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Halving the Deficit Will Involve Major Changes—or 'Fuzzy Math'

Anybody who listened to President Bush speak during his campaign heard a few specific messages reiterated again and again, loud and clear. One addressed the federal budget deficit, which at 3.6 percent of GDP (gross domestic product) in 2004 was the highest it has been in over a decade. Bush has vowed to halve the deficit by 2009. He repeated this promise in a December press conference, stating he will cut the deficit in half while continuing to pursue both making the 2001 and 2003 tax cuts permanent and providing "every tool and resource for our military."

There are many factors working against the president in his quest to fulfill this promise. In 2003, total tax receipts for the federal government were 16.5 percent of GDP – their lowest level since 1959. The U.S. dollar continues to decline in value and the United States has become more reliant on foreign borrowing to finance the government. In addition, Bush has promised to fully fund a costly war in Iraq and extended military operations around the world in the war on terrorism and continues to push for privatizing Social Security, a proposal that many analysts estimate could cost up to $ 2 trillion in transition costs.

With all these factors, many are wondering how the president plans to do it. One way will be to propose a lean federal budget for FY 2006; a budget leaving many programs that Americans depend on dramatically underfunded. Bush has discussed his FY 2006 budget as being both a "tough budget" and a "budget that fits our times," but this really means one thing: less money set aside for non-defense discretionary spending.

These cuts will do little to alleviate the budget deficit. It is convenient for this administration to have such a large budget deficit so it can further its political priorities of shrinking the size and role of the federal government in the name of fiscal discipline. But the cuts the president will make in non-defense discretionary programs in his FY 2006 budget will do little to ease the budget deficit compared to rolling back some or all of the 2001 and 2003 tax cuts.

The administration will certainly continue to use a "reducing the deficit" rationale to justify imposing entitlement caps in the FY 2006 budget. Entitlement programs, such as Medicare and Medicaid, are funded by formulas set in law and not subject to the annual appropriations process. But by including entitlement caps in the budget, the Bush administration will further erode an important aspect of the social safety net just so they can avoid rolling back tax cuts for the super wealthy.

It has recently emerged the administration has another way of battling the budget deficit besides excessively cutting funding for programs and agencies. News sources, including the *New York Times*, reported the administration plans to both use the numbers to their advantage and omit the costs of certain major initiatives and policies.

The *Times* reported on Jan. 2 that administration officials have "decided to measure their progress against a $ 521 billion deficit they predicted last February rather than last year's actual shortfall of $ 413 billion." This means that they are going to use an inflated baseline in pursuing their goal of cutting the deficit in half. Last February, administration officials predicted a federal deficit of $ 521 billion. After the fiscal year ended Sept. 30, the Treasury Department reported that the 2004 budget deficit stood at $ 413 billion – $ 108 billion less than their earlier predicted deficit.

Many economists and analysts argued the February 2004 deficit forecasts had been deliberately overstated to make the real deficit numbers pale in comparison to original predictions, and thus look like the administration was doing well. An October 2004 report by the Center on Budget and Policy Priorities called the situation "misleading at best. The administration's claim [that their policies were helping reduce the deficit] comes about only because the deficit *did not increase as much* in 2004 as the administration earlier predicted it would. This is like a football coach predicting his team will go from a record of 6 wins and 10 losses to a 4-12 record the next year, and then celebrating when the team 'improves' to 5-11." Ranking Senate Budget Committee member Kent Conrad (D-ND) said of the situation, "I believe they were cooking the books." Not only did the overstated deficit prediction allow the administration to claim a "victory" in 2004, but now it is also providing them with a false baseline number to use in their goal of cutting the deficit in half in the next five years.

The administration also hopes to work on lowering the deficit by omitting certain costs, which in fact are very real. Primary among those are the costs of the war in Iraq and Afghanistan, which because they are funded through supplemental requests the administration refuses to count in the deficit numbers. In addition, the administration also is significantly understating the cost of future military and defense plans, according to the Congressional Budget Office (CBO). CBO recently reported that their "Future-Year Defense Plan" will cost substantially more than the amounts cited by the administration in budget projections.

But the largest and most egregious of them all is the president's plans for privatizing Social Security, which many analysts believe could cost the federal government up to $ 2 trillion. As reported in the last edition of the *OMB Watcher*, Office of Management and Budget Director Joshua Bolten appears unconcerned about borrowing such sums and hopes Congress and others will not see the borrowing as debt.

As Bush continues to peddle his rhetoric about cutting the deficit in half by 2009, keep this in mind: the point of cutting the deficit is to help stabilize and grow the U.S. economy and improve the ability of the government to provide for the needs of all Americans. The methods President Bush may employ to meet his obligations while furthering his political goals will more likely have the opposite effect and leave us all in a much worse place.

Social Security Reform Comes Front and Center

The debate on Social Security continues to rage, with scores of new articles, reports, and speeches generated every week. Analysts, economists, politicians and a wide range of others on all points of the spectrum have been holding briefings, discussions, and forums addressing how and when to reform the Social Security investment program.

There is bipartisan consensus that at some point in the future, Social Security will need to be reformed. By 2018, when a majority of the baby boomers will be retired and collecting benefits, the amount of money being paid into Social Security will no longer exceed the amount being paid out in benefits. If no policy changes are made by 2052, says the Congressional Budget Office, the Social Security program will only be able to pay about 80 percent of benefits. It should be said the year in which Social Security will not be able to meet all of its obligations continues to move to later years.

The Bush administration would like people to believe the Social Security crisis is already here, as baby boomers will begin retiring in droves within the decade. However, what the president won't tell you is lawmakers already took steps to address this two decades ago. In the early 1980s, with President Reagan in the White House and Democrats in control of Congress, legislators passed laws both raising the age of Social Security eligibility and started taxing benefits in order to increase revenue for the program. Through the prescience of Alan Greenspan, they anticipated the "baby boomer crisis" and planned ahead. These changes resulted in huge planned surpluses in the Social Security program, which will continue to accumulate until 2018.

So why is there all this talk of crisis right now? Some analysts, including *New York Times* columnist Paul Krugman suggest this "scaremongering" is in large part "an effort to distract the public from the real fiscal danger." In other words, the administration is fabricating a crisis to divert attention from other issues that are potentially much more threatening, such as the cost of Bush's tax cuts if they are made permanent. As the Center on Budget and Policy Priorities pointed out in recent reports, the cost of the Social Security shortfall over the next 75 years does not come close to the cost of either making the 2001 and 2003 tax cuts permanent or of the newly passed Medicare drug benefit. (See the chart below). Both these policies of President Bush would strain the budget to the breaking point long before Social Security would. As E.J. Dionne pointed out in a Jan. 7 editorial in the *Washington Post*, many opponents believe, "Bush is proposing a solution that won't work on an issue that should not be dominating the debate in the first place."

