OMB WATCH
Promoting Government Accountability and Citizen Participation
ACTION CENTER | BLOGS | DONATE
The Watcher
January 23, 2007 Vol. 8, No. 2

In This Issue

Senate Passes Ethics and Lobbying Reform Bill

On Jan. 18, the Senate passed its first major piece of legislation, S. 1, the Legislative Transparency and Accountability Act of 2007. The sweeping measure covers congressional travel, gifts, and lobbying activity and increases disclosure. However, senators rejected proposals to create an independent ethics panel and to require big dollar grassroots lobbying campaigns to disclose their spending. Grassroots lobbying disclosure and other proposals now move to the House, which has passed its own ethics rules, but has yet to act on amending the Lobbying Disclosure Act.

Travel and Gifts

Congressional travel reform followed last year's revelations of lavish trips and "junkets" that allowed lobbyists undue influence with lawmakers. S. 1 prohibits organizations that employ lobbyists from arranging or paying for congressional travel, but charities and

religious organizations are allowed to pay for travel with approval from the Senate Ethics Committee, which will determine whether the trip is educational and whether the funding comes from a lobbying firm. Travel on corporate aircraft is still allowed under the legislation, but it will now become more expensive as Senators will have to pay the full charter rate. One-day trips and travel paid by universities are permitted.

Members will also be required to file travel gift reports, which will be available in an online database by the beginning of 2008. Gifts from lobbyists and organizations that hire lobbyists are strictly banned, and gifts of event tickets from non-lobbyists must be reported at their full value.

Lobbying Changes

S. 1 contains important measures that change lobbying rules and provide more transparency in the system. It increases the frequency of reporting from semi-annually to quarterly and lowers the threshold of expenditures for reporting. In addition, current paper reports will be replaced with electronic reports, which will be publicly available on an Internet database. Other changes to the Lobbying Disclosure Act include:

- All campaign fundraising activity by lobbyists, including bundling (contributions from their clients and others) must be disclosed. According to the *New York Times*, "Of all the bill's provisions, it was the disclosure requirements for bundled checks that met the stiffest resistance behind the scenes in the Democratic caucus because of the potential to make it harder for incumbent lawmakers to tap K Street lobbyists as surrogate fund-raisers, aides involved in negotiations over the bill said, speaking anonymously because the talks were confidential."
- Lobbyists cannot host events that pay tribute to members of Congress, even at party conventions.
- The revolving door prohibition, which bars former members of Congress from lobbying during a "cooling off period," will be extended from one year to two and will be broadened to include "lobbying activity," not just direct lobbying contacts. As Sen. Russell Feingold (D-WI) said on the Senate floor, "They must refrain from running the show behind the scenes. They won't be able to strategize with and coordinate the lobbying activities of others who are trying to influence the Congress. Members who have just left Congress should not be capitalizing on the clout, access, and experience they gained here to lobby their colleagues, whether they are doing the lobbying themselves or instructing others."
- Members of Congress will not be allowed to negotiate employment involving lobbying while they are in Congress, and senior congressional staff will be required to notify the Senate Ethics Committee within three days of negotiating for future employment. Spouses of members of Congress will be prohibited from lobbying, unless they were registered lobbyists prior to their spouse's election or more than one year prior to marrying the Member.
- S. 1 increases the penalty for government officials who falsify their personal financial disclosure forms, from $10,000 to $50,000, and establishes a

maximum one-year prison sentence. The penalty for failing to comply with lobbying disclosure laws is also increased, from $100,000 to $200,000.

It was disappointing that senators voted to strip a provision that would have required grassroots lobbying disclosure, which was aimed at big money grassroots lobbying campaigns, and the Senate missed an opportunity for greater accountability by not adding a requirement for independent enforcement of ethics violations. These and other reform proposals now move to the House, which will be taking up legislative changes on lobbying reforms, possibly in February. The two versions of this legislation will then need to be reconciled through a House-Senate conference committee.

Misinformation Campaign Defeats Grassroots Lobbying Disclosure in Senate

When the Senate passed S. 1, the Legislative Transparency and Accountability Act of 2007, on Jan. 18, it left out a provision that would have required big dollar federal grassroots lobbying campaigns to disclose their spending and the identity of their clients. The provision was taken out after an intensive campaign by opponents that was primarily based on inaccurate information or interpretations that were at odds with the stated intentions of the sponsors. Supporters of the provision, including OMB Watch, have promised to pursue it when the House considers its amendments to the Lobbying Disclosure Act (LDA). OMB Watch has proposed clarifications to the language that are intended to eliminate contradictory interpretations and ensure that the disclosure requirements are limited to big dollar campaigns. In the meantime, misinformation spread by some conservative groups and advertising firms have scuttled an effort to prevent corruption in Congress by bringing greater transparency to the lawmaking process.

Sec. 220, the grassroots disclosure provision of S. 1, would have required organizations that are required to register under the LDA - those that have an employee who spends more than 20 percent of his or her time on *direct* lobbying and spend $10,000 or more per quarter on *direct* lobbying - and spend over $25,000 per quarter on *grassroots* lobbying to disclose information about their grassroots lobbying activities. In addition, it would require entities that accept fees for grassroots lobbying on behalf of another to register and report if their grassroots lobbying fees exceed $25,000 per quarter.

