiffs had not shown injury and thus lacked standing. The suit requested court intervention on a 2003 challenge by the plaintiffs with the National Heart, Lung, and Blood Institute (NHLBI), requesting underlying data on a sodium study the institute had conducted. The case set up a test of DQA's authority and was watched closely by both sides of the DQA debate.

Award for Worst Court Decision — Acceptance of Increased Use of State Secrets Privilege

Based on the 1953 U.S. Supreme Court ruling in [United States v. Reynolds](#), the state secrets privilege allows the executive branch to declare certain materials or topics exempt from disclosure or review. The administration has repeatedly used the state secrets privilege to compel the courts to dismiss lawsuits brought by previous detainees, such as a German man who had been held in Afghanistan for five months after being mistaken for a suspected terrorist with the same name. The Justice Department also

claimed state secrets privilege when it asked the courts to throw out three lawsuits against the NSA's warrantless wiretap program. Additionally, the state secrets privilege was used to shut down a lawsuit by national security whistleblower Sibel Edmonds, an ex-translator for the FBI, who was fired after accusing co-workers of security breaches and intentionally slow work performance. While the state secrets privilege is likely a necessary power, many advocates believe the government is abusing the authority to avoid court review and scrutiny of its more questionable and potentially embarrassing actions. Unfortunately, many of the courts are accepting the government's claims with little questioning.

2006 Fiscal Policy Year in Review: Process Failures, Budgetary Gridlock

2006 was a busy year in federal fiscal policy. As in 2005, the regular budget process broke down almost entirely, increasingly urgent issues were neglected, and much time and attention were devoted to consideration of items and priorities seen by many as insignificant and misguided.

As a result, the nation continues to see its overall debt grow at an alarming rate, to the point where interest expense payments on it are the fastest-growing area of spending. Despite this, the President and Congress remained as focused as ever on enacting still more tax cuts, almost all of which strongly favor the wealthy, provide only marginal broader economic benefits, and dig the country into an ever-deeper deficit hole.

- [Bankrupt Nation](#)
- [The Daily Opportunity Cost of Interest Expense](#)
- [Despite Short-Term Gains, CBO Forecasts Grim Long-Term Fiscal Outlook](#)

There were a few bright spots, however: Congress continued to ignore the Program Assessment Rating Tool and enacted a bill to make federal spending more accessible and transparent to the public. Two dangerous budget process proposals were defeated, and OMB Watch launched a new searchable website containing easily accessible information on federal spending. What's more, there is hope for more advances and victories for responsible and equitable fiscal policy in 2007. But before that, we review all that was in 2006 federal fiscal policy.

Budget/Appropriations

A Budget Full of Cuts and Congressional Inaction

In February, the President proposed a FY2007 federal budget of \$2.77 trillion, replete with funding reductions for important programs. The budget estimated a deficit of \$354 billion by setting a discretionary spending cap of \$873 billion and making deep cuts in student loan programs, the Community Development Block Grant, veterans' health funding, and other health care cuts. Months of congressional negotiations followed, but

only two appropriations bills passed, and the government is now operating under a long-term continuing resolution.

- [Initial Analysis of the President's 2007 Budget](#)
- [Budget Gimmicks in Bush's FY07 Proposal](#)
- [Budget Failures: Cutting to the Core](#)
- [Congress to Have Short Year; Appropriations Work Likely to Suffer](#)
- [Congress Squanders Year As Appropriations Remain Unfinished](#)
- [Lame Duck Session Holds Little Hope for Appropriations Bills](#)

Congress Increased Debt Ceiling Again With Hardly a Mention

An unexpected surge in tax revenues, reflecting better-than-expected short-term corporate profitability, held the official FY2006 budget deficit to \$248 billion. But that deficit figure doesn't tell the entire story because Social Security and Medicare trust funds, which are in temporary surplus, are being used to pay other bills. Count those liabilities, as Congress should, and the debt went up by almost \$550 billion in 2006.

Congress took action to increase the country's debt limit for the fourth time in the last five years to almost \$9 trillion. The Senate passed the increase 52-48, while the House skipped a debate (and vote) entirely by increasing the limit through a special rule that sidestepped a recorded vote.

- [Honest Debate Is Needed Around Vote to Increase Debt Limit](#)
- [House Passes Budget, Slips in Increase to Debt Ceiling](#)
- [Treating Deficit Addiction](#)
- [Treasury Reports Quarter-Trillion Dollar Deficit; President Still Obscures Fiscal Problems](#)

Budget Process

FY2006 Reconciliation Bill Finally Pushed Through Congress

In its budget resolution in 2005, Congress called for a bill that would allow for special fast-track protections for \$34 billion in cuts to mandatory programs and more than twice that amount in additional tax cuts, primarily for the wealthy. In the end, it took well over a year for Congress to pass this bill that, contrary to the original purpose of the reconciliation process, actually *increased* the deficit. Students saving for college, low-income Medicaid beneficiaries, and Americans working abroad were a few of the groups of people worse off under the law.