Further, it is striking that the Bush tax cuts were made possible in the first place due to the planned build up of Social Security reserves. The federal government is currently borrowing those funds to finance the deficit. In 2018, when the

payout of benefits will exceed the revenues in the Social Security program, the government will need to begin paying back what it borrowed from Social Security. Thus, by 2018, the only real crisis will be an artificial one created by the Bush tax cuts and the additional borrowing necessitated by them. Despite overwhelming evidence that immediate and drastic Social Security reform probably does not deserve such a high place on Bush's to-do list, the administration and some Republican senators continue to push it as an issue. Last week, an e-mail message surfaced from the White House inner circle, in which the author – senior administration official Peter Wehner – claimed if they succeed in "reforming" Social Security, it will rank as "one of the most significant conservative governing achievements ever." Wehner went on to state:

> Our strategy will probably include speeches early this month to establish an important premise: the current system is heading for an iceberg. The notion that younger workers will receive benefits anywhere close to the level they have been promised is fiction, unless significant reforms are undertaken. We need to establish in the public mind a key fiscal fact: right now we are on an unsustainable course. That reality needs to be seared into the public consciousness; it is the precondition to authentic reform.

Read the entire message in our Budget Blog.

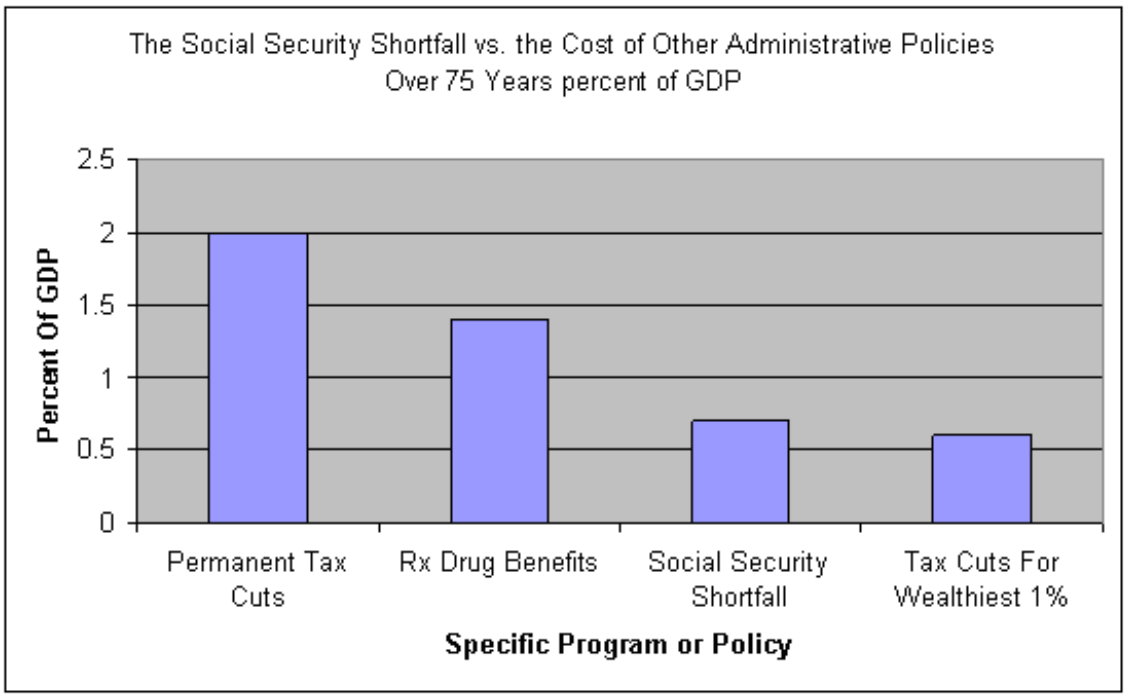
The goals of insiders seem to be twofold: to convince people there is a crisis and the administration's proposals for reform are the only way out; and to push for reforms that will allow the size of benefits paid to drop drastically. There has been recent discussion that the administration and other various groups are interested in linking Social Security benefits to annual price increases rather than wages. The problem is wages generally rise much faster than prices, so if benefits were linked to prices, millions of people would be depending on payments calculated at a significantly lower cost of living than the rest of the economy. Millions of people would see their benefits decline sharply, and in an ironic twist, the very people Bush is courting the most with his proposal for private accounts – younger workers – would be the most adversely affected due to the fact they will have many more years to have their wages outpace prices.

Under this scenario, the Social Security program would no longer be succeeding in pulling people out of poverty – particularly the elderly and the disabled. According to the National Committee to Preserve Social Security and Medicare, for one-fifth of all Social Security recipients, their benefits are their only source of income. One-half of all seniors on Social Security would be living in poverty if they did not receive their monthly Social Security payments. In 2000, Social Security lifted almost 12 million elderly people out of poverty and has consistently been the single most effective poverty prevention program in the history of the United States.

Changing the way benefits are calculated will also negatively affect children, as Annie E. Casey's Michael Laracy pointed out recently in the New York Times. Laracy writes, "If the government changes the way it calculates Social Security benefits, then millions of children would suffer when a parent dies without leaving them generous savings or life insurance."

The fact reforms are necessary to ensure the sustainability of the Social Security program down the road is not a myth. There are many proposals to make small and modest changes to the program that would more than ensure its stability for years. What is a myth is exactly what the Bush administration wants you to believe – that the program is in a crisis right now – and the consequences for such a belief could be drastic.

For frequent updates on the debate over the future of Social Security, check OMB Watch's federal budget blog.



* Note: Data for the cost of the 2001/2003 tax cuts, if made permanent, comes from the Center on Budget and Policy Priorities, "The Implications of the Social Security Projections Issued by the Congressional Budget Office," June 14, 2004, page 2. The estimate of the cost of the tax cuts — 2.0 percent of GDP — is based on estimates by CBO and the Joint Committee on Taxation. Data for the cost of the Rx drug benefit comes from the 2004 Annual Report of the Boards of Trustees of the Federal Hospital Insurance And Federal Supplementary Medical Insurance Trust Funds, page 108. Data for the Social Security trust fund shortfall comes from the Trustees' report, 2004 Annual Report of the Old-Age and Survivors Insurance and Disability Insurance Trust Funds, page 59.