The complex language in the bill, coupled with the complexity of the LDA, created substantial confusion and led to widely differing interpretations of who would be required to report federal grassroots lobbying. For example, despite the stated intent of the sponsors, the Congressional Research Service (CRS) report on identical language in last year's ethics bill interpreted Sec. 220 of S. 1 to say it "Excludes paid efforts to stimulate grassroots lobbying from the exemption from the registration requirement (thus, requiring LDA registration for such activities, regardless of low income or expenses)." However, a spokeswoman for Sen. Joseph Lieberman (ID-CT), a sponsor of

the provision, told the *Congressional Quarterly* on Jan. 17, "There's nothing in this measure that will stop, deter or inhibit anyone from petitioning the government. We're talking about disclosure...when large sums of money are spent by professional organizations."

This did not stop conservative groups from attacking the bill with wildly misleading rhetoric. For example, direct mail guru Richard Viguerie at GrassrootsFreedom.com said, "The Senate would make exercising your First Amendment rights a crime." As a result, groups like Concerned Women of America lobbied against Sec. 220, calling it "a very real and serious threat that would restrict Americans' constitutional right to learn about pending bills and contact their congressmen about them."

Statements from supporters such as the Center for Lobbying in the Public Interest pointed out that Sec. 220 would create a more level political playing field, since "Under current tax law, public charities and other nonprofit organizations are required to file reports on their grassroots lobbying with the Internal Revenue Service. Private sector groups and their lobbyists are not." The Alliance for Justice also urged the Senate to support Sec. 220, noting that the language had been revised from earlier versions so that it "dramatically lessened the impact on nonprofit organizations" and noted that "the addition of the grassroots lobbying provision will not change the registration thresholds under the federal Lobbying Disclosure Act." In a Jan. 12 statement, OMB Watch said, "Disclosure of big dollar grassroots campaigns will bring transparency to the process, so the public will know who speakers are and whose interests they represent."

On Jan. 11, Sen. Bob Bennett (R-UT) and 13 co-sponsors introduced an amendment to strip the grassroots lobbying disclosure provision from S. 1. Support came from a surprising source - Sen. John McCain (R-AZ), who had proposed a similar grassroots lobbying disclosure provision in December 2005. In his announcement of Sec. 105 of the Lobbying Transparency and Accountability Act of 2005, McCain explained how the abuses uncovered by the Senate Indian Affairs subcommittee demonstrated the need for disclosure of big grassroots spending on federal legislation, saying,

*"**It requires greater disclosure of the activities of lobbyists, including for the first time, grassroots lobbying firms**....During its investigation, the Committee also learned about unscrupulous tactics employed to lobby Members and to shape public opinion. We found a sham international think tank in Rehoboth Beach, Delaware, established, in part, to disguise the true identity of clients. We saw phony Christian grassroots organizations consisting of a box of cell phones in a desk drawer. I would submit that in the great marketplace of ideas we call public discourse, truth is a premium that we cannot sacrifice. Through these practices, the lobbyists distorted the truth, not only with false messages, but also with fake messengers. I hope by having, for the first time, disclosure of grassroots activities and the financial interests behind misleading front groups, that such a fraud on Members and voters can be avoided."*

Despite opposition to the Bennett amendment from government reform groups and

many nonprofits, it was approved by a 55-43 vote, with all Republicans and eight Democrats supporting it. The House could take up LDA amendments in February or March, and any grassroots lobbying disclosure provision should be clarified to ensure that only large-scale grassroots campaigns are affected. That way, the debate can be about the merits of grassroots lobbying disclosure.

Supreme Court to Hear Challenge to Ban on Broadcasts (Again)

The long-running debate over whether grassroots lobbying broadcasts should be exempt from the federal ban on "electioneering communications" may finally be resolved in 2007. On Jan. 19, the Supreme Court agreed to hear *Federal Election Commission v. Wisconsin Right to Life* during its current term, making a final decision before the 2008 elections likely. The case challenges the McCain-Feingold campaign finance rule barring corporations, including nonprofits, from paying for broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary. The Supreme Court decision is likely to determine how the Federal Election Commission (FEC) uses its power to create exemptions to the rule and may generate action in Congress as well.

In 2006, the high court ruled that Wisconsin Right to Life (WRTL) could challenge the law as it applies to its grassroots lobbying ads, sending the case back to a lower court to review the facts in order to determine whether the First Amendment was violated. In 2004, WRTL ran radio ads asking the public to contact the state's U.S. Senators about judicial filibusters. Sen. Russell Feingold (D-WI) was running for re-election at the time, so WRTL had to discontinue the ads, even though they did not refer to the election, name any political party or characterize Feingold's position on the filibuster issue. In December 2006, the lower court ruled in favor of WRTL, saying the rule is unconstitutional as applied to them.

However, the court did not create an exemption for all grassroots lobbying ads, ruling that the issue must be brought before the courts on a case-by-case basis. This is not a realistic solution to the problems created by the electioneering communications rule, since the courts move so slowly and many nonprofits could not afford to litigate the issue. But if the Supreme Court rules in favor of WRTL, the FEC may invoke its powers under the Bipartisan Campaign Reform Act of 2002 (BCRA) to create an exemption in line with the court's decision. In 2006, when OMB Watch joined a group of nonprofits that asked the FEC to create a grassroots lobbying exemption, the agency decided to defer action until it has further guidance from the courts.

The Supreme Court order set out a schedule that will have all briefs submitted by April 18, followed by oral argument, making a decision possible by late June. In a press release, WRTL attorney James Bopp, Jr. of the James Madison Center for Free Speech said a favorable ruling will protect "the First Amendment right of citizens to lobby their members of Congress about upcoming legislative action, even in the proximity of

elections."

