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Criminal Investigation of Utah Mine Officials Urged

On May 8, Rep. George Miller☼ (D-CA), chair of the House Education and Labor Committee, released the results of a nine-month committee investigation into the collapse of the Crandall Canyon mine in Utah. In the memorandum summarizing the investigation, Miller reveals that he sent a letter of criminal referral to the U.S. Department of Justice (DOJ) recommending the agency investigate the mine's general manager.

The committee's staff began an investigation in late August 2007, shortly after the mine collapse that entombed six miners and led to the deaths of three rescue workers ten days later. In the memo to committee members, Miller outlined the events that led to the collapse, how the staff conducted the investigation, and its conclusions. The staff reviewed about 400,000 pages of documents and interviewed officials from the mining companies involved with

Crandall Canyon, officials from the Mine Safety and Health Administration (MSHA), and family members of those who were killed in the collapse, among others.

As part of the investigation, the committee took depositions in January from three MSHA officials and tried to depose three employees of the mine operator, including Laine Adair, the general manager of the Crandall Canyon mine. Adair works for Utah-American Energy Inc., which operated the mine and is a subsidiary of Murray Energy Corporation, the owner of the mine. All three employees of the mine operator invoked their Fifth Amendment right against self-incrimination. In February, the committee sought depositions from Robert Murray, president of Murray Energy, and Bruce Hill, president of Utah-American. Both men invoked their Fifth Amendment right as well. Other private sector employees also refused to sit for depositions.

The committee hired its own independent engineering consultants to review the roof control plan submitted to MSHA by Utah-American and approved by the agency in June 2007. At the time MSHA approved the plan, the agency was still inspecting the mine's roof. The inspection began in May 2007 and had not been completed at the time of the August collapse.

A roof control plan is required to detail the stability of a mine's roof and walls where mining operations take place. MSHA must approve the plan in order for work to proceed. According to Miller's memo, the consultant's report questioned the sufficiency of the plan MSHA approved for the Crandall Canyon mine and was highly critical of MSHA's actions leading up to the August incident.

The committee investigation concluded that both the mine operator and MSHA should have realized that the roof control plan was inadequate and that it was unsafe to engage in high-risk retreat mining. In March 2007, another collapse in a section of the mine only about 900 feet away from where the miners died should have been a signal that it was unsafe to conduct retreat mining and that the supporting pillars were unstable. Although no one died in the March collapse, the operator was required to report the incident to MSHA.

In his referral letter to DOJ, Miller questioned the honesty and completeness of the mine operator's report to MSHA. Miller's letter indicated that Adair and other managers not only knew about the March collapse and did not report it as required by regulations, but once they did tell MSHA about the March incident, they "significantly downplayed" its extent.

According to a May 9 article in *The Salt Lake Tribune*, the U.S. attorney for Utah, Brett Tolman, received Miller's referral letter, dated April 28, and takes Miller's request "very seriously." Miller is asking the office to investigate whether charges should be brought against Adair.

Miller wants Tolman's office to investigate whether Adair "individually or in conspiracy with others, willfully concealed or covered up" or made "false representations" to MSHA officials about the March 2007 collapse. Those reporting errors would be a violation of federal law and could warrant criminal prosecution by DOJ. Had MSHA known of the full extent of the March

collapse, it might not have approved the roof control plan.

MSHA is conducting its own investigation of the causes of the August collapse but is still a few months away from finishing it, according to the *Tribune* article.

White House Blocking Whale Protection Rule

Multiple White House offices are working in concert to block a new policy that would expand federal protections for the North Atlantic right whale. The offices, including the office of Vice President Cheney, are questioning the findings of scientists at the National Oceanic and Atmospheric Administration (NOAA), the agency attempting to finalize the rule.

NOAA is proposing speed limits on large ships traveling in Atlantic Ocean whale migration areas during seasons when the right whale is most active. NOAA says collisions with ships are a major cause of death of the right whale — one of the most endangered whale species in the world.

Newly released memos sent from NOAA staff to White House officials indicate the White House is trying to undermine NOAA's conclusion that collisions with ships need to be reduced. The memos were obtained by the Union of Concerned Scientists and released by Rep. Henry Waxman☼ (D-CA) on April 30.

In one memo, NOAA staff responded to objections from the White House Council of Economic Advisors (CEA). CEA reanalyzed statistics in a model intended to determine the relationship between ship speed and the risk to right whales. CEA tweaked certain data points to alter the model's outcome and suggested the relationship is not as strong as NOAA had first concluded. NOAA rejected CEA's claims and called its analysis "biased."

Another memo shows an unidentified White House office questioned NOAA's data on the birth rate of right whales and suggested the species population is increasing more quickly than NOAA had concluded. In response, NOAA officials said they "used the latest, peer-reviewed, scientific data when developing the rule," as required by law.

NOAA also continued to defend its proposal in the memo. NOAA wrote that the option to impose speed limits was chosen because it would "protect right whales while also minimizing economic impact to the shipping industry." NOAA selected the speed limit option from more than 100 policy options considered.

A third memo shows interference by the office of Vice President Cheney. According to the memo, Cheney's staff "contends that we have no evidence (i.e., hard data) that lowering the speeds of 'large ships' will actually make a difference." In response, NOAA staff cited records of collisions in which right whales were killed or seriously injured and again argued in favor of ship speed limits.

Cheney does not often involve his office in specific rulemakings. However, the most frequent targets of his attention have been environmental and homeland security rulemakings, according to an OMB Watch analysis.