Seen and Heard: 109th Congress Opens with Host of Tough Issues

The 109th Congress of the United States opened last week, with much of the fanfare surrounding GOP pre-session planning (particularly ethics committee rule changes) and the decision of a few Democrats (including Senator Boxer from California) to hopelessly challenge the presidential election results from Ohio during the electoral college count on Thursday. In just the first week, there is already an ambitious agenda for both chambers, and this Congress faces many unfinished priorities and issues from 2004, such as energy and highway legislation, an asbestos trust fund proposal, and tort reform. With the perennially ineffective budget process and Social Security reform looming, this Congress already has a very full plate.

GOP Budgetary Rules Changes Fail

In addition to the lengthy debates concerning the House Ethics committee, GOP pre-session planning meetings saw conservative members of the House submit a number of amendments to the House rules that would have large implications in how the chamber's budget process functions. Despite much vocal dissatisfaction from conservatives, all but one of the budget-related rules changes proposed were defeated by wide margins. The one adopted amendment would have little effect on the budgetary process – it will allow House floor references to the Senate.

Some of the defeated amendments would have allowed points of order requiring a three-fifths vote to increase entitlement spending without offsets; created points of order against rules for floor debate that waive certain budget points of order; required roll call votes on bills costing more than $ 50 million; established accounts to redirect spending to debt reduction or tax relief; required a "rainy day fund" for emergency spending; repealed the "Gephardt Rule" that allows automatic passage of a debt ceiling; and removed a proposed rule to allow Wednesday votes on suspension bills.

New Appropriations Chairs and Immediate Supplemental Spending Bills

Also last week, both the House and Senate GOP elected new chairs to the powerful appropriations committees. In the Senate, Thad Cochran (R-MS) is taking over as Chair of the Senate Appropriations Committee from Ted Stevens (R-AK). Cochran was the next in line in seniority after Stevens stepped down because of Republican term limits.

There was much more uncertainty and drama in the contest for chairmanship of the House Appropriations Committee. Three representatives – Jerry Lewis (CA), Ralph Regula (OH), and Harold Rodgers (KY) – all vied for the spot. The 28-member Republican Steering Committee interviewed and required each to showcase their fundraising ability, voting records, and dedication to spending restraint. California members on the Steering Committee supported Lewis and won over critics who believed he had been too close to Democrats in the past. Lewis has said one of his top priorities will be to get the annual spending bills passed "on time and under budget."

An immediate priority for these new chairmen will be to provide emergency supplemental funding to tsunami victims. The tsunami supplemental would be at least $ 350 million, although that number could change now that Secretary of State Colin Powell and Senate Majority Leader Bill Frist have returned from a tour of the damaged countries. The Bush administration will also submit an emergency supplemental for funding military operations in Iraq and Afghanistan. Most estimates put the military supplemental between $ 80 and $ 100 billion, but the timing is much less certain. Some congressional aides have said the military supplemental may not be submitted until mid-March in order to focus on the tsunami package first. Some House members want to combine the tsunami and military supplemental, but there is resistance from the Senate, particularly Majority Leader Frist, who has said we want to complete a clean tsunami package as soon as possible.

The Elephant in the Room: Social Security Reform

There has been a flurry of reports, articles, analysis, rumors and speculation about the president's number one priority in 2005: Social Security reform. But it is unclear when or even whether Congress will have the time or the will to complete such an overhaul. With the spending process perilously close to complete breakdown, and many other priorities from the 108th Congress still unfinished, the prospect of rationally and deliberately overhauling Social Security seems daunting in the least – especially since the president has yet to release any definitive details of his plan. Last week, the Bush administration worked to smooth over dissension among many Republican legislators after an internal e-mail message concerning Social Security reform from a top Bush advisor was leaked. The message cited the need for benefit cuts to accompany any plan for privatization – a position President Bush earlier said he would not support. GOP legislators are deeply divided over what vague details they have of the president's plan.

At the same time, the House has lost one of its foremost experts on Social Security as Rep. Robert Matsui (D-CA) died on New Year's Day. Matsui was the ranking minority member of the Social Security subcommittee of Ways and Means in the House, the chairman of the Democratic Congressional Campaign Committee, and a top Democratic fundraiser. He was expected to lead the Democrats' fight against privatization plans. Rep. Ben Cardin (D-MD) is expected to move into the ranking member position on the committee and is equally if not more opposed to the president's plan to create private

personal accounts in Social Security. In a public appearance in October 2003, his opposition to Bush's plan was quite clear. "The problem is that the president's proposal will take money out of the system," Cardin said. "Social Security is a guaranteed, lifetime, inflation-proof annuitant, and you can't get that through a private account."

All this adds up to an extremely packed schedule for the first session of the 109th Congress, rife with contentious and controversial issues. The president has repeatedly said he will spend political capital to achieve his goals in his second term and that his re-election gave him a mandate to govern. But with most recent polls continuing to show the president with an approval rating below 50 percent, congressional Republicans may be wary of supporting the president, particularly if it is perceived he is trying to dismantle a program as popular as Social Security.

Wisconsin Speaker Pushing for New Sunshine Law

A Wisconsin lawmaker recently proposed state "sunshine" legislation aimed at providing more transparency in the state's contracting process. Currently, details about government contracts are not available to the public.

Assembly Speaker John Gard (R-Peshtigo) introduced the Contract Sunshine Act Dec. 22, 2004, which would require any state contractors to follow the same disclosure requirements as lobbyists. Under law, anyone that employs a lobbyist must register with the state Ethics Board and file semiannual reports on lobbying expenditures. The new bill would extend these same requirements to anyone that is trying to affect the outcome of a contract. This way, the public can see who is asking for state contracts, and the amounts.

While many point to the bill as an improvement over current practices, in copying the lobby law, there are still impediments to full public disclosure. First, an organization only has to report on activities that account for more than 10 percent of its lobbying time. Therefore, if activities to procure contracts do not meet this time requirement they will not be reported. Second, reporting only occurs every six months, delaying public disclosure which can mean that a contract process could see completion before the public can access any of the details.