The case is being appealed by the FEC and the sponsors of BCRA, including Sen. John McCain (R-AZ). In contrast to his willingness to bar broadcasts of grassroots lobbying messages in this case, McCain voted against disclosure of grassroots lobbying costs for big dollar federal lobbying campaigns in S. 1, the Senate ethics and lobbying reform bill passed Jan. 18.

Senate Passes New Rules on Earmark Disclosure

The Senate on Jan. 18 passed a comprehensive lobbying and ethics reform bill — S. 1, the Legislative Transparency and Accountability Act of 2007 — that included an overhauled earmark disclosure rule. After nearly two weeks of floor debate featuring reversals, stalemates, and a brief filibuster, the Senate voted 96-2 to pass the bill, widening the definition of earmarks and increasing their public disclosure requirements. S. 1 must be passed by the House and signed by the president before any of it, including the Senate rules changes, can take effect.

Senate Majority Leader Harry Reid (D-NV) and Minority Leader Mitch McConnell (R-KY) initially introduced an earmarks package modeled on the House disclosure rules adopted last fall. They did, however, add a key provision, requiring that prior to consideration of any bill, amendment, or conference report, a separate list identifying all earmarks must be made available to all Senators and be posted on the Internet at least 48 hours in advance. The Senate version is perceived as far weaker than the earmark rules changes adopted by the House in early January.

In response, Sen. Jim DeMint (R-SC) offered an amendment to expand the scope of earmarks subject to disclosure rules. Reid suffered a setback on the bill on Jan. 11, when he lost a vote to bypass consideration of the DeMint amendment. DeMint's proposal, nearly identical to House Speaker Nancy Pelosi's (D-CA) language in the House rules package, survived by a 51-46 margin (60 votes were needed to set the amendment aside). Reid then used parliamentary strong-arm tactics to not hold a final vote, giving the perception he was going to lobby his own caucus to vote against the DeMint provision. In a surprise reversal the next day, Reid endorsed the DeMint amendment, after Sen. Dick Durbin (D-IL) made minor changes to the original DeMint language. In the end, the Senate supported a much stronger earmark disclosure requirement than what was originally in the bill.

While it seemed this agreement freed the bill from gridlock and ensured its passage, another amendment, unrelated to the underlying bill, almost derailed the entire effort. The GOP filibustered a vote to limit debate on the bill when Sen. Robert Byrd (D-WV) objected to a line-item veto or "enhanced rescission" proposal offered by Sen. Judd Gregg (R-NH). Byrd objected briefly even after Gregg agreed to pull his measure and re-

introduce it at a later date.

The final bill included several significant provisions, including another DeMint amendment to allow the Senate to strike from conference reports earmarks that had not been included in either chamber's version of the bill. Though little noted, this amendment creates a special point of order for Senators to surgically remove such earmarks and send the bill back to the House otherwise intact. Originally part of last year's Senate ethics and lobbying bill that was adopted but never enacted, the DeMint amendment would halt the longstanding congressional practice of “air-dropping” items into legislation on the verge of being cleared for the president’s signature.

Under S. 1, disclosure rules also kick in earlier in the legislative process than before, at the point where earmarks are formally added to a bill at the committee level. At that point, the committee is directed to disclose the sponsoring lawmaker, the intended recipient, the earmark’s purpose, and include a certification that it will not yield a financial benefit to the sponsor or the sponsor's family. This information must be made available online in a searchable format on the committee's website.

An amendment by Majority Whip Richard Durbin (D-IL) that mandates disclosure of earmarks contained not only in the language of a bill proper but also in prints or reports accompanying the legislation passed unanimously. A proposal by Sen. Tom Coburn (R-OK) to prevent lawmakers' immediate family members from benefiting from earmarks was adopted by voice vote. Like the corresponding House provision, the bill handles tax expenditures by defining earmarks as tax deductions, credits, exclusions or preferences to ten or fewer beneficiaries.

S. 1 also made other reforms to the daily legislative processes that will open up Congress to more public scrutiny. Among these changes are a requirement that all conference reports be made available to all members and online to the general public for a period of 48 hours before consideration, and a requirement that all committees and subcommittees have to release a transcript, video, or audio recording of all meetings within 14 days. S. 1 also expressed the sense of the Senate that conference committees should hold regular, formal meetings of all conferees that are also open to the public, give adequate notice of the time and place of those meetings, and allow full and complete debates of the matters before conference committees.

The debate on S. 1 saw a temporary dissolution of the bipartisan mood that prevailed in the Senate at the opening of the session, especially during the GOP filibuster and the impasse when Byrd opposed future Senate consideration of the Gregg amendment. But Reid broke the logjam, clearing the way for what he grandly called the "most significant legislation in ethics and lobbying reform we've had in the history of this country." Others compared it to the most significant changes since Watergate.

The fate of the bill is not yet clear, as many of the provisions affect the House, which has yet to consider such legislation. Democrats were able to quickly enact rules changes in

the House, but moving legislative changes on earmarks may be more difficult. House leaders have not yet said when they might consider the Senate bill or what the scope of the House version would include.

Congress Commits More Time to Doing Its Job

After one of the shortest legislative sessions on record, the 110th Congress has scheduled substantially more days in session for 2007. Hoping to avoid the "do-nothing" label that haunted the 109th Congress, Democratic leaders are hoping the additional time will not only allow for the adoption of their initial "100 hours" agenda, but also the timely completion of all appropriations bills before the start of the next fiscal year. Despite the additional days in session, however, it may still be difficult for Democrats to enact their priorities.

