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The Watcher
February 22, 2006 Vol. 7, No. 4

Federal Budget

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Tough Negotiations Ahead for Tax Bill

House and Senate leadership have appointed conferees for long-awaited negotiations on the 2005 tax reconciliation bill. The conference, which will convene following the President's Day recess during the week of Feb. 27, will address differences between the versions of the bill passed by the House and Senate. An important issue of contention is the extension in the House version of tax cuts on capital gains and dividends, a move that would not only prove extremely costly but also disproportionately benefit the wealthiest Americans.

The House and Senate appointed an uneven number of conferees, potentially giving the House a leg up in the negotiations. This could also cause negotiations to take longer than expected and possibly further delay the enactment of the bill. Notwithstanding this unusual situation, the negotiations will be difficult because of the significant differences in the bills that outline starkly different priorities for the House and Senate.

The Senate bill provides $59.6 billion in tax cuts, including $7 billion in Katrina-related provisions, and extends the Alternative Minimum Tax (AMT) patch for one year (at an almost $30 billion cost), but does not include capital gains and dividends tax cuts. The House bill, on the other hand, provides no Katrina or AMT relief, yet extends low rates on capital gains and dividends through

2010 at a cost of $20.6 billion. While the House bill's total net cost--$56.1 billion--comes to less than the Senate bill, they both will add substantially to the deficit and erase any budget savings achieved through controversial reconciliation spending cuts enacted earlier this month.

Despite the Senate's exclusion of an extension of lower capital gains and dividends rates, a number of Senators are hoping the final version will include this measure. Last week, the Senate voted on a motion by Senate Finance Committee Chairman Charles Grassley (R-IA) instructing conferees to include both a capital gains and dividends rate extension, as well as an extension of AMT relief. The motion passed 53-47, however four Republican Senators voted against the motion: Lincoln Chafee (R-RI), Olympia Snowe (R-ME), George Voinovich (R-OH), and John Warner (R-VA). Two Democrats voted in favor of the motion: Ben Nelson (D-NE) and Bill Nelson (D-FL).

Sen. Ted Kennedy (D-MA) offered a competing motion instructing conferees *not* to include an extension of the lower capital gains and dividend rates, however his motion failed by the same margin (47 - 53). This vote demonstrates a difficult road ahead for Republicans leaders if the capital gains and dividend extension is included in the final bill because they may have to overcome a 60-vote point of order if Senate budget rules are violated.

Further complicating negotiations, Senate Majority Leader Bill Frist (R-TN) sent a letter to Grassley regarding the tax reconciliation conference report. The letter explained Frist would not send a report to the floor that did not include an extension of capital gains and dividends rates, and suggested that Senate conferees drop the AMT patch and the extension of other expiring tax cuts from the bill to make room for those cuts. This approach would not only conflict with the priorities laid out by the Senate in its last bill, but would also prove to be politically difficult for a number of moderate Senators of both parties whose constituents are much more concerned with AMT relief than the extension of capital gains and dividends rates. Finally, the capital gains and dividend cuts do not expire until 2008 so there is no need to extend them this year. With his letter to Grassley, Frist has shown his willingness to sacrifice those cuts (some of which benefit middle class families) in favor of giving more benefits to extremely wealthy Americans.

Conferees from the Senate are Grassley, Ranking Member Max Baucus (D-MT), and Senate Republican Policy Committee Chair Jon Kyl (R-AZ). The House conferees are Reps. Dave Camp (R-MI), Pete Stark (D-CA), and Jim McCrery (R-LA), Ways and Means Committee ranking member Charles Rangel (D-NY), and Ways and Means chairman Bill Thomas (R-CA).

Frist Vows Estate Tax Vote This Spring

In a Feb. 10 speech, Senate Majority Leader Bill Frist (R-TN) told a national gathering of conservatives in Washington, D.C. he would "do everything in [his] power to bury the death tax once and for all," and said he plans to bring estate tax repeal legislation to the floor in May. These remarks, which were delivered at a three-day Conservative Political Action Conference, highlight Frist's desire to gain favor with his base by pushing for estate tax repeal. While full repeal is favored by a number of conservative groups, Frist lacks the 60 votes needed in the Senate to pass such a measure. Frist's remarks also illustrate his intention to use the estate tax as an campaign issue for Republicans once again this year, forcing some Senators up for reelection in November to cast tough votes.

The Senate was scheduled to vote on the estate tax after returning from its August recess in 2005. Hurricane Katrina, however, shook up the legislative calendar and the vote was postponed indefinitely. Sen. Jon Kyl (R-AZ) was the key GOP senator on the estate tax last year and attempted

to negotiate a deal with Democrats that included a higher exemption rate and much lower tax rates. As the Center on Budget and Policy Priorities found, however, many of the suggested "reform" proposals put forth by Republican negotiators were little better than full repeal. Should Frist fail to garner the 60 votes needed for full repeal, it is likely we will see a similar attempt to pass a bad "reform" of the estate tax that is just as damaging as full repeal.

More Dishonest War Budgeting from White House

President George Bush is continuing his piecemeal approach to funding U.S. war efforts in Iraq and Afghanistan, despite rebukes by Congress including last year's stinging one by Sen. Robert Byrd (D-WV). On Feb. 17, Bush sent another supplemental request of $72.4 billion for war funding for the remainder of this fiscal year, leading critics to note that it is impossible to know how much the war efforts are really costing.