Recent controversies over state contracts in Wisconsin were the impetus for the new legislation. The Federal Elections Board is facing a lawsuit challenging the way it entered into a $ 9.7 million contract to build a statewide voter registration list. The plaintiffs are claiming the secret deal violated state open records laws.

Wisconsin's Department of Transportation is also under fire because it awarded several contracts for amounts deemed too high. One no-bid contract provided $ 685,000 for the construction of a basic website. The agency is also under investigation after delaying the release of a report that examined the cost of contracting out work. A Milwaukee newspaper and two unions submitted a request under the state open records law, only to be told the report was not finished. When it was finally released several months later in November 2004, the report was found to have been completed in April 2004, directly contradicting the agency's previous claim.

Illinois State Police Issue Gag Order

A new Illinois State Police policy could silence whistleblowers that expose corruption, impropriety or wrongdoing within the police department by prohibiting employees from talking to news reporters.

The gag order came soon after a November 2004 Chicago television news station story exposed improper conduct on the part of state police guarding the governor. The report questioned the size of the governor's security force on out-of-state trips and detailed how bodyguards allowed unauthorized people to drive or ride in state vehicles, among other things.

Illinois Lieutenant Governor Pat Quinn spoke sharply against the policy stating, "State government should do everything possible to protect those with the fortitude to speak out about wrongdoing. The officer who informs the media about possible officer misconduct may be subject to greater discipline than someone committing the misconduct!"

Whistleblowers should be ensured the opportunity to report illegal activities without fear of reprisal from their employer, but despite legal protections afforded under the national Whistleblower Protection Act of 1989, whistleblowers remain at risk of reprisal. This new policy in Illinois increases the risk of punishment or job loss for state troopers who want to do the right thing and expose corruption within the police force. This gag order appears to be a method for the state police to avoid public scrutiny and accountability.

Working Group on Community Right to Know Joins OMB Watch

Since 1989, the Working Group on Community Right-to-Know has helped people defend and improve our right-to-know about environmental and public health concerns. As of January 2005, the Working Group was merged into OMB Watch and will focus on outreach activities.

The Working Group was originally formed to monitor the Environmental Protection Agency's (EPA) implementation of the Emergency Planning and Community Right to Know Act. A handful of organizations, including OMB Watch, were part of the formation. It was originally housed at the Environmental Policy Institute and focused on emergency planning by Local Emergency Planning Committees established by the law. As it moved to a new home at the U.S. PIRG, the community right-to-know portion of the law became a top subject.

Today, the Working Group serves a nationwide network of organizations and individuals whose right-to-know advocacy makes government responsive, holds corporations accountable, empowers communities, and protects public health and the environment.

On Jan. 3, 2005 the Working Group was transformed from a stand-alone entity to a project of OMB Watch to increase its capacity to conduct outreach to state and local groups whose voices are too often not heard by lawmakers, agencies or even national public interest groups. Its new focus is to aggressively provide information and support to state and local groups that oppose information restrictions.

The Working Group publishes an electronic newsletter, "Working Notes eUpdate." You can sign up for the Working Group's short monthly electronic newsletter to read about new fact sheets, tools and resources and connect with others using right-to-know information.

Visit www.crtk.org for more information on the Working Group, or contact George Sorvalis, the primary staff member at (202) 234-8494.

OMB Finalizes Peer Review Proposal

Shortly before the holidays, the Office of Management and Budget (OMB) released a final version of its bulletin to establish government-wide requirements for when and how federal agencies use scientific peer review. The final bulletin makes modest changes to the revised proposal that OMB published April 28, 2004 which only allowed a 30-day comment period. OMB's announcement did not explain the seven-month delay until just before the holiday season, when many academics, scientists and public interest groups concerned with the policy were away on vacations.

After OMB released the revised proposal on peer review last April, OMB Watch acknowledged the improvements but raised several major concerns, which remained unaddressed, and provided recommendations for improving the final proposal.

OMB Watch's major concerns with OMB's revised proposal on scientific peer review addressed these five areas: Authority, Problem Definition, Oversight, Selection of Reviewers, and Regulatory Delay. For our detailed comments on the newest version of the peer review bulletin, please see our detailed analysis.

Court Strikes Down Restrictions on Private Funds for Legal Services Programs

On Dec. 20, 2004 the United States District Court for the Eastern District of New York struck down application of a 1996 rule imposing restrictions on Legal Services Corporation (LSC) funds on private funding of legal aid groups. The judge denied the plaintiffs' challenge to the restrictions on direct LSC funding. In *Dobbins v. Legal Services Corporation*,the court found that the physical separation requirement for activities funded with private dollars violates the plaintiffs' First Amendment rights because it creates an undue burden on important rights and the government's justification did not support imposing such a burden.

The government had argued that shared facilities and staff create public confusion about what is LSC funded activity and what is not. The court said the government's concerns can be met by having legally separate programs with strict accounting for shared facilities and staff to ensure LSC funds are not spent on restricted activities, and having separate public areas for LSC and privately funded activities. The plaintiffs are represented by the Brennan Center for Justice.

David Udell, director of the Brennan Center, said, "Congress needs to apply the same rules to legal services that apply to other nonprofits, including faith-based nonprofits. More than 40 members of Congress have spoken out against the legal services private money restriction, and now a court has declared the rule unconstitutional. Instead of continuing to defend this unconstitutional restriction, Congress should simply get rid of it." The Center has not yet announced whether it will appeal the portion of the court's ruling upholding the restrictions on LSC funded activities.

The suit follows the 2001 Supreme Court ruling in *Velazquez v. Legal Service Corporation*, which invalidated a restriction barring legal aid lawyers from challenging welfare reform laws. The case was filed in December 2001 by four legal service programs in New York City, a private charity and pro bono attorney. They challenged the constitutionality of restrictions

prohibiting LSC grantees from using LSC or private funds for class action litigation, legislative advocacy and community education. This includes the "program integrity regulation," which requires physical separation between LSC-funded recipients and any organizations that engage in these restricted activities. (Se 45 C.F.R. 1610.) The suit also challenged the bar prohibiting programs from collecting attorneys fees in successful cases.

The restrictions were imposed by Congress in 1996, after the Legal Services Program had been threatened with elimination. They are renewed annually through the appropriations process. During this same time the nonprofit community successfully stopped Rep. Ernest Istook's (R-OK) efforts to impose similar advocacy restrictions on all nonprofits that receive federal funding. But, as John Edie, former General Counsel to the Council on Foundations said in a *Foundation News and Commentary* article, "At first glance, this case appears to affect only funding that helps provide legal services to the poor. But, in fact, the implications are much wider. The ultimate disposition of the Dobbins case could make clear to Congress that, in the absence of a compelling reason, it cannot place limits on private donations to organizations that also receive some federal funding, particularly when the private donations are funding speech."