The interference in NOAA's effort to protect right whales is being coordinated by the Office of Information and Regulatory Affairs (OIRA). OIRA routinely reviews and comments on federal agency rulemakings and solicits the opinions of other offices or agencies. However, it is rare for White House offices to conduct their own research or to see such extended back-and-forths.

Waxman wrote to OIRA Administrator Susan Dudley asking for an explanation of the White House's role. Waxman wrote, "I question why White House economic advisors are apparently conducting their own research on right whales and why the Vice President's staff is challenging the conclusions of the government's scientific experts."

President Bush installed Dudley by recess appointment in April 2007 after opposition from public interest groups, including OMB Watch, and labor unions. Those groups argued Dudley is ideologically opposed to government regulation and that she would put special interests ahead of public need.

In his letter to Dudley, Waxman notes, "The appearance is that the White House rejects the conclusions of its own scientists and peer-reviewed scientific studies because it does not like the policy implications of the data."

The right whale rule has been stuck at OIRA since February 2007. Under Executive Order 12866, which governs the federal rulemaking process, OIRA is supposed to complete its review in no more than 120 days. OIRA also reviewed the rule before NOAA initially proposed it in June 2006.

Environmental advocates and White House critics believe OIRA should discharge the right whale rule quickly because of imminent danger to the species' survival. According to NOAA, only about 300 of the mammals remain. Two right whales have been struck by ships, and one has likely died, in the time the rule has been under OIRA review, according to Waxman. NOAA officials warn that even one more dead female could set the species on an irrevocable path toward extinction.

Congress is considering a bill that would end the OIRA review. On April 24, the Senate Commerce Committee approved a bill (S. 2657) that would require NOAA to quickly finalize the rule. That bill now awaits consideration by the full Senate. A companion bill has been introduced in the House (H.R. 5536).

OMB Interference under Scrutiny in Congress

The White House Office of Management and Budget's review of federal agencies' draft regulations and scientific information was highlighted in two congressional hearings the week

of May 5. The review process gives Office of Management and Budget (OMB) officials an opportunity to delay or undermine public health and safety standards. One hearing examined the constitutional implications of OMB review, the other the scientific implications.

On May 6, the House Judiciary Committee's Subcommittee on Commercial and Administrative Law heard complaints from witnesses about OMB's role in advancing the unitary executive theory through rulemaking.

Under the unitary executive theory, President Bush and conservative constitutional scholars have argued that the president has complete control over implementation of federal law and can ignore the input of Congress in doing so. Bush has used this rationale to dramatically expand the use of presidential signing statements and to ignore the opinions of Congress in his conduct of the war in Iraq.

White House involvement in agency rulemaking is also a battleground for interpretations of executive power, according to hearing witnesses. Congress often delegates regulatory decision making directly to the head of a federal agency. Because agency heads report to the president, the situation becomes murky when agency officials and OMB officials disagree about the substance of regulations.

Noted administrative law scholar and Columbia University law professor Peter Strauss attempted to clarify these situations by defining the president's role as one of oversight. "Our Constitution is very clear, in my judgment, in making the President the overseer of all the varied duties the Congress creates for government agencies to perform, including rulemaking," Strauss testified. "Yet our Constitution is equally clear in permitting Congress to assign duties to administrative agencies rather than the President. When it does, our President is not 'the decider' of these matters, but the overseer of their decisions."

Other witnesses identified several examples where the White House, specifically OMB, has intruded into the substantive work Congress has delegated to federal agencies. Curtis Copeland of the Congressional Research Service discussed the recent revision to the national air quality standard for ozone, or smog.

U.S. Environmental Protection Agency (EPA) Administrator Stephen Johnson had wanted to set a new, tailored standard that would provide greater protection from ozone to sensitive plant life during the summer months. However, OMB's Office of Information and Regulatory Affairs (OIRA) disagreed and pushed for Johnson to abandon his proposal. EPA and OIRA were unable to resolve their disagreement, and Bush was brought in to settle the dispute.

Bush sided with OIRA, even though the Clean Air Act explicitly gives the EPA Administrator the authority to set standards for ozone exposure. As Copeland pointed out, Johnson ultimately claimed responsibility for the decision not to set a summer standard. "[T]he preamble to the final rule that was published in the *Federal Register* on March 27, 2008, indicated that the EPA administrator made the final decision — although the correspondence between OIRA and EPA, as well as subsequent statements by the EPA administrator, indicate

that the EPA administrator was adopting the President's and OIRA's position on the matter," Copeland testified.

Rick Melberth, director of regulatory policy for OMB Watch, discussed OMB's recent interference in a National Oceanic and Atmospheric Administration (NOAA) rule to protect the North Atlantic right whale. In that instance, White House officials have actively worked to undermine the scientific basis for NOAA's policy recommendation. (See related article in this issue of *The Watcher*.)

The ability of OMB to interfere in the science that informs regulatory decisions "give[s] the president unique and unparalleled power ... to shape the substance of agency rulemakings — all behind the scenes," according to Melberth. He added, "In doing so, the implementation of agency statutory requirements may become secondary to the policies and priorities of the president as interpreted by the OIRA staff."

OMB review also drew attention in the Senate. On May 7, an oversight hearing of the Senate Environment and Public Works Committee examined the scientific basis for regulatory decisions at EPA. Throughout the hearing, panel members and witnesses pointed to OMB as a barrier to strong, science-based environmental and public health protections.