- [Final Budget Bill Passed; Tax Bill Sent to Conference](#)
- [Dishonest Budget Gimmick Enables Passage of Irresponsible Tax Cuts](#)
- [Who Wins With The Tax Bill? Bush Raises Taxes On Students, Expatriates](#)

PAYGO Fails By the Narrowest Margin

Congress again considered restoring true Pay-As-You-Go (PAYGO) rules that would

force any increases in mandatory spending or tax cuts to be deficit neutral through the full budget window. The Senate voted on reinstatement of true PAYGO rules during the FY2007 budget resolution debate, and it failed in a 50-50 vote. However, given the change in control of Congress next year, and statements from the Democratic leadership, prospects for PAYGO are now considerably brighter in 2007.

- [Sen. Coburn Caves on PAYGO; GOP Opposes Fiscal Responsibility](#)
- [House Dems Plan Loong Slow Roll-Out of Ethics Package](#)

Dangerous Process Changes Fail to be Enacted

Two dangerous budget process proposals underwent serious consideration throughout the year, but in the end, were defeated in Congress. President's Bush proposal to reenact the line-item veto and conservative attempts to create sunset commissions were both framed as fiscally responsible reforms by their supporters, but would have turned out to be anything but. The defeat of these proposals preserved an important level of checks and balances between the executive and legislative branches of government on budgetary issues.

- [President Restarts Push for Line-Item Veto](#)
- [Harmful Budget Process Plans Could Become Reality](#)

Continuing Resolution Locks in Funding Shortfalls

The unique configuration of the continuing resolution will hold funding for almost half of FY2007 at low levels that are likely to have dire consequences for programs. The Social Security Administration has mentioned the possibility of furloughing every employee. Without adjustments, funding will not keep pace with demand for low-income housing vouchers. School breakfast and lunch programs would face a \$1 billion shortfall, cutting off 1.2 million participants, and the Veterans Health Administration would have to absorb the \$3 billion increase to maintain hold-harmless funding levels elsewhere.

- [To Be Continued: Budget Irresolution](#)
- [Same Old Congress, Same Old Budgetary Gimmicks](#)
- [The Longest CR](#)
- [Continuing the Resolution ... into the New Year](#)

Dishonest Budgeting and Deceptive Analysis

The Bush administration's FY2007 budget promoted dishonest and manipulative budget practices that have decreased the transparency of the federal budget and distorted the debate about important long-term policies. Such practices include skewing budget analysis in order to reinforce and support political goals, omitting certain costs of proposed policies and actual war costs from budget projections, and assuming the extension of the president's tax cuts. In doing so, the White House has misled Congress and the American people about the fiscal health of our country and our capacity to meet current and future financial obligations.

- [More Dishonest War Budgeting from White House](#)
- [Budget Gimmicks in Bush's FY07 Proposal](#)

Wealth and Income Inequality

Congress Fails to Increase Minimum Wage For Ninth Straight Year

Despite numerous efforts in the Senate, Congress closed out its ninth consecutive year without passing an increase to the federal minimum wage. Many states, tired of waiting for leadership from the federal government, have instituted their own minimum wage increases, including six states that passed ballot initiatives in the midterm elections.

- [States Continue to Lead on Wages Where Feds Have Failed](#)
- [Not a Happy Anniversary](#)

Economy Improves, Fails to Benefit Most Americans

The gap between the rich and the middle class widened again this year. Key economic indicators showed that income for high earners vastly outpaced everyone else. Expanding wages showed up in unexpected bumps in federal tax receipts that were driven by high-earners, corporate profits, and a banner year on Wall Street. But average workers' wages were held stagnant as the median wage failed to keep up with productivity gains. Average pay for corporate chief executive officers is now 369 times that of average workers (up from 36 times in 1976).

- [Income Inequality Has Intensified Under Bush](#)
- [Income, Poverty Stats: Two Tales of the Economy](#)
- [Wealth/Income Trends Reported In Wall Street Journal](#)
- [NY Times Fronts Inequality Findings](#)

Federal Tax Policy

Efforts to Repeal, Slash Estate Tax Fail in the Senate

For the fourth time in five years, the House of Representatives passed a bill to permanently repeal the estate tax. The Senate, however, held fast against repeal as well as a host of "compromise" measure to slash the estate tax by over half a trillion dollars over ten years, rejecting both stand-alone repeal and the compromise.