Tsunami Relief Raises Earmarking Issues for Charities

The enormous outpouring of giving for victims of the tsunami disaster in Southeast Asia is bringing the role of nonprofits in international disaster relief into the public eye once again. Many donors are earmarking their contributions for tsunami relief, raising some concern that disaster relief needs in other areas of the world may suffer.

The Red Cross has collected $ 92 million, which will be used for immediate relief as well as long term needs. After the terrorist attacks of 9/11 the group was criticized when donors learned some of the funds for collected would be used for other purposes. This time all gifts are going to its International Response Fund. New York attorney Jack Siegel has set up a website for donors to get information on how to ensure their intent is honored.

Doctors Without Borders suspended its fundraising after collecting more than $ 50 million, saying it had all it needs for those efforts. An announcement on the group's website encourages donors to give to relief efforts in other places, such as Sudan and Iraq.

More contributions are likely to be made now that Congress has passed a bill (H.R. 241) that allows donors to deduct contributions made through the end of January 2005 from their 2004 taxes.

Administration Will Step Up Faith-Based Efforts

Despite budget cuts for social service programs, Jim Towey, director of the White House Office of Faith-Based and Community Initiatives told a recent Pew Charitable Trusts conference on religion and social policy that the administration will push its faith-based agenda in the 109th Congress.

Towey said that the administration will push for legislation allowing religious grantees to based hiring decisions for federally funded positions on religion and promote faith-based programs at the state and local levels. He also cited use of vouchers in a drug treatment program as a mechanism that allows service providers to incorporate religion into their federally funded service because the funds come from the client, not through a direct grant.

Expansion of the faith-based initiative is drawing more attention to continuing declines in federal funding for social service programs. A report Funding Faith-Based Services in a Time of Fiscal Pressures by the Rockefeller Institute of Government examines how long-term fiscal trends affect faith-based social services. The report found:

- During the 1990s funding for faith-based services expanded
- The surplus of state resources compared to social needs "has largely vanished"
- Federal funding for faith-based organizations is small and has not grown.

A summary of conference presentations is online.

White House Advances Anti-Regulatory Hit List

The White House waited until eight days before Christmas to reveal its new regulatory "reform" plan instructing agencies to review and complete action plans on a regulatory hit list of over 200 suggestions for reversing protections of the public interest, mostly proposed by industry lobbyists.

The vehicle for the anti-regulatory plan is the annual report from the Office of Information and Regulatory Affairs (OIRA) on the costs and benefits of regulation. Under the Regulatory Right-to-Know Act, OIRA is required to prepare the annual report, making a draft available for public comment. Just as in past years, OIRA Administrator John Graham opted to use the draft report as an occasion to invite industry to suggest regulations to be "reformed" in order to benefit the manufacturing sector.

In the final report, the White House summarized the public's suggestions and put forward two sets of its own suggestions, all of which the agencies must review by Jan. 24, before the White House announces in February its "regulatory reform priorities."

The vast bulk of the public's nominations for the hit list are directed at environmental regulations, with most others targeting workers' rights and safety (in particular regulations from the Occupational Safety and Health Administration and rules that implement the Family and Medical Leave Act).

Among the protections targeted by industry for reversal and other industry giveaways are the following:

- Privatizing the development and enforcement of regulations – taking those tasks out of government and entrusting them to private contractors
- Keeping consumer complaints out of the public until substantiated
- Relieving air carrier suppliers of the duty to subject employees to drug and alcohol testing
- Weakening even further the rules governing maximum hours that companies can force their truck drivers to work
- Exempting more auto industry manufacturers from the requirement to submit information of potential defects to an early warning database
- Weakening groundwater cleanup goals
- Rolling back a 2001 rule that lowered the reporting threshold for lead
- Weakening or eliminating the FCC's "Do Not Fax" rule
- Altering the rules for listing species on the threatened and endangered lists
- Allowing employers to count guaranteed family and medical leave against employees when distributing perfect attendance benefits
- Weakening worker rights under the Family and Medical Leave Act by forcing workers with FMLA grievances into arbitration instead of the courts
- Allowing mine companies to avoid improving work conditions by instead rotating miner shifts to reduce workers' exposure to diesel particulate matter
- Weakening protections against Listeria for makers of ready-to-eat meat products

In addition to the industry-nominated hit list, the White House issued two sets of its own anti-regulatory directives. One, which the White House titled "Promising Regulatory Reforms," is a fast-track list identifying rulemakings in an early stage of the process that the White House is pushing the agencies to propel to a higher priority status. The other, called "Unfinished Business," is essentially the White House's own nominations for the hit list.

Items on the White House's fast-track list include the following:

- Mercury rule
- Introducing "flexibility" into Title IX regulations securing equal opportunity for women in higher education
- Changes to ease burden on healthcare providers of medical privacy regulations
- Completing the rollback of the roadless rule
- Implementing structural overhaul of vehicle fuel economy regulations

Items on the White House hit list include the following:

- Granting variances from safe drinking water standards to "economically disadvantaged systems"
- Weakening patient protections that require a doctor to inspect any patient placed in restraints within one hour of the restraint
- "Streamlining" HUD predatory lending rules

In order to secure positive spin for the hit list, OIRA added suggestions for reforms that include completion of an OSHA rule on hexavalent chromium (which the agency is already required to finish under court order) and auto safety protections against frontal offset crashes (which most automakers already incorporate because of regulations in foreign markets). Several of them – such as food labeling of trans fats and ensuring that school lunch nutritional guidance does not increase the risk of diabetes – have nothing at all to do with improving manufacturing employment, which was notionally the reason for the hit list.

Track developments related to the hit list and get more information on our website at www.ombwatch.org/article/

archive/309.

Bush Renominates Industry-Backed Radical Right-wingers to Federal Bench

Just two days before Christmas, the White House announced its intention to renominate to the federal bench 20 radical right-wing and corporate-friendly extremists whose nominations had been thwarted in the 108th Congress.

The White House will be supported in this effort by both social conservatives, who see Bush nominees as friendly to conservative positions on controversial social issues like abortion, and the corporate sector, which is dedicating millions of dollars in an unprecedented lobbying effort on behalf of the Bush judicial picks.