In one example, senators and witnesses discussed EPA's recent changes to its process for evaluating the toxicity of industrial chemicals. Under the revised process, EPA allows OMB to review draft versions of its scientific findings and allows OMB to solicit the opinion of other federal agencies or outside interests.

David Michaels, director of the Project on Scientific Knowledge and Public Policy at George Washington University, called OMB's involvement "a black hole" because the scientific studies "go in [to OMB] and they don't come out." A recent Government Accountability Office report concluded that OMB's presence in the chemical assessments can sometimes lead to years of delay.

Sen. Sheldon Whitehouse☼ (D-RI) chided the agency for the lack of transparency associated with OMB's role in the chemical assessments. Although EPA claims the process is transparent, its communications with OMB are classified as deliberative and are not made available to the public. In the hearing, Whitehouse asked rhetorically, "What could be less transparent than secret meetings with OMB?"

Whitehouse also suggested that, unlike EPA, OMB officials do not carry the scientific qualifications requisite to review these assessments.

The Senate panel also heard from Francesca Grifo, the director of the scientific integrity program at the Union of Concerned Scientists (UCS). Grifo testified about a recent survey conducted by UCS that found widespread political interference in the work of EPA scientists. Of the 1,586 EPA scientists that responded to the UCS survey, nearly 100 explicitly identified OMB as a hindrance to scientific work at the agency. In her testimony, Grifo recommended,

"The expanded reach of the Office of Management and Budget must be pushed back."

EPA Official Forced Out for Being Effective

U.S. Environmental Protection Agency (EPA) Region 5 administrator Mary Gade felt the full force of Dow Chemical's influence in Washington when on May 1, she was told to resign or be fired by June 1. Gade, who used to represent industries and often advocated against increased regulation, was on the other side of protracted negotiations with Dow over clean-up of dioxin contamination at its plant in Midland, MI. Gade chose to resign following the ultimatum.

Gade, appointed as head of Region 5 (which covers Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin) by President Bush in September 2006, is an EPA veteran and former director of the Illinois EPA, where she co-founded the Environmental Council of States, an organization that promotes dialog across states. In past jobs for EPA, both in Region 5 and at headquarters, she worked on emergency response, Superfund cleanup, and pollution prevention.

Though EPA officials refuse to comment on the connection between her strong actions against Dow and her forced resignation, Gade has been much more forthcoming, telling the *Chicago Tribune*, "There's no question this is about Dow. I stand behind what I did and what my staff did."

Years of Dioxin Contamination

A regional institution, Dow Chemical Company is one of mid-Michigan's leading employers. The Michigan Operations manufacturing site in Midland is Dow's original production site. In operation for more than 100 years, it spans 1,900 acres.

The mustard gas used in World Wars I and II and the herbicide Agent Orange are among the many chlorinated chemicals that Dow has manufactured at the Midland site. A byproduct of chlorophenol production, dioxin wastes were originally disposed of in on-site ponds, which were allowed to overflow into the Tittabawassee River as needed. Dow released dioxin directly into local waterways for years this way, until EPA outlawed the practice in the mid-1980s.

EPA classifies dioxin as a persistent, bioaccumulative toxin (PBT), a category of chemicals considered to be the most dangerous. Even among PBTs, dioxin is recognized as one of the most toxic chemicals known to humans and is measured on a scale many times smaller than other PBTs. The Toxics Release Inventory threshold for dioxin is 0.1 grams, as opposed to the 10-pound threshold for mercury or 100 pounds for lead. Peer-reviewed studies have implicated dioxin as a cancer-causing agent and in immune and reproductive system disruption.

Dow has been aware of the human health threat of dioxin since the mid-1960s, but the company initially disavowed any responsibility for its presence in the Midland area, claiming

forest fires and wood-burning fireplaces to be the culprit.

The Midland Clean-Up Dispute

In the mid-1980s, EPA began to take notice of dioxin contamination around Dow's Midland plant when fish in the Saginaw Bay were found with high levels of dioxins in their bodies. After first denying responsibility for the toxins, Dow later resisted any claims of dioxin's dangerous health effects. The company used such positions to engage in protracted negotiations with EPA over the issue for more than a decade.

Clean-up guidelines were finally negotiated in 2003, but Dow then continuously delayed implementation, taking only minor steps outlined in the plan. Dow has disputed both the size of the contaminated area, which currently includes 50 miles around the Midland plant, and the severity of the area's contamination, formally filing suit this February.

Dissatisfied with continual wrangling with Dow since she became the EPA regional head in 2006, Gade took increasingly aggressive measures over the past year. She invoked emergency powers in the summer of 2007 to compel Dow to clean up three particularly contaminated areas. In November 2007, she ordered dredging in the waterways that revealed dioxin levels of 1.6 million parts per trillion, *17,000 times* the level that triggers a state clean-up. This is the highest level of dioxin contamination ever recorded in the U.S.

After Dow continued to delay, Gade cut off negotiations in January, and the Michigan Department of Environmental Quality (DEQ) slapped Dow with an "interim response action" (IRA) on April 16, directing the company to take immediate action on parts of the clean-up plan. Two weeks later, EPA gave Gade their ultimatum to quit or be fired. Five days after Gade's forced resignation, on May 6, Dow appealed the IRA determination in yet another lawsuit.