The latest request from the White House puts the total amount requested for FY 2006 at $115.3 billion, more than double the amount the president included in his most recent budget request for FY 2007, which was only $50 billion. Unlike previous years, the president actually did include funding in his 2007 budget request for the wars, but given the historical rate of spending by the Defense Department over the last three years, the request is less than half of what will likely be necessary. By continuing to omit the true expected costs of the wars, the administration's budget projections remain significantly skewed and the president continues to be dishonest with both Congress and the American people about not only the cost of the wars, but also the nation's overall fiscal outlook.

This sentiment has been shared by members of Congress of late. On Feb. 8, two days after the president's FY 2007 budget proposal was released, Budget Committee member Rosa DeLauro (D-CT) and Rep. Rahm Emanuel (D-IL) sent a letter to Budget Committee chairman Jim Nussle (R-IA) asking him to honor his public support for having a "realistic and honest [picture of the] long-term funding for the wars." Their letter refers to a statement Nussle made at the opening of a 2003 hearing on budgeting practices for the wars in Iraq and Afghanistan, which included the following entreaty:

> Can we continue to fund our war efforts on this type ad-hoc basis? I think most of us would agree that we cannot. This Committee - and this Congress - has to have a solid plan - a blueprint - to set our priorities for the year. And to do that, we must be able to gather whatever information is needed to put together a credible and responsible budget for this nation.

House Appropriations Committee Ranking Member David Obey (D-WI) was equally frustrated with the president's seemingly disjointed plan. In a statement, Obey explained that, in the nearly three years since the start of the Iraq war, Congress has yet to receive accurate information about the expected duration or cost of the war. "Hundreds of billions of dollars later," Obey went on to say, "the administration continues to hide the war's full costs with piecemeal requests so that they don't have to take responsibility for its impact on the budget and can continue down a fiscally reckless path." Since the beginning of the conflicts, Congress has approved $334.1 billion for the two wars with another $115.3 billion likely to be approved before September.

Unfortunately, Congress is no closer to a solid plan from this administration than when Nussle expressed the need for it in late 2003. As the stonewalling continues, the administration's lack of detail on the long-term costs appears to be sparked less by an unwillingness to share its plans with

Congress, and more by the reality that the administration does not have a plan at all.

Lobby Reform Continues to Overlook Budget Process

As Congress toils through the process of establishing self-regulation of lobbying and ethics issues, most proposals continue to overlook budget process reform that is critically needed to address corruption and open the process in Washington. Despite new legislation recently introduced that to some extent addresses the role of the budget process in the larger reform picture, no proposal gets all the parts right, nor does any go far enough to truly have a significant impact.

Since we last reported on congressional efforts to respond to the fallout of the Jack Abramoff scandals, a few new bills have been introduced that contain positive proposals to bring more transparency to the legislative process, particularly concerning budget earmarks. Sens. Diane Feinstein (D-CA) and Trent Lott (R-MS), Sen. Barrack Obama (D-IL), and Sen. John McCain (R-AZ) have introduced proposals to outlaw the inclusion of extraneous provisions in conference reports, open up conference committee procedures, and curtail the appropriations of funds for unauthorized programs or projects.

The resolution cosponsored by Lott and Feinstein (S. Res 365) would do three things. First, it would establish a 60-vote point of order against any provisions or language in conference reports that has not been separately approved by either chamber. Second, it would require all bills, amendments, and conference reports (both appropriations and authorizations) to include a separate list of all earmarks in the measure, the identity of the member who proposed the earmark, and an explanation of the essential government purpose of the earmark. The resolution would also require members to file requests for earmarks with the Secretary of the Senate and have those requests printed in the Congressional Record. Finally, it would require all conference reports to be available to members and the public on the Internet at least 24 hours in advance of consideration of the report.

Unfortunately, the 24-hours waiting period in the resolution is too short to allow for full analysis of long and complex conference reports, and deliberations and details of conference committees will remain largely hidden under the Lott/Feinstein resolution. Obama's bill (S. 2179) would resolve this by opening conference committee deliberations. It would establish the sense of the Senate that all conference committees be open meetings of all conferees that are publicly available or televised; that adequate notice of such meetings be given, and that members be allowed to engage in full debate of pertinent matters.

In addition, S. 2179 would require one representative of the majority and minority parties to sign a pledge that all Senate conferees had the chance to vote on all amendments and other proposition of the committee; that any motions to instruct conferees have been considered and publicly voted on in the conference; and that the minority was offered the chance to submit minority views for the joint statement of the managers. Finally, Obama's bill would require a list of all earmarks in bills to be available to members and the public (via the Internet) at least 72 hours before consideration; the bill would include a waiver for this requirement with approval of two-thirds of the Senate.

Both the Obama and Lott/Feinstein bills have merit. The extended wait period before consideration in Obama's would allow for thorough analysis of the earmarks in bills while not excessively slowing down the work of the Senate. Also making materials available on the Internet, not simply in the Congressional Record, is crucial to creating transparency for the process. The Lott/Feinstein bill would limit the ability of powerful members of the House and Senate who can insert provisions

agreed to during back-room deals without the knowledge or approval of either full chamber.