- [Senate Rejects Estate Tax Repeal; Frist Likely to Turn to Costly 'Compromise'](#)
- [Last-Minute Attempt to Add Estate Tax to Pension Reforms Fails](#)
- [Senate Defeats Estate Tax Giveaway...Yet Again](#)

Package of "Extenders" Finally Passes Congress

The popular set of tax breaks that expired at the beginning of 2006, known as the Extenders — featuring a varied package of middle class and business tax credits — proved too politically appetizing to pass on a stand-alone basis. Senate Majority Leader Bill Frist (R-TN) pulled the Extenders off of the tax reconciliation and pension bills, then

affixed them to the poison pill of the estate tax. Eventually, the extenders package passed the full Senate during the lame-duck session and will become law before the end of the year.

- [Senate Finally Passes 'Extenders' Tax Cut Package](#)

Accountability and Transparency in Federal Spending

Federal Funding Accountability and Transparency Act (S. 2590)

In the most significant spending disclosure efforts in several years, OMB Watch worked with Sens. Tom Coburn (R-OK) and Barack Obama (D-IL) to pass the Federal Funding Accountability and Transparency Act. The Act mandates increased government accountability and public access to federal spending data, through a free, public, searchable website of all federal spending, including government contracts and grants that will be available to the public by January 1, 2008.

- [Battle Brewing on How to Track Contract and Grant Bucks](#)
- [Spending Transparency Bill Passes Senate, House Approval Imminent](#)

FedSpending.org

One of the major OMB Watch initiatives of 2006 was the launch of a new website - [FedSpending.org](#). A massive undertaking, the site combines data from the Federal Procurement Data System on federal contracts and the Federal Assistance Award Data System on federal assistance such as grants, loans, insurance, and direct subsidies like Social Security. FedSpending.org enables the public to exercise its right to know how the federal government spends our money so citizens are able to hold elected officials accountable for the national priorities Congress sets.

- [OMB Watch Launches Fedspending.org](#)
- [FedSpending.org](#)

Earmark Reform

"Earmarks" — lines of funding legislation in appropriations bills members of Congress designate for specific projects in their districts — became a dirty word in Washington in early 2006, evoking visions of a \$250 million "bridge to nowhere," questionable projects bearing the name of a congressional sponsor, Jack Abramoff, casinos, and a cash-for-favors culture. A sham to some, a harbinger of progress to others, the GOP-led House adopted an internal rule that required sponsors of earmarks to be identified by name in the given spending measure. The rule stayed on the House books until the adjournment of the 109th Congress, but was largely ignored, disappointing many reformers.

- [Earmark My Word: Boehner Promises House Action This Week](#)
- [Understanding the New Earmark Rule](#)
- [Clearer Marks On Earmarks](#)

Government Performance and Management

PART Fails to Provide Unbiased Program Assessments

The Program Assessment Rating Tool (PART) continued to fail as a tool to provide an unbiased, useful mechanism to grade programs across the federal government. Instead, the program was seen by many as a thin veneer of accountability and good government, thrown up to deflect attention and criticism from controversial, politically biased judgments. OMB Watch continued our work monitoring the impact of PART and educating Congress and the public about its implementation, and Congress continued to exercise good judgment by largely ignoring the results of the PART.

- [OMB Watch Congressional Testimony Opposing PART](#)
- [New PART Score Showcase More Contradictions of Program](#)
- [PART and the FY06 Federal Budget](#)
- [PART and the FY07 Federal Budget](#)

Problems with Management and Oversight At Federal Agencies

2006 was filled with reports of contractors that engaged in illegal dealings with government officials, questionable management and policy decisions within government agencies, and a general lack of accountability throughout the public and private sectors. The release of FedSpending.org this fall has helped to bring increased attention to the lack of oversight of government contracting and management decisions, but much more is still needed to help enact policies to improve government performance and effectiveness while promoting and protecting the common good.

- [Strange Happenings at the IRS Could Affect Enforcement](#)
- [FedSpending Spotlight: Skyrocketing Contracts, Less Competition](#)
- [Congress Continues Insufficient Oversight of Federal Contracts](#)
- [Oversight of Iraq Reconstruction Funds Still Needed](#)
- ["Anything Goes" at Interior Department. Anything.](#)
- [Efforts to Undermine Contract Oversight at GSA](#)
- [Contractors, FEMA Still Bungling Hurricane Relief](#)
- [House Saves Program for Measuring Results of Government Assistance](#)

Attempts to Roll Back, Delay Regulatory Protections Common in 2006

Throughout the past several years, attempts to roll back regulatory safeguards and delay new rulemaking have been common. 2006 proved to be no different, and several important issues garnered attention. Among these were sunset commission legislation, the nomination of Susan Dudley, and proposals to further complicate the regulatory process.