Community Outcry

Local residents have long battled for clean-up of Midland waterways and soils in the area. At a May 7 community briefing, Michigan DEQ and Dow officials assured residents that aspects of the clean-up would continue, regardless of the legal actions, but did not address Gade's resignation.

Tittabawassee River Watch and the Lone Tree Council, local citizens' groups in the Midland area, are not reassured. "Denial and delay has been part of Dow's game plan for years," Michelle Riddick, a Lone Tree Council member, told the *Tribune*. "They still haven't delivered." Tittabawassee River resident Carol Chisholm is fed up. She said, "We pay tax-dollars and expect those agencies who work for us to respond." A group of residents has already sued Dow, alleging that the pollution has devalued their property.

Rep. John Dingell☼ (D-MI), chair of the House Energy and Commerce Committee, is taking notice. He has directed his oversight staff to look into the matter. Sen. Sheldon Whitehouse (D-

RI) protested Gade's resignation in a floor speech as "just the latest in a growing pile of evidence of troubling and destructive forces ... from an administration that values compliance with a political agenda over the best interests of the American people." Whitehouse called for a May 7 hearing to investigate political interference at EPA, but he is still not satisfied after hearing from the agency. Whitehouse was not convinced by Assistant Administrator for Research and Development George Gray's testimony, praising only his "ability to say preposterous things and be completely straightfaced throughout."

Meanwhile, Dow continues to maintain that the Midland area, a designated Superfund site, is safe. As company spokesman John Musser told the *Chicago Tribune*, "There is all of this mystique about dioxin. Just because it's there doesn't mean there is an imminent health threat."

The Rule of Secret Law in the Bush Administration

The Senate Judiciary Subcommittee on the Constitution held a hearing on the proliferation of secret law in the Bush administration. In particular, the subcommittee focused on the role of the Office of Legal Counsel (OLC) in the Justice Department in the development of secret law governing the executive branch.

The hearing began with disagreement between the chairman and ranking member, Sens. Russ Feingold (D-WI) and Sam Brownback (R-KS), respectively, over what constituted secret law. Feingold argued that OLC memoranda and Foreign Intelligence Surveillance Court opinions are binding law and are often issued in secret. Brownback maintained that those issues do not comport with the notion of "secret laws," which he argued were limited to secret agency rules and regulations.

The OLC provides legal advice to the president to guide his decisions and executive agency actions. OLC memoranda are regarded as binding on the executive branch and often go unreviewed by courts and Congress. The OLC is infamous for John Yoo's secret 2002 torture memorandum, which limited the definition of torture to interrogation which results in "death, organ failure or the permanent impairment of significant bodily function."

A set of principles were developed by nineteen former OLC lawyers to guide the office in the wake of the recent controversies. The guidelines recommend, "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure."

Dawn Johnsen, former acting head of the OLC, testified that a contributing factor in the failure to provide the president with accurate legal advice is the failure to make such advice public. "OLC has been terribly wrong to withhold the content of much of its advice from Congress and the public — particularly when advising the executive branch that in essence it could act contrary to federal statutory constraints."

Johnsen stressed that the OLC should be required to disclose opinions that state the president

has the authority to operate in contravention to existing statutes or executive orders. It is particularly important that these memoranda be released, because without such disclosures, Congress and the public would not be given any notice that the president is not abiding by written law. Moreover, OLC memoranda often persist as binding on the executive without being reviewed by courts because they are never challenged or even known to exist.

John Elwood, current head of the OLC, disagreed. He argued that the president needs confidential advice and that the relationship of the OLC to the president should be regarded as an attorney-client relationship. "[T]he Executive Branch must be able to come to a unified interpretation of the law in order to carry out the President's constitutional duty to execute the law faithfully, and doing so necessarily requires the ability to seek and obtain confidential, authoritative legal advice within the Executive Branch," said Elwood.

Elwood also noted that the OLC under his leadership has maintained consistent publication procedures that resulted in a significant portion of memoranda being published on the office's website every year.

Steven Aftergood of the Federation of American Scientists countered Elwood, stating that there has been a "precipitous decline" in the number of OLC memoranda published during the Bush administration. From 1995 to 1997, there were 117 memoranda published, but from 2005 to 2007, there were only 23.

William Leonard, former director of the Information Security Oversight Office, remarked that the OLC torture memorandum never should have been classified in the first place. "The classification of this memo was wrong on so many levels," noted Leonard. It did not contain any sensitive information, only legal analysis, did not identify who marked the document as classified, and did not contain any reasons for why it was classified, all in violation of classification procedures and all done, presumably, by a high-level government official in the Justice Department. Moreover, the administration has never pursued an investigation of who inappropriately classified the document.

The OLC has also been at the center of controversy regarding its advice on the National Security Agency's secret warrantless wiretapping program and the secret Central Intelligence Agency prisons.

The role of the Foreign Intelligence Surveillance Court's issuance of secret opinions, the issuance of secret presidential directives, and the Transportation Security Administration's issuance of secret security regulations were also covered during the hearing. All of these activities have created an environment in which the American public is subject to secret laws, a notion that is anathema to a democratic government. The hearing also attempted to grapple with the role of Congress in examining the magnitude of the problem and restraining the rule of secret law.

Sen. Patrick Leahy☼ (D-VT), chairman of the Senate Judiciary Committee, noted, "Secret law

is not a check on government; when law is kept secret, the rule of law suffers."