McCain's bill (S. 2265) goes further than either the Lott/Feinstein or Obama legislation, allowing senators to raise a point of order on the floor against any earmark in an appropriations bill, unless the earmark has been authorized in separate legislation. Sixty senators would then be required to support the earmark, or it would be stripped from the appropriation bill and the level of funding allotted to the bill would be reduced. McCain would also require entities receiving federal earmarked funds to disclose any lobbying expenditures they made during the previous year.

McCain's requirement to remove not only the earmark, but also to lower the generic funding in appropriations bills is truly unique among this year's budget process reform proposals, in that it would actually lower the level of spending if earmarks are removed. McCain's proposals would transfer some power from the appropriations committees to the authorizing committees by exempting authorized earmarks from a point of order, which if enacted would likely create tension between the chairs of appropriation and authorizing committees.

No one single proposal is ideal and a combination of the three would do the most good in the current political environment on Capitol Hill. OMB Watch supports Lott/Feinstein bill's requirement that all bills, amendments, and conference reports for both appropriations and authorizations include a list of earmarks, the requesting Member's identity, and an explanation of the essential government purpose of the earmark. However, we believe that the waiting period should be extended from 24 to 72 hours, as Obama proposes, and the definition of earmark should be expanded to include spending and authorizations, as well as "limited tax benefits," as proposed by Rep. David Obey (D-WI). Finally, members should be required to disclose who has requested the earmark, and, if a lobbyist, on whose behalf the request is being made, and all earmark disclosure information should be made available in a free, searchable database that includes current and past years.

What Others Are Saying About PART

OMB Watch is not alone in criticizing the White House's Program Assessment Rating Tool. See what others have had to say recently about this flawed measure.

PART Punishes Programs for Following the Law

Clay Johnson, OMB deputy director, when asked in a congressional hearing, "[I]s it possible for a program to get a poor rating simply because it does what's required by statute and not necessarily what OMB might like for that program to do?":

Yes.

--*Accountability and Results in Federal Budgeting: Hearing Before the Subcomm. on Federal Financial Management, Government Information & Int'l Security of the Senate Comm. on Homeland Security & Gov't Affairs*, 109th Cong. (2005), 2005 WL 1409975 (F.D.C.H.) (colloquy between Sen. Carper and Clay Johnson III).

PART Is Divorced from Reality

From ThinkProgress:

1) "Federal Emergency Management Agency: Disaster Recovery":	The Department of Homeland Security's Recovery program ensures that individuals and communities affected by disastes [SIC] of all sizes, including catastrophic and terrorist events, are able to return to normal function with minimal suffering and disruption of services. PERFORMING: Adequate (one star)	Reality--Reuters: With no clear recovery plan in sight five months after Hurricane Katrina, many victims are simply hanging on, waiting anxiously for signs that their neighborhoods are either reviving or turning into permanent ghost towns.
2) "Preparedness--Grants and Training Office National Exercise Program":	Prepare Federal, state, and local responders to prevent, respond to, and recover from acts of terrorism by providing the tools to plan, conduct, and evaluate exercises. PERFORMING: Effective (three stars)	Reality--GAO: Although the [National Response Plan] framework envisions a proactive national response in the event of a catastrophe, the nation does not yet have the types of detailed plans needed to better delineate capabilities that might be required and how such assistance will be provided and coordinated.
3) "Federal Emergency Management Agency: Disaster Response":	The Department of Homeland Security's Response program is designed to quickly, efficiently and effectively provide support to State, Tribal, and local governments, and Federal response teams in the event of a natural or manmade disaster, emergency or terrorist event. PERFORMING: Adequate (one star)	Reality--*Washington Post*: Four years after the Sept. 11, 2001, attacks, administration officials did not establish a clear chain of command for the domestic emergency; disregarded early warnings of a Category 5 hurricane inundating New Orleans and southeast Louisiana; and did not ensure that cities and states had adequate plans and training before the Aug. 29 storm, according to the Government Accountability Office.

PART Continues the Bush War on Science

Statement of Dr. Genevieve Matanoski, EPA Science Advisory Board, to Subcommittee on Environment, Technology, and Standards, House Committee on Science, March 11, 2004, *available on Westlaw at* 2004 WL 506081 (by subscription-only):

[A]fter evaluating PART summaries for several research programs, our conclusion is that PART may, at this time, have a limited capacity to inform budget decisions on research programs. The Board is concerned with the manner in which the weighting formula in PART seems to influence the full analysis and thus **favor programs with short-run results over those having long term results**. There is also concern that **an evaluator's subjective considerations might be able to bias those weights and the rating itself**.

Specifically, it appears that the weighting formula in the PART **favors programs with near-term benefits at the expense of programs with long-term benefits**. Since research inevitably involves more long-term benefits and fewer short-term benefits, PART ratings serve to bias the decision-making process against programs such as STAR ecosystem research, global climate change research,

likely program success. However, the weights that the PART assigns to different program characteristics do not seem to have been validated systematically against the contribution of each program characteristic to any independent objective measure of program success. If the weights in the tool are arbitrarily assigned, the PART may have characteristics that could lead to biases in evaluation that are related to the subjective judgments of its designers. We believe that the tool should be reviewed to determine its adequacy for its use in supporting budget decisions.