In Congress

When the do-nothing Congress did act on regulatory policy issues in 2006, it continued the trend that it followed in recent years: favoring industry-backed proposals on environmental, public health and safety rollbacks. Highlights included:

- **Sunset Commission Legislation** - Industry efforts to put safety, health and environmental regulations on the chopping block resulted in two major House bills which would have established [sunset commissions](#). Under this legislation, independent commissions of unelected officials would decide which federal programs and agencies live and die and which get changed. Commission recommendations would then get fast-track authority through Congress without opportunity for public input or modification. Opposition from many quarters - veterans, state and local groups, and OMB Watch and our partners - helped prevent Congress from acting on these bills in September when votes were scheduled.
- **Paperwork Reduction Act Reauthorization** - Efforts to begin the reauthorization of the Paperwork Reduction Act (PRA) featured [anti-regulatory approaches](#) favored by industry. The House committee with oversight focused on tools used in the regulatory process to delay or stop regulations, such as [emphasizing cost-benefit analyses](#) over other requirements, and setting automatic expiration dates on any ten-year old regulations unless they can be justified again through the regulatory process. Although reauthorization never fully got going, it is likely to be part of the congressional agenda in 2007.
- **Susan Dudley Confirmation Hearing** - The Senate held a confirmation hearing in November on Susan Dudley to be the next administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). Dudley bobbed and weaved around tough questions posed by Senators. However, her rich trail of articles and speeches demonstrated an anti-regulatory zealotry possibly unmatched in OIRA nominees. Yet evasiveness in answering questions at the hearing left a disquieting unease with Democrats and possibly some Republicans on the oversight committee. The result was that the oversight committee did not even vote on moving Dudley's nomination to the Senate floor, leaving open the prospect of a Bush recess appointment that would circumvent Congress.

In the White House

Most attacks on the regulatory process came from the Bush White House, with strong industry backing. John Graham, the previous administrator of OIRA, resigned in February, leaving [an unmatched anti-regulatory legacy](#). Bush then nominated Dudley to replace Graham.

Another White House initiative launched by OMB was a [Risk Assessment Bulletin](#), released for comment in January 2006. It proposes to change regulatory analyses within agencies, which would result in real danger to public safeguards. Risk assessments would become so burdened with activities outside the normal assessment processes that agencies would be paralyzed by analyzing information on the universe of potential risks.

The Bulletin was even criticized by agencies that have had their own rollback agendas. For example, EPA argued that the populations normally considered in these assessments would change from the usual focus on those most vulnerable to a more generalized sample. These changes would be in direct conflict with laws governing clean air, safe drinking water, and pesticides, for example, which explicitly require the agencies to consider the harm imposed on susceptible populations, including the elderly and children. Release of the final Bulletin has been delayed as a result of public comments but is supposed to be released before the end of 2006.

Around the same time that OMB was releasing the Risk Assessment Bulletin, it was also collecting comments on its [*Proposed Bulletin on Good Guidance Practices*](#). This proposal set new requirements that include lengthy high-level review by senior agency staff of any guidance document deemed "significant." Agencies would also be required to get OMB's approval for what has traditionally been an agency function. The result would be more delays in agencies' ability to protect the public. Further action on the proposed bulletin has been on hold since Graham left OIRA, but it is likely to be on the White House agenda for 2007.

Attacks on public health and safety haven't focused solely on analytic tools. For example, similar attacks on food safety regulations occurred within the Department of Agriculture (USDA) and the Food and Drug Administration (FDA). In April, Center for Science in the Public Interest, OMB Watch and Consumer Federation of America issued a [report and press release](#) pointing to the special interest lobbying aimed at these two agencies and OMB in the midst of an outbreak of mad cow disease. The lobbying halted reforms such as a nationwide animal identification system and FDA's regulations regarding animal feed ingredients. The report, [*Cow Sense: The Bush Administration's Broken Record on Mad Cow Disease*](#), identified ten closed-door meetings among OMB staff, the meat and feed industries, and the number of senior level USDA officials who were former industry insiders. The national ID system was to be fully implemented by 2009, but USDA in November [backed away](#) from a specific deadline.

The 110th Congress

The leaders of the next Congress say they intend to re-establish the oversight role missing for years under one-party control of the Presidency and Congress. Some new committee chairs are [masters of oversight](#). Others have already started to fight back against Bush appointees and have outlined agendas to address formerly forbidden issues.

The Democrats have their work cut out for them, however. It's doubtful the White House will abandon its attempts to alter the regulatory process by initiating proposals to delay, dismantle and paralyze public protections. Although the mid-term elections might slow executive actions in the regulatory area, the public interest community should also watch for actions designed to entrench this administration's philosophy of governance.