After Democrats won back control of both the House and Senate in the 2006 elections, the incoming leadership of the House promised to put an end to the typical three-day workweeks that left little time for actual legislative business in 2006. Incoming Majority Leader Steny Hoyer (D-MD) said the first step was to return to a full five-day work week, including scheduling votes on Mondays. This change gives members a reason to return to Washington at the start of the week or risk missing votes.

Hoyer and the Democratic leadership crafted a legislative schedule for 2007 that included a 28 percent increase in the number of days in session (from 125 to 160), and more importantly, a 54 percent increase in days where legislative votes will be held (from 72 to 111). The Senate has a net of three more days in session through Labor Day and is likely to have a schedule similar to the one published by the House for September and October.

The extra time in Washington seems to be making a difference already. After the election, House Democrats pledged to enact legislation to address critical priorities within the first 100 legislative hours. House Speaker Nancy Pelosi (D-CA) vowed that, "Democrats will get to work immediately to restore civility, integrity, and fiscal responsibility to the House, while increasing prosperity, opportunity, and security for all Americans." Since Jan. 4, they have passed six bills as part of that "100 hours agenda" (H.R. 1 - H.R. 6) by healthy majorities - attracting at least 24 Republicans on each bill.

The Senate, traditionally a slower moving body, has also had similar success, passing a major overhaul to ethics and lobbying rules last week in its first bill (Click here and here for summaries of that bill). The Senate will move to debate a raise to the minimum wage this week and hopes to pass an increase by the end of January.

Despite the increased days in session and early success, it may be equally hard for the Democrats to fully enact their top agenda items and all the FY 2008 appropriations bills on time. With only a one-vote majority in the Senate and a president from the other

party in the White House, Democrats will have to craft moderate legislation that not only attracts sufficient support to overcome a possible filibuster in the Senate, but that will also be acceptable to President Bush. This tenuous balance may create long delays and roadblocks centered around controversial issues such as supplemental funding of the Iraq war, stem cell research, tax policy, and adequately funding domestic programs to meet the increasing needs in communities around the country.

While the Democrats may not be able to pass as many of their top priority items as they would like, the increased time Congress will spend working in Washington will certainly allow them the opportunity to conduct more thorough oversight of government and investigate troubling and unacceptable performance in a wide variety of areas and topics.

Congressional oversight has been almost nonexistent during the Bush presidency, continuing a downward trend that started in the late 1960s. Joel Aberbach, a political scientist at UCLA reported the overall number of oversight hearings in the House fell from 782 during the first six months of 1983 to 287 during the first six months of 1997 — a drop of 63 percent. The falloff in the Senate between 1983 and 1997 is equally large — 59 percent (from 429 to 175). Last fall, Norm Ornstein and Thomas Mann cited a steady drop in committee and subcommittee meetings and hearings overall as one of the main impediments to proper congressional oversight. "In the 1960s and 1970s, Congress held an average of 5,372 committee and subcommittee meetings every two years; in the 1980s and 1990s, the average was 4,793; and in 2003-4, it was 2,135."

A longer legislative session has provided the opportunity for Democrats to stay true to their campaign pledges to conduct rigorous oversight and pass appropriations and other legislation in a timely manner, but does not assure them success in either endeavor. It still falls to the leadership and committee chairs to actually hold hearings, find compromise and move legislation before the new Congress can truly be judged a better functioning institution than the last one.

The Fiscal Impact of House 100 Hours Agenda

On Jan. 18, the House Democrats succeeded in passing the final piece of their six-part "100 hours" agenda. The combined fiscal impact of the bills — which implement 9/11 Commission recommendations, close energy tax loopholes and more — is significant: the Congressional Budget Office (CBO) has estimated $21.1 billion in savings and revenue over the next ten years if the bills are signed into law.

H.R. 1: Implementing the 9/11 Commission Recommendations Act of 2007
H.R. 1 makes a number of changes to homeland security policy, all of which will have a negligible impact on federal finances. It does, however, issue new cargo inspection requirements that will impose some costs on businesses that are responsible for screening airplane cargo and shipping containers.

CBO estimated 10-year cost: $0

H.R. 2: Fair Minimum Wage Act of 2007

H.R. 2 changes the Fair Labor Standards Act (FLSA) to increase the federal minimum wage in three steps, from $5.15 per hour to $7.25 per hour over the next two years.

According to a CBO estimate dated Jan. 11, H.R. 2 would have no significant effect on the direct spending and revenues of the federal government. Because a very small number of federal employees are paid the federal minimum wage, the act would have a minor effect on the budgets of federal agencies that are controlled through annual appropriations.

There is speculation that a package of tax "sweeteners" for small business, the Small Business And Work Opportunity Act of 2007, may be combined in the Senate with the minimum wage increase. According to Citizens for Tax Justice, the biggest tax break is an extension and expansion of the Work Opportunity Tax Credit. Other breaks would allow restaurants and retail stores bigger tax write-offs and expand the number of businesses allowed to use the more advantageous cash method of accounting.

In a change from recent tax policy, the tax package is entirely offset. The biggest offset would restrict an especially egregious form of tax shelters known as sale-in, lease-out (SILOs). These arrangements, which can involve an American bank buying something like a subway or sewer system in another country and "leasing" it back to the foreign government for tax advantages, were already banned in 2004, but that ban would retroactively apply to deals made before 2004 under this provision.