As the Board observed significant decreases in science and research funding, it also noted a substantial resource increase in the State and Tribal Assistance Grant account (STAG) for an initiative for retrofitting school busses. The Board does not challenge the worthiness of this program, rather it notes that it has no information on the science supporting this initiative. The Board trusts that the benefits of this program have been rigorously reviewed.

The real issue here is **how research programs (and others) are to be evaluated** and **whether a different metric is necessary for basic vs. applied research programs**. Also, of interest is whether research results should be evaluated separately from the outcomes of programs they are intended to support? Although the Board did not directly evaluate the PART itself, it is of obvious difficulty to conceive of a simple quantitative metric that could be applied across the broad areas of ecosystem quality, human health effects, endocrine effects, and technology development. The question is even more complex when you consider that some research is intended to develop limited data in the short-run to fill a specific knowledge gap and other research is intended to provide an understanding of whole systems in the long-term. Research program measurement is even more difficult because the knowledge and methods developed by EPA, especially ORD's researchers, are not usually directly applied by ORD, rather they are often used by others to support decisions on a broad suite of diverse statutory mandates. Thus, we believe that evaluations of the performance of research programs will need to consider the specific factors of each program that the research is intended to support. Further, **it is unlikely that simple formulas will be able to handle this task well**. It is more likely that realistic research program performance assessment will need to be a combination of quantitative metrics and other information and analyses which is then evaluated by groups of experts with relevant knowledge.

I note that the NAS, in its review of STAR, also had concerns with quantitative routines used in performance assessments and noted that "The Committee judges that expert review by a group of people with appropriate expertise is the best method of evaluating broad research programs, such as the STAR program."

White House Pushes for Sunsets, Reorganization Power

The White House used its annual budget submission yet again as a platform to call for policies that would distort the management of government programs.

Both the budget submission that was released Feb. 6 and the follow-up document detailing programs slated for elimination or deep cuts reiterated the White House's call for sunset and reorganization authority legislation.

Bills have been introduced in past Congresses to further these goals, but they typically failed to advance. That the White House is not only endorsing but also actively proposing sunset and reorganization proposals is a new factor, as is the sheer number of bills that have been introduced to push the concepts.

Click here for more information on the sunset commission proposals, and here for more information on the reorganization authority proposals. Click here for recent OMB Watch testimony on two bills in the House that embody the White House proposals.

Patriot Act Deal Compromises Civil Liberties

After two short-term extensions of the USA PATRIOT Act, Congress and the White House appear to have reached a deal on the controversial legislation. Unfortunately, the deal fails to make real progress toward protecting civil liberties.

The White House has been pushing for full reauthorization of the Patriot Act for several years, even calling for making permenant several law enforcement powers that were created by scheduled to sunset under the act. Sens. John Sununu (R-NH) and Russell Feingold (D-WI), led a group of Senators in demanding specific changes to the USA PATRIOT Act to better protect civil liberties. But Sununu recently struck a deal with the White House that fails to make changes to most of the identified problems.

The deal would:

- permit judicial review of Section 215 orders (which allow inspection of records or other items held by libraries and booksellers) after *one year* of its receipt.
- allow National Security Letter (NSL) recipients not to inform the FBI of their attorney's name.
- clarify that libraries are not subject to NSLs.

Feingold argues that such changes are insufficient and has committed to doing everything he can to stop it.

The following provisions are previously identified problems that Sununu's deal fails to address:

- The Library Records Provision (Sec. 215) -- This provision allows the government to obtain a secret court order for any records or items from libraries and booksellers. The agreement does not require the government to show a connection between the records being sought and a suspected terrorist, nor does the target of the investigation need be suspected of having any link to terrorism. The bi-partisan group of Senators previously argued that the government should show a connection when seeking court orders to prevent "fishing expeditions" that unduly invade privacy.
- Sneak and Peak Provision (Section 213) -- This provision allows delayed notice of searches of homes and businesses. The agreement would allow a 30-day delay in providing notice of a search. Also troubling is that such "sneak and peak" searches are not limited to persons or businesses with links to terrorism. The deal fails to reinstate the maximum of seven days before notification that existed before the USA PATRIOT Act and which the bi-partisan group argued for.
- National Security Letters (Section 505) -- This provision expands the power of the FBI to issue NSLs to obtain records from businesses about their customers. This includes credit reports, records from Internet Service Providers, and financial records. The agreement does not require court approval or a connection between the requested records and a suspected terrorist.

A vote on amendments to the USA PATRIOT Act and a final vote on the bill are expected in the

coming weeks. Failing a dramatic turnaround, the Senate is expected to pass the agreement with little modification, leaving another missed opportunity for Congress to ensure better protection of civil liberties under the USA PATRIOT Act.

Bush Budget Cuts Target EPA Libraries

President Bush's proposed budget for 2007 includes deep cuts to the Environmental Protection Agency (EPA) Library Network, which EPA staff and the public rely on for research, policy making and advocacy efforts. According to internal EPA documents, the proposed cuts would force the EPA to close its headquarters library, discontinue its Online Library System electronic catalogue, and shut the doors of many of the libraries operating in EPA's 10 regions.