2006 Roundup: Federal Developments Impacting Nonprofit Speech Rights

Although 2006 brought nonprofit organizations a somewhat hostile legal climate for grassroots advocacy, nonprofits provided leadership on issues in public policy debates and helped get voters to the polls and protect their rights. Nonprofits exposed government surveillance of groups that dissent and resisted efforts to silence debate or use federal grants as a wedge to control speech. To level the political playing field, nonprofits supported efforts to increase transparency in Congress. Some in the sector also called for frozen funds of charities designated as supporters of terrorism to be released for charitable purposes.

Issue Advocacy

Ethics and Lobby Disclosure

While both the House and Senate passed bills to reform ethics practices in Congress and increase disclosure by lobbyists, no conference committee was formed because of disagreement over an additional item included in the House bill. This provision would subject independent political committees (527s) to the same regulations as political parties and candidate campaigns. It is expected to be dropped in 2007 so that the measure can move forward. The bills that evolved in 2006 would increase lobby disclosure. While the House included costs of grassroots communications by lobbying firms and coalition membership, the Senate jettisoned this provision. Since charities and unions must already disclose grassroots lobbying expenditures, disclosure by others would help level the political playing field by exposing sham groups that front for special interests.

- [Lobby Reform Bill Squeaks Through House](#)

Nonprofit Accountability

An October [report](#) from Senate Finance Committee Ranking Member Max Baucus (D-MT) found instances of serious abuse in interactions between five tax-exempt organizations and disgraced lobbyist Jack Abramoff and his associates. The report recommends a broad expansion of the definition of lobbying, increased disclosure requirements and enhanced penalties for violations. Senate Finance Committee Chair Charles Grassley (R-IA) also expressed concerns about nonprofit accountability. In a [letter](#) to the Association of Community Organizations for Reform Now (ACORN), Grassley stated that "misuse of tax-exempt organizations for political and lobbying activities is a widespread problem." The letter followed news reports that voter registration drives sponsored by ACORN are being investigated by federal authorities after allegations that fraudulent voter registration cards were submitted in four of its 17 state efforts. At year's end, the ACORN investigation remains open, and advocates are watching the case to ensure that its outcome does not have widespread, negative

ramifications for the nonprofit sector.

- [Report Details Abramoff Abuse of Nonprofits, Recommends New Rules](#)
- [ACORN Voter Registration Drive Investigated](#)

IRS Political Activities Compliance Initiative (PACI)

In early 2006, the Internal Revenue Service (IRS) announced that it would step up enforcement of the ban on partisan activities by charities and religious organizations — and would provide quick resolution on investigations. Though several investigations from the 2004 election remained unresolved, the IRS did take action on some issues.

The IRS dropped its investigation of the NAACP, finding that the group did not violate the ban on partisan electioneering when its chairman, Julian Bond, criticized several Bush administration policies during a speech given at its 2004 national convention. Investigators also increased their scrutiny of religious organizations, which led Sen. James Inhofe (R-OK) to introduce [S.3957](#), the Religious Freedom Act of 2006. The legislation's vague language is intended to allow religious groups to make partisan statements. The bill did not pass in the 109th Congress, but the issue is likely to re-surface in 2007.

- [IRS Investigations of Political Activity Heat Up](#)
- [IRS Drops Case Against NAACP](#)
- [First Church Electioneering Bill Introduced in Senate](#)
- [Ohio Church Complaint Raises Questions of Fairness in IRS Enforcement](#)

IRS Report and Response

In February, the IRS released its assessment of its 2004 enforcement program, which found that a significant number of charities investigated had violated the ban on partisan election activity. At the same time, the agency released guidance on permissible activities and published new enforcement procedures for expedited handling of referrals alleging violations. According to the documents, the agency's goal is to deter any ongoing violations. However, OMB Watch published a [report](#) in July that suggested that the IRS's PACI program threatens the constitutional rights of nonprofit organizations and churches to speak out on issues of the day.

- [Report Finds IRS Program Could Hamper Free Speech for Organizations](#)

Voter Guides and Vagueness

Lack of clarity about standards for permissible voter guides became an increasing problem in 2006. A November enforcement decision by the Federal Election Commission (FEC) on a Sierra Club voter guide from 2004 expanded regulation of voter guides if the FEC determines the guide's overall content implies support or opposition to

federal candidates - even if the guide does not explicitly endorse or oppose candidates. By moving away from the clear cut standard subjecting only "vote for" or "vote against" statements to federal campaign finance rules, the FEC has moved in the direction of the problematic IRS "facts and circumstances" test. The result of this and other cases could be a widespread reluctance by nonprofits to provide voters with materials that mention one's conscience or values, or to use elections to hold politicians accountable for their records.