Safeguards at Stake

Although a few high-profile issues such as abortion rights and the separation of church and state tend to dominate discussion of the implications of Bush's judicial selections, these particular nominees pose an equally great threat to corporate accountability and the use of regulatory policy to serve the public interest. Many of the nominees show signs not only that they will consolidate the pro-industry bias of many Republican-appointed jurists on the bench but, further, that they are proponents of a radical right-wing philosophy that seeks to undermine the power of the federal government to create national solutions for nationwide needs.

Radical Right-wing Philosophy

Several of the Bush nominees for federal appeals courts subscribe to a radical right-wing theory of constitutional law that would trade the New Deal for a raw deal. As stated most clearly in a book review and a speech by Judge Douglas Ginsburg (also a former White House regulatory czar and unsuccessful Supreme Court nominee), this extremist philosophy advocates a return to pre-New Deal constitutional doctrines construing the Constitution as forbidding early progressive efforts such as bans on child labor and hour and wage controls. After FDR announced the eventually unsuccessful court-packing plan, the Supreme Court brought this doctrine (generally referred to as the *Lochner* era) to an end. Since then, the federal courts have found in the Commerce Clause, the Spending Clause, and section 5 of the Fourteenth Amendment expansive power to regulate in the public interest.

Radical right-wing extremists actually advocate a return to *Lochner*. One of the returning nominees, Janice Rogers Brown, declared in a speech that the New Deal "cut away the very ground on which the Constitution rests." In Ginsburg's memorable turn of phrase, the Constitution went into "exile" after the New Deal reversal of *Lochner* and its progeny. Returning *Lochner* from exile could mean, in a contemporary context, any of the following threats to regulatory policy:

Cabining the Commerce Clause. The Commerce Clause is perhaps the most important source of congressional power to legislate in the public interest, in particular for the environment and workplace health and safety. The Rehnquist Court has already struck the first blow, most dramatically in its rejection of the Gun-Free School Zones Act and the Violence Against Women Act, which were the first court decisions in 60 years to find a congressional act unconstitutionally exceeding Commerce Clause authority.

Dusting Off the Non-Delegation Doctrine. The very basis of modern regulatory policy is that Congress delegates broad grants of authority to regulatory agencies, which are empowered to work out the technical details of public-interest legislation in regulations that have the force of law. *Lochner*-era courts flirted with a harsh version of the Separation of Powers doctrine that would forbid this kind of delegation of legislative authority. Notably, the occasion for Ginsburg's infamous phrase "the Constitution-in-exile" was a review of a book entitled *Power Without Responsibility: How Congress Abuses the People Through Delegation*.

Pitting Property Against Protection. The Takings Clause forbids the government from taking private property unless it compensates the property owner, the classic example being eminent domain. In the hands of radical right-wing extremists, who maintain that property rights should be elevated to the same status as personal civil liberties such as free speech, the Takings Clause could be expanded to turn regulation into unconstitutional takings. Regulation of the environment or workplace safety, for example, would be effectively blocked by a requirement to pay corporations for their lost profits.

Making Mandates Meaningless. Although it receives less attention than the Commerce Clause from critics of the radical right-wing threat, the Spending Clause is also under attack. Through the Spending Clause, Congress is able to ensure that states receiving federal funds for programs such as foster care and Medicaid meet certain minimum standards. For example, the Adoption and Safe Families Act forbids states receiving federal foster care funds from allowing children to languish in foster care for excessive periods of time without having plans for permanent outcomes. Although the primary means of establishing these standards is the carrot of federal funding, public interest groups have successfully used civil rights litigation to bring in the stick of court injunctions. Radical right-wingers advocate harsh interpretations of the Eleventh Amendment, non-constitutional federalism doctrines, and the standards for finding enforceable rights in federal statutes in order to close out victims of state indifference from making these mandates meaningful.

Scaling Back Civil Rights. Civil rights are already under attack as the Spending Clause and section 5 of the Fourteenth Amendment are constricted, but they are further imperiled by some radical right-wingers who hew to originalist readings of the Constitution and reject the possibility of any civil rights not spelled out specifically in the Constitution. Many basic civil rights – such as the right to privacy of married couples and the rights of parents to raise their children without undue interference from the state – are not spelled out as such in any specific clause but are considered "implicit in the concept of ordered liberty" and thus arising from the penumbra of existing constitutional clauses.

Giving States More Rights than People. A recurring theme throughout the radical right-wing project is an advancement of states' rights as a countervailing force against federal regulatory policy. As states secure more rights against federal mandates, the downside will be felt by both vulnerable populations relying on state administration of federal programs as well as state and local government employees, who are being excluded from the expansion of rights for other workers.

Several of the Bush nominees – most notably Janice Rogers Brown, Thomas B. Griffith, William Myers, Patricia Owen, and Bill Pryor – subscribe to one form or other of radical right-wing extremism. Another, Michael Kavanaugh, has been instrumental in helping the Bush administration pack the courts with other radical right-wing extremists.

Industry Connections and Bias

A troubling related development is the announcement that the National Association of Manufacturers will be lobbying, for the first time, on behalf of the Bush administration's judicial nominees. C. Boyden Gray, a prominent player in the Reagan and Bush I administrations with a background of running industry-funded front groups for conservative causes, has already been stumping on behalf of these nominees, as has conservative stalwart Grover Norquist. Although a genuinely surprising development, NAM's announcement is only the culmination of a long-term plan by industry to nurture radical right-wing jurists and pack them into the state courts, where they have been weakening corporate accountability by making it more difficult for injured consumers and wrongfully discharged employees to seek legal remedies. Helping these industry-backed nominees pack the federal courts is a companion to a larger campaign against civil justice and corporate accountability: pass tort "reform" legislation that removes most class action cases from state courts into the federal courts, and pack the federal bench with conservative judges who will rule on behalf of corporate special interests.