White House Issues Memo on Controlled Unclassified Information

The White House released a memorandum on May 9 establishing new rules governing the designation and sharing of Controlled Unclassified Information (CUI). By creating a single designation and consistent procedures, the memo attempts to resolve the growing problem of multiple Sensitive But Unclassified (SBU) designations, which slow the sharing of information.

The memo replaces the multiple SBU categorizations and establishes three universal CUI designations for all agencies; agencies are then barred from creating new CUI categories unless prescribed by the National Archives and Records Administration (NARA). Open government advocates have supported simplifying the more than 100 different SBU categories but fear the memo does little to reduce growing secrecy.

In the wake of the 9/11 terrorist attacks, federal agencies created numerous new SBU categories in an attempt to better protect information believed to have the potential to be used to harm the United States. In doing so, the agencies unwittingly expanded already existing, but little recognized, difficulties that such vague and inconsistent designations carried. This includes confusion among officials as to how to manage information; less and slower sharing of designated information with other federal, state, and local agencies regardless of their need for the information; and near-automatic withholding of such information from the public.

The memo orders several changes that will go far in simplifying the information sharing problems, not the least of which is the creation of CUI as the single SBU category for federal agencies, coupled with a clear ban on the creation of new agency-created SBU categories. However, the definition of CUI remains very broad: information that is "pertinent to the national interests of the United States or to the important interests of entities outside the Federal Government" and requires protection from unauthorized disclosure, special handling safeguards, or prescribed limits on exchange or dissemination. Additionally, the memo appears to only establish a framework for managing "CUI terrorism related information," leaving any CUI that is unrelated to terrorism, which could be a considerable amount of information, largely unaddressed.

The memo creates three possible designations:

- Controlled with Standard Dissemination — Information that requires standard safeguarding to reduce the risks of unauthorized disclosure and dissemination is permitted to the extent that it is reasonably believed to further the execution of a lawful or official purpose.
- Controlled with Specified Dissemination — Information that requires standard safeguarding to reduce the risks of unauthorized or inadvertent disclosure and dissemination is permitted only with additional instructions.

- Controlled Enhanced with Specified Dissemination — More stringent safeguarding measures than those normally required as unauthorized disclosure would risk substantial harm, and material contains additional instructions on what dissemination is permitted.

The absence of any Controlled Enhanced with Standard Dissemination designation implies that any information requiring enhanced safeguarding procedures automatically qualifies as also needing specified dissemination instructions.

The White House memo tasks NARA with being the "Executive Agent" in charge of the new CUI effort, with detailing the safeguarding procedures and dissemination guidance, and several other responsibilities, including:

- Develop and issue CUI policy standards and implementation guidance
- Establish and chair a CUI Council
- Establish, approve, and maintain safeguarding standards and dissemination instructions
- Publish the CUI safeguarding and dissemination standards in the CUI Registry
- Monitor department and agency compliance with CUI policy, standards, and markings
- Establish baseline training requirements and develop a CUI training program to be implemented by departments and agencies
- Provide appropriate information regarding the CUI Framework to Congress; to state, local, tribal, and private sector entities; and to foreign partners
- Advise departments and agencies on the resolution of complaints and disputes concerning the proper designation or marking of CUI
- Establish a process that addresses enforcement mechanisms and penalties for improper handling of CUI.

It appears the purpose of this effort is to eliminate bureaucratic difficulties and to create smoother information sharing with little concern for public access to the information. While the memo's instructions that "CUI markings may inform but do not control the decision of whether to disclose or release the information to the public, such as in response to a request made pursuant to the Freedom of Information Act (FOIA)" acknowledge the possibility that CUI designation could prevent public disclosures of information that merits release, they do little to prevent such outcomes.

The memo offers no instructions that indicate the government is concerned with limiting the amount of information designated CUI. There are no instructions to restrict the number of officials capable of assigning the CUI markings and only some simple acknowledgement that the designation should not be used to conceal information on waste, fraud, or abuse, nor assigned to information that is either already public or ordered to be made public by statute. There are also no time limits on CUI designations; when one considers the fact that classified information is automatically declassified after 25 years unless officials intervene to maintain the information restrictions, it seems strange that CUI designations will be permanent. It may be that NARA will create such procedures to prevent the growth of CUI from encroaching on

public access in the policy standards and implementation guidance the agency is tasked with, but the White House memo does not specify that such steps be a part of the effort. Moreover, it is not clear whether NARA will be given additional resources to implement these new tasks.

For years, the government has been working to resolve this multi-headed SBU problem and streamline the sharing of unclassified information. In December 2005, President Bush issued a memorandum directing SBU procedures to be standardized across the government. Two years later, in December 2007, the Department of Defense issued a memorandum to prepare government officials for an administrative overhaul of the numerous SBU categories to the single CUI designation. The memo explained that a policy had been recommended to the president and that approval was expected shortly. Open government advocates had requested a meeting to discuss the issues, but that request was ignored. The current CUI memo explaining the new policy to executive departments and agencies is not the final step in this long journey; work remains to ensure that the public has access to unclassified information.

Whistleblower Week in Washington

Whistleblower advocates convene in Washington, DC, this week (May 12-16) for events dedicated to honoring whistleblowers, promoting their protection, and educating the public and Congress about the most pressing issues for whistleblowers today.