- [FEC Expands Regulation of Voter Guides](#)
- [Catholic Group Responds to IRS Complaint By Forming New Group](#)

Get Out the Vote and Voter Protection

A growing body of state laws and regulations governing voter registration drives and the voting process created barriers to voting that discriminate against minorities, new citizens and the elderly. Nonprofits were instrumental in challenging these new voter suppression tactics, including filing several successful lawsuits. For example, federal courts struck down state rules limiting the ability of nonprofits to register voters in Florida and Ohio.

- [Roundup: Recent Nonprofit Efforts to Protect Voting Rights](#)

Campaign Finance Rules Continue to Infringe on Issue Advocacy by Charities

In December 2005, the Federal Election Commission (FEC) eliminated exemptions for 501(c)(3) organizations to Bipartisan Campaign Reform Act (BCRA) rules that restrict television, radio and cable advertisements that mention a federal candidate 30 days before a primary or 60 days before a general election, setting the stage for a series of attempts to protect genuine grassroots lobbying broadcasts. In response, the AFL-CIO, Alliance for Justice, the U.S. Chamber of Commerce, the National Education Association and OMB Watch filed a petition in February 2006 that asked the FEC to allow nonprofits, corporations and unions to fund grassroots lobbying advertisements if a strict set of conditions that prohibits references to elections were met. In August, the FEC voted down a proposed rule that would have exempted such broadcasts.

In a related issue, the U.S. Supreme Court held that the rule on "electioneering communications" can be challenged as applied on a case-by-case basis. The Court's decision opened the door for the Wisconsin Right to Life Committee (WRTL) to pursue its claim that BCRA is unconstitutional as applied to its grassroots lobbying communications.

- [Law Meant to Regulate 'Sham' Issue Ads Instead Silences Citizens Groups](#)
- [FEC Deadlocks on Grassroots Lobbying Broadcast Exemption](#)
- [Grassroots Lobbying Issue Hits the FEC and the Courts](#)

Government Grants and Advocacy Rights

In two separate cases, federal courts struck down a United States Agency for International Development (USAID) requirement that public health groups must pledge their "opposition to prostitution" in order to continue receiving federal funds for their HIV prevention work as a violation of the First Amendment. DKT International and the Alliance for Open Society International had challenged the requirements. While the court's decision applies directly only to the organizations involved in the litigation, it could have a broader impact.

Another court case provided much needed clarification on how federally funded programs should be separated from faith-based activities. These standards are the first clear guidance on what constitutes adequate separation between federally and privately funded activities, and could be adapted to separate federal programs from lobbying activities, which must be paid for with private, not federal, funds. Under the terms of a February settlement between the ACLU and the Department of Health and Human Services (HHS), HHS agreed to withhold a grant to Silver Ring Thing (SRT), a Pennsylvania-based nonprofit that runs faith-based sexual abstinence education programs for teens across the country. The settlement agreement included steps SRT must take to separate government-funded activities from religious activities before it can be eligible for any more federal funding. These steps include guidance on separate and distinct programs, cost allocation, separate presentations, use of religious materials and invitations to religious programs.

- [USAID Pledge Requirement Again Found Unconstitutional](#)
- [HHS Gives Guidance on Keeping Federal Funds Out of Religious Programs](#)

Civic Participation and the Right to Dissent

Surveillance of Organizations that Dissent

As information on the scope of government surveillance continues to accumulate, the ACLU has requested a congressional investigation into use of counterterrorism resources for surveillance of nonviolent domestic organizations by the Pentagon's Threat and Local Observation Notice (TALON) database, the FBI and Joint Terrorism Task Force. The surveillance of antiwar, religious, animal rights and environmental groups was exposed by ACLU Freedom of Information Act requests. At least two Senate committees have shown interest in examining the issue.

- [ACLU Seeks Congressional Hearings on Monitoring of Antiwar Groups](#)

Charities and Anti-Terrorist Financing Policies

Several discreet issues related to charities and anti-terrorism policies emerged in 2006. These developments may be especially important to U.S.-based nonprofits that seek to

respond to natural disasters, famine, and refugee crises in foreign countries.