CBO estimated 10-year cost: $0

H.R. 3: Stem Cell Research Enhancement Act of 2007

This bill has no associated fiscal impact. It directs "the Secretary [to] conduct and support research that utilizes human embryonic stem cells in accordance with this section." There is no new program that would require additional federal expenditures.

CBO estimated 10-year cost: $0

H.R. 4: Medicare Prescription Drug Price Negotiation Act of 2007

H.R. 4 enables the federal government to negotiate with private companies over the price of prescription drugs purchased for the Medicare Part D program. CBO estimates this new power will not produce lower drug prices because drug companies will still have the upper hand at the bargaining table.

Rep. Henry Waxman (D-CA) has disputed this projection. Waxman's committee produced a report that found the new bill would save between $61 billion to $96 billion. The report reached this estimate by extrapolating from the cost of prescription drugs purchased by a Veteran Affairs Department prescription drug program. This comparison may be inexact, however, because the VA program uses negotiating tools that H.R. 4

does not grant to Medicare.

CBO estimated 10-year cost: $0

H.R. 5: College Student Relief Act of 2007

H.R. 5 changes some of the ways the federal government regulates student loans. It imposes reduced student loan rates, increased fees for lenders, and a reduced share of default collections retained by nonfederal guaranty agencies. Over ten years, these changes are projected to add $7.1 billion to the federal Treasury. Nearly all of the new savings will be realized after 2013, when student loan interest rates are scheduled to return to the pre-law level.

CBO estimated 10-year savings: $7.1 billion

H.R. 6: CLEAN Energy Act of 2007

According to a CBO estimate, through changes related to the development of federally owned resources, particularly oil and natural gas in submerged lands on the Outer Continental Shelf (OCS) and conservation of resources fee levies, H.R. 6 would reduce direct spending by $2.6 billion over the 2007-2012 period and by $6.3 billion over the 2007-2017 period.

In addition, the Joint Committee on Taxation (JCT) estimates that, since income from oil, natural gas or any associated primary products would no longer qualify for an income tax deduction, the legislation would increase revenues by $2.9 billion over the 2007-2012 period and by $7.7 billion over the 2007-2017 period. The outlay savings and revenue increases from enacting H.R. 6 would total $5.5 billion and $14.0 billion, respectively, over those periods.

CBO estimated 10-year savings and revenue: $14 billion

Congress Can Shape War Policy through Appropriations Process

President Bush's plan to increase troop levels in Iraq has stirred up debate recently over the extent to which Congress can direct war policy. While some have gone so far as to suggest that Congress has the authority to do no more than make symbolic statements, in truth, the appropriations process gives Congress significant — albeit restricted — power to shape the course of war policy.

Using the Power of the Purse

One of Congress's strongest tools for guiding war policy stems from the "power of the purse," which gives Congress the power to introduce legislation allocating funding for federal programs and policies. Fundamentally, this power means that Congress has a

strong hand in approving or denying funding to implement military policy.

Current military action is being funded through the appropriations process. As such, Congress allocates a certain amount of money to be spent on the war effort in a given fiscal year. When the military runs out of that money, it must ask Congress for another appropriation, at which point Congress gets a new opportunity to "turn on" or "turn off" funding for the war effort.

The power to "turn off" funding for military policy can be applied either bluntly or precisely. Congress can turn off funding entirely by deciding not to pass any funding for the war at all. Alternatively, it can turn off funding *within* an appropriations bill for certain purposes or timeframes. These restrictions are phrased negatively and are explicitly geared to restrict the funds for certain uses (i.e., funding in this account shall *not* be used for this specific purpose...).

The same principle applies for "turning on" funding. Congress can pass an appropriations bill that provides a lump-sum of funding with no directions. Or, within an appropriations bill, Congress can proactively direct funding for an express purpose or timeframe. It can mandate that a specific amount of money be used for a specific purpose only. Or it can condition funding allocation on some other event or benchmark being met. If this guiding language is included in the text of the legislation, it carries the force of law and is binding on the president. If it is included in report language that accompanies the bill, it is not binding.

Restrictions on Purse-Power

The power of the purse is not unlimited. First and foremost, an appropriations bill that includes new authorizing language is subject to a point of order. "Legislating on appropriations" means the appropriations bill limits, directs or conditions funding in a way that does not comport with enacted authorizations, which enable or create government policy but often do not fund them. The Congressional Research Service summarizes this restriction:

> Under Senate and House rules, limitations, as well as other language in the text of appropriations legislation, cannot change existing law (paragraphs 2 and 4 of Senate Rule XVI and clause 2(b) and (c) of House Rule XXI). That is, they cannot amend or repeal existing law nor create new law (referred to as legislation or legislation on an appropriations bill). Limitations also may not extend beyond the fiscal year for which an appropriation is provided.

In other words, Congress cannot turn on funding for policies that are not already written into law without waiving a point of order. When this does happen, it is what's known as an "unauthorized appropriation." In addition, language in appropriations bills cannot change the terms of enacted authorizations.

This obstacle is not as restrictive as it may appear. Points of order are not self-enforcing,

as a member must raise a point of order for it to take effect. In the House, points of order can be waived by special order of the Rules Committee. In the Senate, a 3/5ths majority is necessary for a waiver. And this point of order has limited application. It does not apply to *limitations* that proscribe or prescribe funding certain activities, unless they explicitly amend, repeal or enact authorizing legislation.