The president's budget proposal, which was released earlier this month, slashes the EPA Library Network's budget by a whopping 80 percent from 2006 funding levels, dropping the library budget from $2.5 million to $500,000. These funding cuts are part of a larger package of EPA budget cuts that would slash $300 million, or 5 percent, from the agency's 2006 funding levels.

EPA's Headquarter and Regional libraries handle more than 134,000 research requests from EPA scientific and enforcement staff each year, according to a report by an EPA Workgroup that analyzes how the agency might cope with the proposed library budget cuts. These services, according to the report, "are extremely important, perhaps essential, in helping EPA staff perform the Agency's mission."

According to EPA library staff, the cuts would eliminate the irreplaceable service of the Online Library System (OLS) electronic catalogue, which is operated out of EPA's headquarters library. The OLS serves as the EPA library network's card catalogue, without which EPA's libraries would not be able to locate any of their individual holdings. EPA staff and the public would thus be left without useful access to the agency's vast storehouse of information, as well as 50,000 documents not available anywhere else.

Cuts to EPA's regional libraries could affect citizen access to Offsite Consequence Analysis (OCA) Reading Rooms. OCA Reading Rooms provide the only public access to information on what could go wrong in "worst-case" chemical accidents at thousands of facilities around the country that store large quantities of ultra-hazardous chemicals. Public access to this information has helped spur improvements in industrial process and reduce risks faced by fence-line communities.

The president's proposed budget will be eventually parsed out into several appropriation bills, which will be debated by the appropriate congressional committees. The Interior Subcommittees of the Appropriations Committees, in the House and Senate, have jurisdiction over EPA's budget items. The subcommittees will likely debate EPA's budget items sometime in May or June. It is at this point that legislators can make changes and amendments to the budget proposals. OMB Watch budget policy analyst Adam Hughes predicts that Congress will make many changes to the president's budget, calling it "overall, unrealistic." However, if the president's proposed EPA cuts make it through the budget process unchanged, EPA staff and the public will likely have much less access to EPA's library materials and the public health and safety information they contain.

One in Five Women Carries Too Much Mercury

On Feb. 8, the Environmental Quality Institute (EQI) at the University of North Carolina-Asheville released the largest ever biomonitoring study of mercury levels in the U.S. population. Based on hair samples from more than 6,600 women, researchers found that 20 percent of women of childbearing

age exceed the EPA's recommended mercury limit.

In support of the study, Sierra Club and Greenpeace sponsored mercury-testing events. Individuals were also able to order testing kits online. "We found the greatest single factor influencing mercury exposure was the frequency of fish consumption," says Dr. Steve Patch, EQI's co-director. Coal-fired power plants produce 42 percent of industrial mercury pollution in the U.S., and airborne mercury emissions from these plants often settle into lakes, streams, and oceans, contaminating fish and shellfish. Polluted fish along with the mercury they contain then winds up on dinner tables. Mercury is a persistent bioaccumulative toxin, which means it collects as it moves up the food chain and concentrates at the top, slots occupied by people and a few other "high-order" consumers.

The Centers for Disease Control and Prevention (CDC) conducted a similar study in 1999 as part of its National Health and Nutrition Examination Survey. The project tested hair mercury levels in 838 children one to five years of age, and 1,726 women between 16 and 49 years old. The study found mercury exposure similar to those of the EQI study. In addition, CDC estimated from its study that between 300,000 and 630,000 newborns each year may be exposed before birth to mercury concentrations above the EPA limit, above which the risk increases that neurological development will be adversely affected.

Biomonitoring studies, such as the CDC and EQI study, can help improve public health policy by indicating trends in chemical exposures, identifying communities that are disproportionately affected or particularly vulnerable, assessing the effectiveness of current regulations, and setting priorities for legislative and regulatory action. The biomonitoring studies point to a need for improved policies, environmental and health advocates argue, because after years of progress in pollution prevention and reduction of toxic releases, these studies' results still show dangerously high levels of toxic substances in peoples' bodies.

Unfortunately, thus far biomonitoring's usefulness as a public health tool has been constrained by the limited number and scope of studies performed. For instance, while July 2005 marked the release of CDC's Third National Report on Human Exposure to Environmental Chemicals, a nation-wide biomonitoring study released every two years, many critics continue to describe the study as too small and limited for use on a national scale. The study only examines exposure levels in 2,500 people across the country. Many scientists have called for more extensive national research and more focused biomonitoring studies, such as state-specific programs, that would help make the connection between sources of toxics, at-risk populations, and pollution-prevention measures. Sadly, efforts thus far to establish state biomonitoring programs have been blocked. Last year, the California legislature passed what would have been the country's first state-wide biomonitoring program; however, the bill (SB 600) was vetoed by Governor Arnold Schwarzenegger.

Sensitive But Unclassified Info: You Can't Have It. Why? Because They Say So.

The explosion in the use by federal agencies of Sensitive But Unclassified (SBU) designations to withhold information since the 9/11 terrorist attacks has resulted in uneven policies across agencies and unnecessary restrictions on public access to information, according to a recent American Bar Association report. Such problems have manifested themselves in Connecticut, where state officials are trying to access, and make public, safety information pertaining to a liquefied natural gas (LNG) plant, in order to determine and reduce any risk to the public posed by the plant.