- In September, the Treasury Department released the third version of its [Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities](#), after allowing public comments on the Dec. 2005 revision. Although the Treasury Department placed greater emphasis on the voluntary nature of the guidelines, the fundamental problems that led the nonprofit sector to call for withdrawal of the Guidelines remain unchanged.
- In a [letter](#) sent Nov. 6, a group of nonprofit sector leaders asked the Treasury Department to release frozen funds belonging to charities designated as supporters of terrorism "to trustworthy aid agencies that can ensure the funds are used for their intended charitable purposes." The Treasury Department has not responded.
- A November [decision](#) by a federal district court found that two portions of Executive Order 13224 (EO 13224), used to designate organizations as supporters of terrorism, are unconstitutional. The court said EO 13224 lacks standards for designating terrorist organizations, giving the President "unfettered discretion", so that designations could be "for any reason, including for.... associating with anyone listed... or for no reason." The opinion also struck down provisions allowing designation of people and groups "otherwise associated" with terrorism because EO 13224 "contains no definable criteria for designating individuals and groups."
- [Treasury Releases Third Version of Anti-Terrorist Financing Guidelines](#)
- [Court Says Parts of Executive Order Used to Shut Down Charities are Unconstitutional](#)

Access to Congress Via Email

A group of 105 organizations, spanning the ideological spectrum, sent a [letter](#) to House and Senate congressional offices asking them to disable the so-called "logic puzzle", designed to stop e-mail spam from reaching congressional e-mail inboxes. The organizations, led by Consumers Union, National Taxpayers Union, and Earthjustice, argued that constituents should not be required to show a basic knowledge of math or English to express their concerns to their elected members of Congress. According congressional offices, the purpose of the program is to cut down on the amount of mass emails the offices receive daily.

- [Nonprofits Protest Barrier to Emailing Congress](#)

2007 Presents Opportunities, Pitfalls for Advancement of Open, Responsible Government

With Democrats in control of Congress, 2007 will usher in an era of renewed

government oversight. At the same time, the slim majority in Congress means it is unlikely that 2007 will be a time for passing legislation unless it is truly bipartisan. For advocates of fairness, honesty, and accountability in government, it is likely to be a busy and exciting year. However, for those who hope for increased spending on low-income programs and social justice initiatives, it may prove disappointing.

Fiscal Policy

Many expect President Bush's budget for FY 2008 to propose slashing domestic spending and that the administration's tax cuts be made permanent. While these proposals may be "dead on arrival," Democrats are not likely to want to pass a budget that has a deficit higher than what the president proposes in his budget. Assuming the president's budget is austere, it will put even greater pressure on Democrats to constrain spending, especially since they are unlikely to propose tax increases.

Rep. David Obey (D-WI) and Sen. Robert Byrd (D-WV) will chair the House and Senate Appropriations Committees. Obey and Byrd may attempt to boost funding in fiscal year 2008 for some domestic discretionary programs including education, Community Development Block Grants, medical research and homeland security. Emergency supplemental spending requests from the administration are unlikely to end, but their fate at the hands of the committee is uncertain. There is some interest in budget reform that would put an end to serial emergency supplementals from the administration to pay for the Iraq war.

On entitlement spending, the pay-as-you-go requirements that Democrats will restart will make it very difficult to increase funding for entitlement programs since they will now have to be paid for, and the Democrats are not eager to propose tax increases. This will put immediate pressure on capped entitlements, such as the State Children Health Insurance Program, since to maintain the same number of children served this year will require additional spending for next year. Additional spending will require either more revenue or cuts in other entitlements.

Getting spending bills done will be a high priority. However, conservatives will most certainly interrupt the process as often as possible to demand more limited government. They did this when their own party was in control, but it was limited. Now there will be no limit.

Given [remarks from Obey and Byrd on Dec. 11](#), one thing is almost virtually certain—FY 2007 funding, which is the current fiscal year, will be delivered through a long-term continuing resolution that will last until the end of the fiscal year. Both committee chairmen said such a move will allow them to focus on moving their agenda forward in the FY 2008 appropriations bills, but agencies and public interest organizations are concerned that a long-term CR would shortchange many important programs through Sept. 30, 2007. Obey and Byrd have alluded to "adjustments" they would make, but that

remains unclear.

With Rep. John Spratt (D-SC) and Sen. Kent Conrad (D-ND) taking over the Budget Committee in their respective houses, there will be greater emphasis on deficit reduction. They will likely make strong efforts to stick to new pay-as-you-go budget rules that require new tax cuts and entitlement spending to be offset by new revenue or spending cuts. They may also be interested in earmark reform and exploring ways to address the \$345 million tax gap — the difference between what is owed in taxes and what the government actually collects. Finally, they may explore the idea of a discretionary spending cap.

Both Sen. Max Baucus (D-MT) and Rep. Charlie Rangel (D-NY), the chairs of the tax writing committees, are keen on investigating the tax gap as a means of closing deficits and bringing in much needed revenue for national priorities. One of their top agenda items may be the ever-growing Alternative Minimum Tax, which was originally designed to ensure super-rich Americans would pay some level of income tax. Without reform, [the AMT will impact 23.4 million Americans in 2007](#) (up from 3.5 million currently), a few of whom will make as little as \$50,000 per year.