Whistleblowers play a vital role in ensuring we have a functioning, effective, and accountable government. When governmental checks and balances fail to prevent waste, fraud, and abuse, the responsibility to call notice to a problem and hopefully bring about a resolution often falls to employees. Unfortunately, the Whistleblower Protection Act of 1989, which was enacted to protect federal employees against reprisals for the exposure of government inadequacies, has been rendered largely toothless by judicial decisions. Additionally, there have been recent administrative policies that seek to control and/or limit the speech of scientists, researchers, and policy personnel that might give voice to facts and opinions that differ from the current political agenda.

The whistleblower events this week are part of an ongoing effort over the past several years to restore the needed protections to those employees who have the courage to stand up and draw notice to unaddressed problems. Sponsors hope the events will raise awareness of the shortcomings of our current whistleblower policies among members of Congress as well the general public.

This is the second annual Washington Whistleblower Week (W3), which has organized hearings and workshops on Capitol Hill with congressional leaders' participation. The Government Accountability Project, No FEAR Coalition, Semmelweis Society, U.S. Bill of Rights Foundation, and National Whistleblower Center are among the sponsors of these events.

In a coordinated effort, the International Association of Whistleblowers is simultaneously

hosting the International Assembly of Whistleblowers (IAW), in which public interest groups have gathered to strategize and lobby Congress for greater whistleblower protection.

Some events of note at both conferences:

- Congressional No FEAR Tribunal: Ongoing testimony all day Wednesday, May 14, to members of Congress as part of W3. Public and private sector employees and public interest professionals will provide their insight about the issues and solutions for strengthening whistleblower protection. Rep. Sheila Jackson Lee (D-TX) will chair the event.
- Walter E. Fauntroy No FEAR Awards: May 14 awards reception for members of Congress and citizens who have had a significant role in advancing whistleblower rights.
- Judicial Accountability: IAW-focused events on Thursday, May 15, to discuss issues of whistleblower oversight and accountability in the courts. A debate in the morning will provide context for an afternoon of testimony from a diverse, bipartisan panel.
- Whistleblowers at International Organizations: IAW panel on May 15 focusing on the lack of protections for employees at International Financial Institutions (i.e., World Bank). These institutions operate under the cover of special immunity from national laws and present a particular set of challenges.

The 110th Congress has made significant progress toward re-establishing strong whistleblower protections. Both the House and the Senate have passed bills to reestablish strong whistleblower protections, going beyond the 1989 provisions, but their differences have yet to be negotiated in conference. Those participating in the whistleblower events this week are being strongly encouraged to contact their representatives and senators to express support for key provisions in the respective bills.

Both bills close many of the loopholes left open in the 1989 law and widened by court rulings. The House Whistleblower Protection Enhancement Act of 2007 (H.R. 985) includes federal contractors under the protection mantle, while the Federal Employee Protection of Disclosures Act (S. 274) limits its scope to federal employees. Though President Bush has promised a veto, the bills have strong support and could possibly override a veto should it come with enough time remaining in the session for Congress to respond.

Gas Tax Holiday Would Yield Little for Consumers

Increasing gasoline prices have spurred federal lawmakers to propose policies designed to help consumers at the pump. One such proposal that has garnered considerable attention is a "gas tax holiday." Unfortunately, this proposal would do little for consumers because it would be unlikely to lower the price of gas.

The proposal would entail suspending the 18.4-cent-per-gallon federal tax on gasoline for the summer. Not only has the proposal received wide media attention, it has been universally

panned by experts of all ideological stripes (including *Motor Trend* magazine). At the heart of the criticism is the likelihood that the tax break would mostly serve to inflate the profits of oil and gas companies, and consumers would enjoy little benefit. The basic economic principles described below explain why the benefits of a sales tax break do not wholly accrue to consumers.

The willingness and ability of producers (suppliers) to sell a given amount of gasoline at a given price is known simply as the "supply of gasoline." To maximize profits, gas producers will supply the market with larger quantities of gas as the price of gas increases. For example, when the price of gasoline is $4 per gallon, suppliers will maximize profits by supplying to the market 1 million gallons; when the price of gas is $3.50 per gallon, profits are maximized when 900,000 gallons are sold.

The behavior of the consumer (buyer) is described by the quantity of gas he or she is willing to purchase at each price, and typically this quantity decreases as prices increase. This behavior is known as "demand." And rather than profit maximization, consumers are driven by utility maximization. (Utility is simply the value, or usefulness, that a consumer gains from consuming goods.) When suppliers and buyers meet in the marketplace and exchange goods for dollars, a price will be determined.

When the government becomes a participant in the market — when it imposes a tax on goods — the response of market participants can be described in terms of either a change in demand or a change in supply. To the consumer, it appears that suppliers are supplying smaller quantities of gas at each price (i.e., supply is reduced). To the supplier, it appears that buyers are willing and able to purchase smaller quantities of gas at each price (i.e., demand is reduced). Described either way, the result is an increase in price and a decrease in the quantity of gas sold on the market.

But who would benefit if the gas tax is sent on a "holiday"? If suppliers pay the tax, their profits will increase during a gas tax holiday. If buyers pay the tax, then their ability to purchase other goods is enhanced if the gas tax is temporarily repealed. And, the proportion that each pays, the incidence, is determined by how responsive each is to changes in price. If the consumer is relatively more responsive to changes in prices (i.e., when prices increase, the decrease in his or her quantity consumed is greater than the increase in quantity supplied), then the producer pays the greater share of the tax and will benefit more than the consumer from a repeal. Vice versa for the consumer.