The American Bar Association (ABA) report noted several problems with the implementation of

SBU. First, SBU categories have been too vaguely defined by the administration and are too unevenly implemented across government agencies. Second, government agencies often incorrectly cite SBU as being automatically exempt from requests under laws governing public disclosure, particularly the Freedom of Information Act (FOIA).

In March 2002, White House Chief of Staff Andrew Card issued a memorandum to federal agencies urging them to withhold sensitive information from public disclosure, but it failed to adequately define the procedures for categorizing information as SBU. A 2003 Congressional Research Services report on SBU states, "There is no uniformity in Federal agency definitions, or rules to implement safeguards for 'sensitive but unclassified' information." Indeed, as noted in Openthegovernment.org's 2005 Secrecy Report Card, there are currently at least 50 different versions of SBU categories being used by various federal agencies.

The ABA found that this lack of uniformity "contributes to confusion regarding whether information should be withheld under FOIA," and that many government agencies have taken the position that SBU information is automatically exempt from FOIA, leading to "excessive withholding of information that should be disclosed under FOIA." Though not incorrectly advising agencies that SBU information is automatically exempt from FOIA, the Bush administration has urged agencies to attempt to use FOIA exemptions for SBU information. The ABA recommends that the administration clarify this position to prevent agencies from continuing to mistakenly restrict access to important information.

This assumption of nondisclosure for SBU currently being played out in Connecticut. Soon after the Card memo, the Federal Energy Regulatory Commission (FERC) categorized a great deal of information as Critical Energy Infrastructure Information (CEII), a category of SBU information. FERC removed all information categorized as CEII from the agency's website, and the agency has flatly stated that all CEII is exempt from FOIA. A separate procedure for the commission to consider limited release of CEII information on a "need to know" basis was established. However, the new procedure does not allow information to become public, requiring agreements of non-disclosure from users before allowing access.

The FERC policy sparked controversy when Connecticut's State Attorney General recently attempted to access information regarding a proposed LNG plant. The State of Connecticut wishes to review the design and safety plans of the Broadwater LNG plant in order to determine whether it should be built and whether it would endanger the health and safety of the residents of Connecticut. FERC has denied the state's request claiming that such information is not publicly releasable because it is sensitive but unclassified.

Connecticut Attorney General Richard Blumenthal states that his office "will aggressively fight this at every forum possible - piercing Broadwater's shroud of secrecy that so clearly demonstrates the danger of this project. The FERC secrecy order belies its contention that there are no terrorist or security concerns - and we will explore ways to force greater disclosure."

FERC contends that it has, unlike other agencies, provided additional mechanisms to access such information. The agency, however, appears to be overlooking the fact that no automatic exemption from FOIA exists for CEII. Open government advocates contend that information on the potential health and safety risks from a new facility should obviously be provided to surrounding communities and that, in this case in particular, the government has no right to withhold it.

Dep't of Homeland Security Plans Broad Info Grab

According to reports, the Department of Homeland Security (DHS) is developing a program to collect and search a wide array of personal, public and classified information, similar to a program killed by Congress in 2002. The Analysis, Dissemination, Visualization, Insight, and Semantic Enhancement (ADVISE) program would implement a massive data mining program to prevent terrorist attacks; the program, however, continues to lack the necessary oversight structure and procedures to protect privacy and safeguard civil liberties.

The *Christian Science Monitor* recently reported that DHS is actively developing the ADVISE program, despite Congress having little knowledge of it. DHS is allocating $50 million in funding this year to develop the data mining tool that will store massive amounts of information, including buying habits, travel records, criminal records, intelligence reports, and information gleaned from public news sources such as blogs and traditional sources like CNN. According to a DHS report, the technology will draw connections between persons, determining who is related to whom, who works with whom, who lives close to whom, and who is associated with what organization/s. It will also flag suspicious behavior patterns and form the foundational structure for other more specifically targeted programs, like the Biodefense Knowledge Center, whose goal it is to "integrate disparate components in order to anticipate, prepare for, prevent, detect, respond to, and attribute biological threats."

This is not the first time the federal government has sought to establish a comprehensive data mining program. The Total Information Awareness (TIA) program, developed by the Defense Advanced Research Projects Agency (DARPA) in 2002, bares a close resemblance to DHS's ADVISE program. The program was quickly shut down by Congress amid wide-spread privacy concerns, despite DARPA's attempt to assuage such concerns by renaming the program *Terrorism* Information Awareness. TIA would have been able to store and retrieve personal information, including data pertaining to people's health records, travel plans, buying habits, educational records, with few restrictions to protect privacy and ensure citizen's Fourth Amendment rights related to searches and seizures. The plan was viewed by many as a Big Brother-like attempt to store *all* existing data and monitor the public for suspicious behavior.

The U.S. intelligence agencies have developed over the last 50 years in the context of the Cold War, when the United States faced a finite number of threats from an identifiable number of sources and locations. The terrorist attacks of Sept. 11 forced a dramatic shift in intelligence collection methodology and priorities. No longer does the country face a finite number of threats, and no longer are the locations and sources of threats clearly identifiable. Hence, greater emphasis is now placed on increasing the amount of potentially pertinent information collected and on drawing connections between disparate, seemingly innocuous bits of data.