What's more, there is ample evidence of unauthorized appropriations surviving year after year. The Congressional Budget Office produces a report each year itemizing unauthorized appropriations that continue to pass each year. Therefore, the point of order must be waived from time to time.

Yet there are other ways this power is limited, such as through the presidential veto. Just like any other bill, appropriations bills are subject to a possible veto, which can be overturned only by a two-thirds majority in the House and Senate. Further, the president could also choose to not comply with directives included in an appropriations bill. Someone must then enter litigation to force presidential compliance. If such a dispute were to enter the courts, Congress's authority would likely be affirmed. Many constitutional law experts have asserted Congress has the constitutional authority to construct rules that guide military affairs.

Opportunities to Influence Policy

So when can Congress use this power? Three opportunities will soon present themselves: the extension of the FY 2007 Continuing Resolution in late January or early February, the enactment of the FY 2007 supplemental war appropriations request expected in February, and the enactment of FY 2008 Department of Defense appropriations bill later in 2007. All of these legislative vehicles will send funding to the war efforts in Afghanistan and Iraq, and all can be amended should Congress so choose.

Congressional prerogative over war policy in appropriations bills would have precedents as well. The Center for American Progress has compiled an expansive list of examples where Congress has shaped war and foreign policy through the appropriations process. Thus, if Congress wants to make binding changes in war policy, the appropriations process affords ample opportunity.

Transparency Makes Early Appearance in the New Congress

In the 110th Congress, transparency provisions have quickly moved into a central role in efforts to bring about greater oversight and accountability. From lobbying reform to national security oversight, the new Congress has made legislative strides toward a more open government.

National Security

Since 9/11, the Bush administration has liberally exercised executive powers to track and unilaterally act on potential terrorist threats. Accompanying the increase in executive powers has been the excessive use of secrecy and controversies created over government spying and other data collection efforts. The new Congress recognizes that transparency is a central part of greater oversight and accountability in this area. The new Congress has called for greater oversight of government contracts in Iraq, and efforts have been made to ensure that the executive exercises transparency in its collection and analysis of personal information. The Federal Agency Data Mining Reporting Act of 2007 (S. 236) was introduced by Sens. Russell Feingold (D-WI) and John Sununu (R-NH) to require the government to report on any efforts to use data mining technologies and to circumvent privacy protections already in place.

Whistleblower Protection

Whistleblower protections have long served to ensure greater transparency in government practices and to uncover government abuse. However, court decisions and lackluster support from government agencies have weakened whistleblower protections over the years. Sen. Daniel Akaka (D-HI) introduced the Federal Employee Protection of Disclosures Act (S. 274) with bipartisan support to prevent retaliatory actions against government employees who expose government fraud, waste or abuse. "If we fail to protect whistleblowers," Akaka stated, "then our efforts to improve government management, protect the public, and secure the nation will also fail."

Ethics Reform

The Democrats were, to a great extent, swept into power on the promise to reform corrupt processes in Washington, which catered to lobbyists and subverted the public interest. In its first month of operations, the Senate passed a package of ethics reform measures, a central theme of which is greater transparency and disclosure. The Legislative Transparency and Accountability Act (S. 1) includes the following transparency provisions:

- Conference reports are required to be made available on the Internet at least 48 hours before they are considered.
- Information on approved travel and lodging gifts and the meetings involved in such travel must be posted on the member's official website.
- Greater lobbying disclosure requirements along with the requirement that such lobbying disclosure forms be submitted in an electronic format so that they can be provided to the public on the Internet in a searchable database.
- Requirement that all earmarks be publicly available on the Internet along with their intended justifications at least 48 hours before they are considered.
- Requirement that all committees and subcommittees have to release a transcript, video or audio recording of each meeting within 14 days.

These provisions will go a long way toward ensuring greater transparency and

accountability in government practices. Though the Legislative Transparency and Accountability Act passed the Senate 96 to 2, it will need to pass the House and be signed into law by the president.

As Congress continues to exercise its oversight responsibilities, we expect to see the continual articulation of the need for transparency and open government. It is likely that Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) will reintroduce bills to improve the government's implementation of the Freedom of Information Act, which they have previously proposed. On the House side, Rep. Henry Waxman (D-CA), a longtime proponent of government openness, is also expected to introduce legislation addressing public access. Dating back to the financial reforms of the New Deal, the requirement to disclose information about an institution's practices has proven to be an effective method of preventing abuse and waste and promoting efficiency.

NSA Warrantless Spying Program Shut Down, but Questions Remain

President George W. Bush will not reauthorize the National Security Agency's (NSA) Terrorist Surveillance Program (TSP) through secret Executive Order, according to the U.S. Department of Justice (DOJ). Attorney General Alberto Gonzales announced in a Jan. 17 letter to lawmakers that DOJ will instead seek court orders from the Foreign Intelligence Surveillance Court (FISC), and that henceforth, the program will operate in compliance with the Foreign Intelligence Surveillance Act (FISA). While the announcement and the increased accountability are welcomed by many of the program's critics, many questions remain unanswered.

The discovery that President Bush authorized the NSA to spy, without warrants, on the international communications of U.S. citizens was reported by *The New York Times* in December 2005. The battle over authority and oversight that ensued between the Bush administration and Congress played out for much of 2006. Many members of Congress were outraged that the White house did not inform relevant congressional committees on intelligence and judiciary about the program. The Bush administration vigorously fought to keep details of the program secret and tried, without success, to pass legislation that would have retroactively legalized the spying program.