A suspension of a sales tax, then, mostly benefits the market participant that is less responsive to changes in prices. So, some portion of the tax on gas will go toward higher profits for gasoline suppliers, and the rest will go to the pockets of consumers. As it turns out, according to one study, the gas tax incidence falls almost equally on buyers and suppliers of gas in the United States. If we assume that $9 billion would have been collected in federal gasoline taxes over the summer, then a temporary suspension of the gas tax would have at least four results:

- The Highway Trust Fund would see nine billion fewer dollars

- Gasoline producers (Exxon, Chevron, etc.) would see their profits increase by $4.5 billion
- Motorists would save $4.5 billion — about $40 per driver over the summer
- Motorists would be willing and able to drive more, consuming more gas, spending more time on the road, creating more pollution — and possibly not saving even the $40 per driver over the summer.

A crucial caveat to these numbers, however, is the nature of the short-term supply of gasoline. Decisions of how much gas to produce are made months in advance, and changing production quantities over a three-month period is a costly endeavor that may not even be possible to undertake at this point. This implies that during the summer driving season, a time span for which production decisions have already been made, the ability of producers to change the quantity of gasoline supplied is severely impaired, making suppliers considerably less responsive to changes in gas prices. The upshot is that the vast majority of a "gas tax holiday" tax cut — nine billion dollars — would go toward increasing gas suppliers' profits.

Most major oil companies have been making historic profits in recent years. The largest company, ExxonMobil, reported profits for the most recent quarter of $10.9 billion, the second-largest quarterly profit in U.S. history. This quarter is not an anomaly. Just the quarter before, ExxonMobil reported the largest-ever quarterly profit for a U.S. company at $11.66 billion.

A suspension of the federal gas tax would ultimately inflate the profits of the most profitable companies of the world while providing miniscule relief to consumers. And as motorists would see marginally cheaper gas, they would drive more miles on the bridges and roads that depend on a trust fund deprived of $9 billion in revenues for repairs.

House Foreclosure Legislation Meets GOP Ambiguity

Despite a worsening housing crisis across the country, Congress continues to move slowly to enact legislation intended to ease the burden for homeowners. On May 8, the House adopted comprehensive legislation (H.R. 3221) that would seek to reduce foreclosures in the face of an administration veto threat issued just days before. But Senate negotiations between the chair and ranking member of the Banking, Housing, and Urban Affairs Committee have gone on for weeks, with no deal in sight. Most members' eagerness to pass a bill to address the crisis before Memorial Day has thus far been thwarted by key GOP leaders in Congress and some in the Bush administration.

While the debate in Congress drags on, the nation's housing situation continues to deteriorate. Home prices have fallen ten percent in the last year, and 20,000 more American homes enter foreclosure each week. In just the last two months, the number of homes in foreclosure has gone from one in 557 to one in just 194.

It appeared there was consensus forming around the recently-passed approach in H.R. 3221,

the American Housing Rescue and Foreclosure Prevention Act drafted by House Financial Services Committee Chair Barney Frank (D-MA). The bill would provide $300 billion in mortgage refinance loan guarantees through the Federal Housing Administration (FHA), helping Americans across the country refinance their mortgages and avoid foreclosure.

Yet continuing mixed signals from the administration throughout the spring regarding H.R. 3221 have cast doubt on the bill's prospects. Housing and Urban Development Deputy Secretary Roy Bernardi wrote a letter to Frank on April 24 opposing the bill. "Americans don't want to pay for the risky financial behavior of others," Bernardi said. "And they don't want to make the federal government the lender of last resort, with the private sector dumping bad loans on FHA and the taxpayers themselves."

At the same time, Treasury Secretary Henry Paulson said the administration had already proposed a similar plan and indicated he was open to Frank's bill. "There are not huge differences," Paulson said, within days of the Bernardi letter. "We are behind the objectives. We like some parts of it better than others and we have not issued a veto threat," he told Reuters.

Speculation about the administration's position halted momentarily on May 6 when President Bush released a Statement of Administration Policy (SAP) threatening to veto H.R. 3221. The SAP argued that:

- The administration's FHASecure program "has already helped more than 180,000 borrowers refinance"
- The Frank plan's "$1.7 billion price tag would be passed on to taxpayers who are not participating in this new FHA program. This attempt to shift costs to taxpayers constitutes a bailout"
- Frank's concession to administration demands to include "GSE Reform and FHA Modernization ... in H.R. 3221 is largely symbolic"
- The bill is "likely to prove ineffective. The requirements to write down a portion of the principal balance and to waive prepayment penalties by existing lenders will likely result in only the worst loans being approved by servicers to participate in the program"

Rejoinders by Frank and others have disputed each of these claims. The Congressional Budget Office estimated the Frank plan would forestall at least three times as many foreclosures as FHASecure. OMB Watch estimated the Frank foreclosure prevention plan would, at most, cost the average taxpayer *$4 dollars a year*. Against this backdrop is the cost of the housing crisis, which Princeton Professor Paul Krugman projects will be six to seven trillion dollars in lost home equity value.

It was not just outside analysts and experts who questioned the Bush administration's tactics, as some congressional Republicans openly doubted the sincerity of Bush's veto threat. Sen. Mel Martinez☼ (R-FL), who served as Bush's first Secretary of Housing and Urban Development was quoted in *The New York Times* as being "surprised" by the White House's

actions and felt the inconsistent message and late and "obtuse" threat was issued merely as a negotiating tactic. An even more telling response to the SAP came from the 39 Republican House members who joined the majority in the May 8 vote to pass the Frank bill 266-154. As one of them, Rep. Steven LaTourette☼ (R-OH), told the *Washington Post* after the vote:

> What's offensive is some of the rhetoric. They say it rewards speculators. No, it doesn't. It's limited to homeowners. They say it's a $300 billion bailout. No, it's not. It costs $1.7 billion. Would I have written the bill the way Chairman Frank did? No, but we're not in charge anymore ... People are expecting us to do something.