As the Government Accountability Office reported in 2004, there is a plethora of intelligence-collection programs, both wide in scope and outside the bounds of traditional intelligence programs. Most recently, we learned of the National Security Agency's (NSA) warrantless domestic spying program authorized by President Bush that monitors international telephone and Internet communications of American citizens with individuals in certain Middle Eastern countries, operating without judicial oversight.

DHS acknowledges that the program needs to contain safeguards for personal privacy and civil liberties and plans to institute protective procedures like creating "multiple levels of trust," which only allow certain people who have access to ADVISE to access personal information and "reversible anonymization," which "allows human beings to look at information about a person and

only learn the identity of the person if the information fits a profile of suspicious behavior."

Privacy advocates, however, find the privacy safeguards discussed by DHS to be insufficient. The most important safeguard to protecting privacy and civil liberties, they argue, is oversight, something sorely lacking from the program in which the Defense Department would have had complete, unchecked authority to access and monitor Americans' private information. In its 2004 report, GAO recommended an oversight board as the best way to ensure the protection of privacy. Moreover, Congress should be updated on DHS's activities and efforts to protect against terrorist attacks while maintaining civil liberties. As the *Christian Science Monitor* reported, many members of Congress with direct oversight of DHS were not even aware of the program's existence, let alone the civil liberties and privacy issues it raises.

A separate criticism concerns the program's effectiveness. Many believe it would be a waste of taxpayer dollars to develop such enormously expensive technologies that offer little in return. Past examples of such inefficiency include an NSA program called Trailblazer that cost $1 billion dollars to develop but was a complete failure. Trailblazer was intended to be a revolutionary data mining program that would have easily searched and highlighted suspicious patterns among the enormous collection of NSA intelligence, but, as reported by MSNBC, it is, according to Robert D. Steele of the CIA, a "complete and abject failure." An additional problem with data mining technology is the risk of false-positive results associated with so much data collection. Such false leads could drain agency resources with unnecessary follow up and violate the privacy rights of falsely identified individuals. DHS reports that some of technologies used in the ADVISE program have just a 60 to 80 percent accuracy rate. Many data sources, particularly Internet sources, contain inaccurate information, adding to concerns over the technology's potential effectiveness.

Finally, privacy advocates pointed out that the potential for abuse is an ever-present concern with all data mining programs. Fearing a reemergence of the monitoring of innocent Americans that occurred in the1950s and 60s, civil liberties advocates are calling on Congress to put in place strict procedures for the use of information such as that to be collected under the ADVISE program, along with clear procedures for judicial and congressional oversight.

Report: U.S. Anti-Terrorism Policies Hurt Muslim Charities

A new report from OMB Watch details the organization's concerns about the impact of the war on terror on Muslim charities, and updates readers on the status of U.S.-based Muslim charities that have been shut down by the Treasury Department. Muslim Charities and the War on Terror: Top Ten Concerns and Status Update notes that, "Since the 9/11 terrorist attacks, U.S.-based charities have become targets in the government's war on terror financing...the lion's share of the burden of increased scrutiny, suspicion, and pre-emptive action has fallen on Muslim groups. This imbalanced campaign raises significant legal and ethical questions."

To follow are OMB Watch's top 10 concerns with U.S. anti-terrorism policies and their affect on Muslim charities:

1. Drastic sanctions in anti-terrorist financing laws are being used to shut down entire organizations, resulting in loss of badly needed humanitarian assistance around the world and creating a climate of fear in the nonprofit sector.
2. Despite sweeping post-9/11 investigative powers, authorities have failed to produce significant evidence of terror financing by U.S.-based charities.
3. Questionable evidence has been used to shut down the largest U.S.-based Muslim charities.

4. Anti-terrorist financing policies deny charities fundamental due process.
5. There are no safe harbor procedures to protect charities acting in good faith or to eliminate the risk of giving to Muslim charities or charitable programs working with Muslim populations.
6. Government action has created the perception of ethnic profiling and negatively impacted Muslim giving.
7. Organizations and individuals suspected of supporting terrorism are guilty until proven innocent.
8. Charitable funds have been withheld from people in need of assistance and diverted to help pay judgments in unrelated lawsuits, violating the intentions of innocent Muslim donors.
9. There is unequal enforcement of anti-terrorist financing laws.
10. Treatment of Muslim charities hurts, not helps, the war on terrorism.

Lobby Reform: Momentum in Senate; House, Nonprofits Weigh Impact

After making a lot of noise about reform, lawmakers finally move to wade through the mountain of lobby and ethics reform bills and begin marking up legislation.

In the Senate, two committees are scheduled to mark up lobby reform bills the week of Feb. 27. Senate Rules and Administration Chairman Trent Lott (R-MS) has said his panel would likely mark up a lobbying reform bill on Feb. 28. Lott said the goal is to have the full Senate begin debate on the bill, which is still being written, the week of March 6.