The campaign is already showing results for industry. According to the Center for Investigative Reporting, Bush nominees to federal appeals courts and courts of claims "are notable for their close ties to corporate interests, especially the energy and mining industries…. The investigation reveals that more than a third of President Bush's nominees to these federal courts — 21 of 59 nominations since 2001 — have a history of working as lawyers and lobbyists on behalf of the oil, gas and energy industries." Analyses by the People for the American Way Foundation of split decisions on the appeals courts reveal a pattern of hostility by Bush appointees to civil rights, environmental law, and other public interest litigation. More specifically, the Environmental Law Institute has discovered that Bush appointees are more conservative than even other Republican-appointed judges in National Environmental Policy Act (NEPA) cases. Finally, a report in the journal *Judicature* concludes that Bush appointees to federal district courts "are among the most conservative on record for all modern administrations, being on a par with Ronald Reagan's judicial team. Furthermore, in the realm of civil rights and liberties the Bush jurists are clearly the most conservative on record, being a full four points more conservative than even the trial judges appointed by Presidents Reagan or Bush, Sr."

The Perfect Political Opportunity?

That corporate special interests have been mounting a stealth campaign to pack the courts with radical right-wing extremists makes sense, given the enormous wealth already pumped into their steady assault on regulatory policy. In some cases, corporate special interests may be at odds with some of the principles of radical right-wing theory. For example, corporate special interests may not agree with the extremists' hostility to federal preemption of state regulatory authority, because it is in the interests of industry to be able to capture a centralized regulatory authority and not have to expend its resources lobbying the regulatory authorities of all 50 states. Such fine points do not matter at this stage, however, because the fight is not over specific tenets of an ideology but, instead, over the person of the nominees themselves. The industry-backed radical right-wingers tend overall to be industry-friendly, and their jurisprudential approach overlaps enough with industry interests to make it worth industry's millions.

Other factors make this a critical moment. The GOP's use of the social conservative base and the high-profile nature of some controversial social issues mean that a significant grassroots base is already mobilized to defend Bush's judicial nominees. The recent humbling of Sen. Arlen Specter (R-PA) means that a voice of moderation on the Senate Judiciary Committee may be muted, and the combination of industry support and the threat of weakening the filibuster option may splinter centrist Democrats from the party's progressive wing – the result in each case being a weakening of Senate resistance to radical right-wingers. Finally, the tendency in the national press to focus on high-profile issues like abortion will keep these more technical and complicated issues off the radar.

Federal regulatory policy has been an important equalizing force that raises standards in such areas as environmental quality and workplace health and safety. With the federal government rather than the states setting the regulatory floor, we have been able to avoid an ugly race to the bottom and a destructive return to laissez faire. Radical right-wing jurists find beauty in laissez faire and are wealthy enough to be unharmed by the race to the bottom. The threat to regulatory policy has never been more sweeping, or more real.

Expect Anti-Regulatory Bills in 109th Congress

When the 109th Congress reconvenes on Jan. 20, expect Republican lawmakers to continue work on anti-regulatory measures that will protect industry interests at the cost of the public interest.

House Speaker Tom DeLay (R-TX) has repeatedly mentioned "universal regulatory reform" as one of several high-priority items for the 109th Congress's agenda, and the House Government Reform Committee announced late last year that reauthorization of the Paperwork Reduction Act will be only one part of "a reform-focused legislative and oversight agenda that will streamline the federal government."

Moreover, Sen. George Voinovich (R-OH) has recently requested the Government Accountability Office to investigate the current state of fiscal federalism and related issues in the wake of the Unfunded Mandates Reform Act. This request may signal Voinovich's interest in revisiting UMRA and putting teeth into its requirements, one possibility being a stringent "no money, no mandate" requirement that would eviscerate the ability of the federal government to use federal funding as a vehicle for raising standards for human needs programs and ensuring civil rights.

Additionally, the Congressional Research Service is currently investigating the history, policy, and legal issues related to the construction of fencing and other barriers along the nation's southern border. The implication of this research is that Rep. Duncan Hunter (R-CA) is interested in reviving the defeated effort to grant the Secretary of Homeland Security the power to waive all federal law in order to expedite completion of the border.

Further, as we discuss here, the White House has been meeting secretly with industry interests to brainstorm anti-regulatory measures that could be added to the upcoming reauthorization of the Paperwork Reduction Act.

Among the anti-regulatory measures attempted in the past or discussed recently are the following, any one of which could resurface in the 109th Congress:

- Preventing agencies from issuing new regulations unless they can show that monetized benefits exceed industry estimates of the costs of implementing the regulations;
- Imposing fictional "budgets" of total regulatory costs that agencies can impose in any given year, then forbidding any new regulations once an agency has reached its "budgeted" cap;
- Blocking economically significant regulations from being implemented until they are voted on by Congress – in essence, imposing a statutory form of the nondelegation doctrine; and
- Diverting limited agency resources into more navel-gazing analyses, such as those already required by the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and executive orders.

Continue checking back at our website and our blog REG•WATCH for further developments and action alerts.

White House Meets with Industry to Plan Deregulatory Strategy

Over the past several months, the White House has met with industry representatives to develop a sweeping deregulatory strategy.

The White House's Office of Information and Regulatory Affairs (OIRA) has given industry a leg-up on the upcoming reauthorization of the Paperwork Reduction Act (PRA). According to *Inside EPA*, OIRA has been working with a coalition of industry groups to strategize using the PRA reauthorization as a vehicle for developing new anti-regulatory policies.

On top of that, during the mid-December White House economic summit, Treasury Secretary John Snow led a panel discussion on tax and regulatory reform. According to BNA's *Daily Labor Report*, representatives of industry groups and industry-funded think tanks recommended rolling back existing regulations and developing anti-regulatory policies that echo the suggestions developed in the meetings between OIRA and industry.

Both the OIRA meetings with industry and the economic summit indicate a broad attempt by industry, industry-funded think tanks, and the administration to dismantle or weaken existing regulation while making it more difficult to promulgate new public safeguards. Following through on the industry recommendations – which range from increasing the use of cost-benefit analysis to legislating judicial review for the Data Quality Act – business may very well receive the "regulatory relief" it seeks at the cost of longstanding public health, safety and environmental protections.

The Paperwork Reduction Act

The Paperwork Reduction Act created the Office of Information and Regulatory Affairs (OIRA) within OMB and gave it a number of very specific assignments, which included meeting annual paperwork reduction goals, reviewing every agency's information management activities, and improving federal information policy. Despite this broad mandate, the heart of the law turned out to be the paperwork clearance process resurrected from the 1942 Federal Reports Act. Through the paperwork clearance process, OIRA reviews all activities of federal agencies, including the independent regulatory agencies, which involve collecting information from ten or more persons. These information collections include application forms, questionnaires, surveys, and reporting, recordkeeping or labeling requirements. Thus, everything from tax forms to

health research questions must be approved by OMB. Funding for the PRA expired in 2001, and since that time paperwork reduction has received funding annually through Transportation, Treasury, and Independent Agencies Appropriations.