There are currently over thirty court cases challenging various aspects of NSA's TSP and data-mining program. It is unclear what the fate will be of the cases challenging the legality of the NSA program and whether this change in policy by the Bush administration will affect those cases. One court, the U.S. Court for the Eastern District of Michigan, has already found the surveillance program to be in violation of the First and Fourth Amendments and the separation of powers doctrine. The government has appealed the ruling to the U.S. Court of Appeals for the Sixth Circuit, and based on the new FISC oversight policy, has already moved to dismiss the case, arguing that it is now moot. The current NSA cases may go forward despite the change in policy since the

president still maintains that he has the right to wiretap without a court order.

It is also unclear what role Senate and House judiciary and intelligence committees in the Democratically-controlled Congress will play. In a Senate Judiciary Committee hearing shortly after the Justice Department announcement, Gonzales dodged questions concerning specifics of the program and the FISC decision. Of central concern is whether or not the FISC order granted broad authorization for the whole program or only particular wiretaps. Both the *New York Times* and the *Washington Post* have reported that the FISC orders are a hybrid between the two. If the former, the order and the program may still violate the Fourth Amendment, which requires particularized orders for surveillance. Gonzales rebuffed efforts by Sen. Patrick Leahy (D-VT), chairman of the Senate Judiciary Committee, to obtain the text of the decision issued by FISC. Similarly, Sen. Charles Schumer's (D-NY) efforts to discover specifics of the program's operations and of the order's requirements met with little cooperation from Gonzales. These evasive tactics appear to indicate that while the administration has submitted the NSA surveillance program to FISC oversight, it is not prepared to accept congressional oversight as well.

Serious questions concerning the specifics of the NSA program and the FISC decision need to be answered in order to ensure proper oversight and accountability. Moreover, the president's claim to maintain the power to wiretap without a warrant should be scrutinized by the courts in the NSA cases. Without judicial resolution on the issue, the president could secretly resume warrantless wiretaps on American citizens. In fact, the warrantless wiretapping of American citizens could be occurring right now in a program outside of TSP.

President Bush Amends Federal Regulatory Process

On Jan. 18, President George W. Bush issued amendments to Executive Order 12866 on Regulatory Planning and Review. The most notable of the changes will require federal agencies to: implement a stricter market failure criterion for assessing the need for regulation; require agencies to develop a summation of total costs and benefits each year for all proposed regulations; install a presidential appointee as agency Regulatory Policy Officer; and subject "guidance documents" to the same White House Office of Management and Budget (OMB) review process as regulations. Bush's amendments do not have the force of law but significantly change E.O. 12866, which figures prominently into the nation's regulatory process. The amendments will impact the way in which federal agencies go about creating rules and enforcing laws.

The first of Bush's amendments places greater emphasis on the identification of a "specific market failure" before an agency can assess whether or not to regulate. This amendment gives examples of market failures as externalities, market power and lack of information.

The previous text of the E.O. called for agencies to identify a problem in need of regulation and only suggested market failure as an example. The amended text calls first for identification of a "specific market failure" and then other "specific problems," such as the failure of public institutions. The amendment occurs in a section titled "Statement of Regulatory Philosophy and Principles."

Agencies will also now be required to evaluate all of their proposed regulations as a whole, according to the amended E.O. Under the status quo, agencies are to prepare a Regulatory Plan each year. The Plan is to include the most significant regulations upon which an agency will endeavor. Each proposed regulation is to include a cost-benefit analysis, as well as cost-benefit analyses for reasonable alternatives.

Bush's amendments require one additional obligation of federal agencies in the preparation of their Regulatory Plans. Agencies are now to prepare an "estimate of the combined aggregate costs and benefits of all ... regulations planned for that calendar year to assist with the identification of priorities."

Another amendment changes the status of an agency's Regulatory Policy Officer. Under the E.O., each agency is to have a designated Regulatory Policy Officer reporting directly to the agency head. According to the original E.O.: "The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations."

Bush's amendments do not alter the responsibilities of the Regulatory Policy Officer, but do require each agency to designate a presidential appointee to that position. Each agency will have 60 days to comply with this requirement.

Several amended sections of the E.O. move agency "guidance documents" closer in status to that of agency rules. Federal agencies use the term "guidance document" to classify statements that clarify or interpret rules. Agencies often use these statements to guide agency regulators in the hands-on enforcement of rules. Unlike agency rules, they are not mandatory.

Bush's amendments subject guidance documents to the same review process as agency rules. In effect, this means agencies will submit guidance documents to OMB's regulatory arm, the Office of Information and Regulatory Affairs (OIRA), where administrators will scrutinize them in the same way as they do regulations. OIRA will manage guidance documents in order to ensure a stated need for, and consequences of, the proposed guidance.

Much in the same way as it treats regulations, OIRA will subject "significant" guidance documents to a more strenuous review. Among other criteria, "significant" regulations and guidance documents are those expected to cause an annual effect of $100 million or more on the economy. OIRA will exert greater influence in the issuance of significant guidance documents by requiring an advanced draft of the statement. OIRA also reserves

the right to request consultation with the agency before final issuance of the guidance document.