While the change in control of the legislative branch makes it almost assured the estate tax will not be repealed in the 110th Congress, there is still a very real threat of a repeal-like proposal moving forward. Baucus has long been an opponent of the tax, and it will likely fall upon the House next year to act as a backstop against irresponsible and unfair proposals that give more tax breaks to the nation's wealthiest families.

Government Transparency and Oversight

Rep. Nancy Pelosi (D-CA), the incoming Speaker of House, [has made it clear that transparency will be a watchword](#) in the new Democratic controlled Congress, with several relevant reforms listed as part of the Democrats' [first 100 hours agenda](#). For instance, we are likely to see requirements that earmarks — line items in appropriations bills that members of Congress designate for specific projects in their districts. Another likely rule change would require that bills be available to Members and the general public well in advance of any vote.

Rep. Henry Waxman (D-CA), who will chair the House Government Reform Committee, is likely to place a high priority on oversight and accountability. Waxman has shown tenacious interest in the manipulation and censoring of agency scientists as well as the extensive overuse of pseudo-classification categories, such as Sensitive But Unclassified, to restrict public access to many types of information important to protecting public health and safety. Waxman has also been concerned about the growth in government contracting and the increase in fraud and abuse that has come with that growth. It is likely that Waxman's committee will seek bipartisan solutions to these types of problems. Finally, Waxman has expressed concerns about the regulatory playing field being tilted heavily in favor of the regulated community's interest. It is quite likely that

Waxman will be keeping an eye on the regulatory process, including OMB's Office of Information and Regulatory Affairs.

In the Senate, Sen. Joseph Lieberman (ID-CT), will be chairing the government oversight committee. Like Waxman, Lieberman is a strong proponent of government transparency. He has been a leading voice on e-government initiatives to make government more accessible to the public. Lieberman has also been very involved in chemical security issues, calling for legislation to insure our chemical plants are safe and secure and that there is some level of public accountability to make sure such efforts are working. Despite long bipartisan efforts in both the Senate and House on chemical security, the Republican leadership decided to pass a weak set of chemical security provisions tacked onto the FY 2007 Homeland Security Appropriations bill, which passed at the end of the 109th Congress. Lieberman may be interested in taking up the issue again despite the provisions passed in the 109th, in order to craft a more complete program.

Improving agency implementation of the Freedom of Information Act (FOIA) is another access issue likely to see greater attention next year. Several bills proposed by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) to improve the FOIA process received increasing bipartisan support during 2006, and President Bush's Executive Order 13392, issued Dec. 2005, solidified the government-wide commitment to improving FOIA. The order, which required agencies to develop FOIA improvement plans, has been considered by many to be a positive but insufficient improvement. It is likely that a legislative solution will be sought and the Cornyn-Leahy bills may very well be revived.

With transparency being the Democratic watchword, 2007 might be an opportunity to promote a proactive right to know agenda. While FOIA needs to be strengthened, many advocates have hoped that FOIA would be a vehicle of last resort for public access. Ideally, agencies would have an affirmative obligation to disseminate information rather than a passive one, as suggested by FOIA. It is conceivable that the new Congress may consider such ideas, starting in 2007.

Nonprofit Advocacy and Speech Rights

Nonprofit lobbying and advocacy rights may be taken up by Baucus' Senate Finance Committee, although it will not likely be a top priority. Baucus released a report regarding potential abuses by tax exempt organizations in relation to convicted lobbyist Jack Abramoff. In the report, Baucus called for examining lobbying rights of nonprofits. Additionally, the ranking member of the committee, Sen. Charles Grassley (R-IA), has raised concerns about nonprofit voter engagement, which could emerge again in 2007.

The incoming Congress has already indicated that lobby disclosure will be a top priority. The topic is part of the Democrats' [first 100 hours agenda](#), and will likely include an expansion of information collected on campaign contributions and client fees, increased frequency of reporting, electronic report filing, certification of accuracy of filings, and

criminal penalties for false information.

Both Congress and the administration hold the potential to impact nonprofit speech rights when it comes to anti-terrorism policies. The Treasury Department [seems determined to keep a tight grip on donations it has seized](#) from a number of charities that the department claims are supporters of terrorism, and no one in the Bush administration has indicated any interest in releasing those funds for legitimate humanitarian efforts. Though Congress has expressed little interest in this issue in the past, there is a possibility that 2007 might be different, especially if there is judicial action challenging Treasury's stance on frozen funds and its terrorist designations.

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