According to the *Inside EPA article*, OIRA has met with industry officials and industry-funded think tanks to discuss several additions that may be included when the bill is reauthorized this year. On the whole these changes will create new barriers that agencies must surmount to pass new regulation as well as open up existing regulation to potential rollbacks. The changes to the PRA may face some resistance in Congress but will certainly be an important agenda item for the House Government Reform Committee in the coming year.

Potential Pro-Industry, Anti-Regulatory Measures

A number of overlapping themes emerged from both the summit and OIRA's meetings with industry for potential anti-regulatory measures that may be enacted during the PRA reauthorization or in other forms during the coming congressional session. Industry representatives weary of "regulatory burden" have recommended rollbacks of existing regulations. At the economic summit, Mercatus director Susan Dudley recommended inserting sunsets into rules that appear to be outdated. She asserted that older rules must have a demonstrated necessity in order to remain on the books. Responding to industry demands that new regulations be based on "better" information, OIRA is considering including language in the PRA that will expand the use of cost-benefit analysis and giving greater authority to the Data Quality Act. Industry has also suggested a desire to expand the use of the Regulatory Flexibility Act to review existing rules on the books.

Increasing the Use of Cost-Benefit Analysis

One possible amendment to the Paperwork Reduction Act being considered by industry representatives and OIRA is a codification of Executive Order 12866. Issued under Clinton, E.O. 12866 requires agencies to perform cost-benefit analysis on regulations prior to publication and also requires OMB to review all "major" rules.

Cost-benefit analysis is already a tool often used by opponents of regulation. While it is easy to quantify the cost of a new regulation on industry, it is much more difficult to estimate the benefit in economic terms, especially when that benefit is a better quality of life, healthier children, or cleaner air. Rather than cost-benefit analysis being just another tool in the regulator's toolbox, codifying E.O. 12866 will create a legal mandate for cost-benefit analysis and will increase its role in developing regulation.

Reviewing Existing Regulation

Already the Regulatory Flexibility Act requires that agencies proposing rules that would have a "significant" economic impact on small business, small not-for-profit organizations, or small governmental entities must prepare a Regulatory Flexibility Analysis (RFA) and try to find simpler, less burdensome ways for such small organizations to comply with federal requirements. The Act was created in 1980 in response to criticism from small businesses that they were drowning in federal forms and going broke because of federal regulations. The Act also requires that agencies go back and review existing regulations at least once every ten years and reassess the rule's impact on small business.

According to the *Inside EPA* article, industry may also use the occasion of the paperwork reduction act to ensure the increased the use of Regulatory Flexibility Act analyses. EPA and other agencies have already begun to increase the number of reviews they perform. Between the December 2002 Unified Agenda and the December 2004 agenda, the number of rules undergoing section 610 reviews increased from 34 to 42. The additional reviews seem to be especially targeting the Environmental Protection Agency. The December 2002 agenda included no 610 reviews for EPA, but 10 have been added over the past year, including reviews of regulation regarding lead-based paint activities in child-occupied facilities and worker protection from pesticides.

Larry Mocha, the U.S. Chamber of Commerce representative, voiced the business community's desire for greater use of section 610 reviews. Mocha plans to lead town hall sessions on the Regulatory Flexibility Act at the state levels. The Small Business Administration, working in conjunction with the industry-funded think tank ALEC, has likewise been lobbying the states.

Expanding Data Quality Provisions

The call by industry representatives that regulation be based on "better" information could translate into an expansion of the powers of the Data Quality Act. One idea being floated at OIRA is to include language in the Paperwork Reduction Act that would create the legal right to sue agencies over data, cost benefit analyses, and other decisions that agencies use to make regulatory decisions. This provision would effectively overturn two recent federal court decisions holding that the DQA is not judicially enforceable, and it could open regulations to even more challenges from industry.

A Mounting Threat

Both in President Bush's closing remarks at the summit as well as in White House information on the conference, regulatory reform was put forth as an objective in the coming term. The "White House "Securing Our Economic Future" Fact Sheet stated that though "America has a growing, dynamic and changing economy . . . the economy remains handicapped by unnecessary tax and regulatory burdens." It went on to say that "the president wants to streamline regulations and reduce paperwork." OIRA's meetings with industry provide even further evidence that regulatory reform is clearly on the agenda for the coming year, and the strategy against public safeguards is beginning to take shape.

New Forestry Rules Endanger Wildlife, Limit Public Participation

Three days before Christmas the U.S. Forest Service gave the timber and paper industry an early Christmas present, announcing a final rule that will drastically overhaul the U.S. Forest Service's land management system.

The plan will relax existing standards, allowing forest managers greater flexibility in managing national forests. Using a model commonly implemented in the business arena, forest managers will now implement an environmental management system which will allow them to set their own environmental goals in a continual cycle of planning, implementation and assessment, rather than creating long-term plans that are open for public review, as was previously the case. While implementing plans quickly and efficiently is a benefit to both industry and environmental advocates, the new regulation cuts out public participation in the process and eliminates protections for fish and wildlife.

The environmental management system will replace the environmental impact assessments used by the forest industry for the past two decades. Under the new regulations, forest managers can produce environmental impact statements if they believe such statements are necessary, but managers are given discretion as to the extent to which they produce environmental impact analysis. Environmentalists believe that without the environmental impact assessments, forest managers will be able to implement forestry plans without paying heed to environmental protections. Eliminating the environmental review process also cuts out public participation in the planning process. Forest managers will now be able to easily approve logging, drilling or mining plans without having to assess the environmental impact or answer to the public.

Further threatening fish and wildlife within the national forests, the new regulations do not specifically require forest managers to protect fish and wildlife populations from becoming threatened or endangered. Rather, managers must consider the best available science to make decisions that benefit the entire ecosystem. The regulation essentially jettisons any wildlife protection provisions from land management plans. The new regulation gives environmental protection and economic interests equal weight.

Forest managers are to be held accountable under the new plan through an audit system. However, the regulation gives little guideline as to who these auditors will be. Auditors are just as likely to be industry representatives and as they are to be environmental scientists. Furthermore, true oversight of such a program would come with a heavy cost.

The regulation impacts 155 national forests, covering 191 million acres. Environmental groups have already planned to challenge the regulation in court.

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