These amendments mark the second time Bush has altered E.O. 12866, and are by far the most significant amendments made to the E.O. since President Clinton issued it in 1993. The E.O. sets the regulatory philosophy for the federal government, mandates the use of market tools for promulgating regulations, and calls for the OIRA review of agency rules. Though the Administrative Procedure Act outlines the formal rulemaking process, in practice, formal rulemaking procedures are rarely used; E.O. 12866 has been the basis for the regulatory process since Clinton used it to replace two Reagan administration executive orders.

There had been rumblings about modifying the E.O. over the past year or so as OMB had proposed changes in the way guidance documents are handled by agencies. However, it was a surprise to see the amendments include the addition of the market failure criterion.

Bush's amendments will affect the regulatory process in several ways. First, the new emphasis on a market failure criterion codifies a free-market ideology in the E.O. Though this criterion is not a requirement, its appearance in the "Statement of Regulatory Philosophy and Principles" allows it to set the tenor for the entire federal regulatory process. Presumably, OMB will need to provide information to agencies on how to interpret this new analytic requirement. Many in the public interest community fear this addition to the E.O. will become another means to reducing public protections.

Second, aggregating the costs and benefits of rules may change the standard by which proposed rules are prioritized. This amendment may make cost-benefit analysis the preeminent tool for determining which regulations to pursue even when the comparison of rules crosses agency lines. Former OIRA administrator John Graham, current nominee Susan Dudley, and other proponents of free-market solutions have suggested aggregating total costs and benefits as a step toward a regulatory budget. A regulatory budget is a way of choosing where to regulate based upon economic impact, rather than public need.

Third, the new Regulatory Policy Officer requirement mandates the designation of a political appointee to the position of regulatory chief within each agency. Many agencies already have political appointees reviewing and approving proposed rules. Yet the amendment to the E.O. suggests a further politicizing of the regulatory process. The Officer is to report directly to the agency head, often a cabinet-level Secretary.

Last, OIRA's stricter controls on guidance documents may hinder an agency's ability to enforce law by slowing down the process by which agencies issue these guidelines. This amendment provides OIRA with an opportunity to take a greater role in agency procedures.

With that in mind, the same day that Bush issued these amendments, OMB issued its "Final Bulletin for Agency Good Guidance Practices." The Bulletin sets forth policy and procedures agencies should follow internally when formulating guidance documents. The Bulletin works in concert with Bush's amendments, outlining ways in which agencies can write guidelines that better meet the new E.O. procedures.

OIRA's role in the issuance of agency guidance documents is likely to be the most significant of Bush's amendments. Rick Melberth, Director of Regulatory Policy for OMB Watch, says, "By mandating a review of interpretive documents like guidance documents and manuals, OIRA is adding another means of delaying agency actions required by Congress and further threatening public health and safety protections."

National Research Council Strongly Objects to OMB Risk Assessment Bulletin

A Jan. 11 National Research Council (NRC) report found the Office of Management and Budget's (OMB) Proposed Risk Assessment Bulletin to be "fundamentally flawed." The report contained concerns similar to those raised by OMB Watch and Public Citizen in comments submitted in August 2006. OMB asked NRC to review the document after its release in January 2006. NRC suggested the Bulletin be withdrawn completely. Following the release of the report, OMB announced that it will go back to the drawing board to "develop improved guidance for risk assessment."

The Bulletin contained a set of guidelines to govern all risk assessments and included technical standards for all federal agencies to use when conducting risk assessments, as well as other scientific documents. The OMB guidelines would apply to risk assessments conducted as part of issuing or revising health, safety and environmental rules, as well as important scientific studies.

The Council found that OMB's new definition of risk assessment was "too broad and in conflict with long-established concepts and practices." The Bulletin defined a risk assessment as a document instead of a process and the goals outlined, when considered together, indicated "that a risk assessment should be tailored to the specific need for which it is undertaken." The emphasis, according to the NRC evaluation, was on efficiency over quality and stated that the goals outlined did not "support the primary purpose of the bulletin — to enhance the technical quality and objectivity of risk assessments."

The report also recommended that OMB leave technical risk assessment guidelines and standards to each federal agency because one size does not fit all when it comes to risk assessments. The Council stressed concerns over "the likely drain on agency resources, the extended time necessary to complete risk assessments that are undertaken, and the highly likely disruptive effect on many agencies."

As OMB has done with other regulatory tools, the risk assessment approach called for in this release would have created unnecessary delays in the rulemaking process by adding to the already cumbersome process that OMB oversees. The ability of government agencies to protect the public would be compromised by attempts to manipulate science and the risk assessment process. For example, the proposed standards called for the use of central estimates or tendencies instead of statistical ranges. Using this approach puts the most vulnerable populations, who fall outside these "central estimates," at risk in some analyses.

In May 2006, the NRC held a public meeting at which it took comments from a range of organizations interested in the Risk Assessment Bulletin. OMB Watch, the Natural Resources Defense Council, Resources for the Future, and several medical experts gave presentations regarding the impacts of OMB's risk standards. Also submitting comments were representatives from several federal agencies who conduct risk assessments. The NRC used these comments and their own analysis to reach the conclusions in the report.

The rebuke by the NRC is one of the strongest commentaries issued on the trend over the last six years to centralize power over the regulatory process within OMB and move it away from agencies responsible for protecting health, safety and the environment. The administration has consistently used regulatory tools to manipulate science for its own ends, attempted to impose a one-size-fits-all framework on the agencies' use of these tools, and shift the criteria for defining when regulations are necessary away from a health or safety problem and toward market-based criteria. The strongly-worded NRC evaluation should provide a Congress interested in executive oversight with a strong example of the dangers of this regulatory trend.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)