Lott's markup will be followed on March 2 by a markup in the Senate Homeland Security and Governmental Affairs Committee. The Committee is currently crafting a bill based on an earlier bill sponsored by Sen. John McCain (R-AZ). The McCain bill (S. 2128) increases lobbyist reporting and disclosure requirements under the Lobbying Disclosure Act (LDA). For more information on the McCain bill, see Abramoff Plea Brings New Lobby Reform Bills (*OMB Watcher*, Jan. 10, 2005).

The Senate Finance Committee is also putting a finger in the pie. The Senate Indian Affairs Subcommittee agreed on Feb. 10 to send nearly 100 pages of documents regarding lobbyist Jack Abramoff's use of nonprofit groups to the Finance Committee. A joint statement issued by Committee Chair Charles Grassley (R-IA) and Ranking Member Max Baucus (D-MT) said the documents are part of an ongoing probe into whether "tax-exempt groups are misused for financial and political gain."

In the House, Speaker Dennis Hastert (R-IL) has asked for new restrictions that would increase lobbyist's reporting and disclosure requirements, impose tighter limits on gifts, and ban privately sponsored travel. He would like votes on the House floor by the end of March. This has led to conflict with newly elected Majority Leader John Boehner (R-OH), who has backed more disclosure for lobbyists, but has publicly opposed restrictive gift and travel proposals, calling any ban on private travel "childish." Boehner's statements are largely seen as representative of the views of rank-and-file members who do not want to give up their travel and gifts. Because of differences among House Republicans, the chamber may not bring up lobbying reform by Hastert's deadline, instead possibly opting to follow the Senate's lead on legislation.

Lawmakers on both sides of the aisle are facing conflicting pressures, particularly from outside

groups. Reform advocates are pushing changes beyond current proposals, such as bans on lobbyist-hosted fundraisers and a severe cap on lobbyist campaign donations. Conversely, many groups are quietly (and some not so quietly) fighting grassroots lobbying disclosure and bans on travel. Some nonprofits are concerned that a requirement to disclose their grassroots lobbying amounts would be burdensome. Charities currently disclose grassroots lobbying - state and federal - on IRS Form 990, and legislation that mimics the IRS definitions as closely as possible should ease the burden of additional reporting.

Some in the nonprofit sector are also seeking language that would allow nonprofit groups to continue paying for educational travel. A number of groups sent a letter this week to Hastert, authored by the Institute on Religion and Public Policy, opposing the travel ban. "If NGOs are barred from funding educational travel by members and staff, such travel will only be feasible with taxpayer funds or at personal expense," said the letter. "If members must travel only at their own expense, the toll of the traveling cost will inevitably lead to minimal travel."

Nonprofits are also watching closely a provision in Rep. Mike Fitzpatrick's (R-PA) H.R. 4667, the Lobbying Transparency and Accountability Act. While largely similar to legislation introduced by McCain, the bill contains a provision that could have serious repercussions for nonprofits. The provision, similar to legislation introduced in 1995 by Rep. Earnest Istook (R-OK) and former Reps. David McIntosh (R-IN) and Robert Ehrlich (R-MD), limits the amount of privately raised funds that can be used by federal grantees for advocacy purposes; creates expansive definition of advocacy; and constructs new, burdensome regulatory and paperwork requirements for charities. Experts are currently examining the language, although it is unlikely that the Fitzpatrick bill will move through committee.

OMB Watch Files Petition for Electioneering Communication Rulemaking

On Feb. 16, OMB Watch joined numerous other groups, including the AFL-CIO, Alliance for Justice, and U.S. Chamber of Commerce, in filing a Petition for Rulemaking with the Federal Election Commission (FEC), asking the FEC to exempt legitimate grassroots communications from "electioneering communication" prohibitions.

The petition is in response to the Supreme Court's ruling in *Wisconsin Right to Life, Inc. v. FEC*. The Court upheld the right of advocacy groups to seek protection for legitimate issue advertising and noted that the FEC had the statutory authority to craft a rule to protect certain ads. In the Court's decision, they upheld the right of advocacy groups to seek protection for legitimate issue advertising.

Jan Baran, attorney for the U.S. Chamber of Commerce noted, "Everybody who read the action of the Supreme Court was struck by their reference to the [Federal Election] Commission's power to make exceptions under the law. We saw that as a signal to the FEC and the regulated community to see whether or not an exception can be made through rulemaking instead of repeated litigation."

Currently, the electioneering communications provision, under the Bipartisan Campaign Reform Act of 2002 (BCRA), bars any ad that mentions a federal candidate broadcast within 30 days of a primary election or within 60 days of a general election. The FEC had initially exempted organizations under Section 501(c)(3) of the tax code from the "electioneering communications rule" due to their nonpartisan nature. (Ads sponsored by such groups cannot support or oppose a candidate for elected office. Thus, such ads would have to be issue ads, supporting or opposing

policy options.)

The FEC withdrew the exemption in December 2005 after a federal court found its justification for the exemption inadequate. The FEC rule bars general references to federal candidates, so that a grassroots broadcast message during the banned period asking people to "call your Senator" to support or oppose legislation violates the rule, according to the court.

Under federal campaign finance laws, if the petition succeeds, the FEC will issue a Notice of Availability, inviting comment on the merits of this proposed rulemaking. The coalition asked the FEC to issue a rulemaking on an expedited basis in light of the November elections.