Whether Congress does anything depends largely on what Senate Banking, Housing, and Urban Affairs Committee Chair and Ranking Member, Sens. Christopher Dodd (D-CT) and Richard Shelby (R-AL), respectively, plan to do with Dodd's housing bill. That bill is modeled on H.R. 3221 but provides up to $400 billion in FHA loan guarantees. Dodd's legislation was originally included in, then dropped from, the Senate housing package adopted on April 10. Dodd recently reintroduced his original FHA loan guarantee proposal in a separate, stand-alone bill.

The final Senate package has been roundly criticized, especially for its tax provisions. The Center on Budget and Policy Priorities reported those provisions "will do little or nothing to help either homeowners or hard-hit communities and that in one case will actually worsen the problems facing local governments."

Prospects for the Dodd bill may have been complicated on May 9 when a front-page article in *The New York Times* broke a story detailing Shelby's real estate interests. The article noted that critics of Shelby believe his "ties to the mortgage industry and the Alabama real estate market, and the generous campaign donations he receives from financial services companies, have distorted his perspective and led him to delay critical legislative remedies" to the point where, some feel, Shelby should not be playing a leading role in drafting solutions to the housing crisis. Frank in particular feels that during the recent negotiations, Shelby has been a major obstacle to passing compromise proposals.

With a cloud over Shelby's role in negotiations with Dodd on a Senate companion piece to the Frank bill, the White House's apparent determination to veto the bill, and continued opposition to it from the GOP congressional leadership, the road ahead for the Frank bill is far from certain. But the salience of the issue and election-year imperatives may push Congress past the current obstacles to enact some kind of relief package before the year is over.

Congressional Hearings Explore Contracting Waste, Fraud, and Abuse

The Senate Democratic Policy Committee (DPC), the political arm of the Democrats in the Senate, has been holding a series of investigatory hearings concerning contracting problems

during the Iraq war. The series of hearings has been aimed at increasing accountability and oversight of the federal contracting process, particularly related to the reconstruction of Iraq and the increased outsourcing of key military functions during the war.

The committee held two hearings at the end of 2007 and has followed those with two more in 2008 in a 14-hearing series dating back to the 109th Congress. The most recent hearing was held May 12, and focused on waste, fraud, and abuse in reconstruction contracts and the failure of anti-corruption efforts by the United States in Iraq. The committee heard testimony from two former State Department officials from the Office of Accountability and Transparency (OAT) — an office designed as the federal government's premier effort to combat corruption in the Iraqi government. Arthur Brennan, the former head of OAT, and James Mattil, the former chief of staff for OAT, testified that the U.S. government repeatedly ignored warnings and recommendations from OAT about corruption in the Iraqi government and kept secret many pieces of information that could embarrass the Iraqi government.

The DPC hearings during the 110th Congress started in the fall of 2007 with two hearings investigating problems with contracting in Iraq. The first hearing, held on Sept. 21, delved into abuses by private security firms operating in Iraq and the lack of protections for whistleblowers who report corruption or waste in reconstruction contracts. The hearings saw two panels of independent witnesses, the first focusing on private security contractors, particularly BlackwaterUSA, amid reports of misconduct by that and other security companies. The second panel heard from witnesses who have been demoted, fired, threatened, and even detained for speaking the truth about Iraq contracting practices.

The DPC held a second hearing in 2007 on Dec. 7, where two additional former contractor employees who had witnessed and reported waste, fraud, and abuse in contracting in Iraq shared their experiences. These witnesses reported a similar pattern of retaliation by their companies after reporting problems. In addition, two defense policy experts, Phillip Coyle of the Center for Defense Information, and Larry Korb of the Center for American Progress, testified about wasteful spending practices within the Department of Defense.

The first DPC hearing of 2008 took place on April 28 and focused on waste and abuse in contracting in Iraq, hearing from two former employees of KBR, Inc., a large defense contractor operating in Iraq, and another witness who was employed by a subcontractor of KBR. The witnesses discussed rampant theft and destruction of military equipment and materials, billing fraud, and contract fraud, including awarding contracts to subcontractors for work that was never completed. The witnesses also reported being retaliated against for reporting misconduct or corruption. Specifically, they suffered threats and detainment.

The recent hearings in the DPC have been particularly timely, as there have been a variety of legislative initiatives introduced in both the House and the Senate in 2008 that would help to bring greater accountability and transparency to the federal contracting process, especially in Iraq. The House has passed a number of these reforms in recent months, but the Senate has not yet taken up those proposals. The proceedings in the DPC hearings continue to confirm the need to enact these reform proposals as a first step in reforming the federal contracting

system.

However, these bills have not been enacted, and there continues to be a need to expose wasteful and corrupt practices and hold contractors and others responsible for abusive behavior. Sen. Byron Dorgan☼ (D-ND), the chairman of the DPC, stated that one of the themes that has emerged from these hearings is the level of impunity contractors in Iraq operate under.

What's more, continued and repeated reports of corruption and waste in federal contracting show there are still significant and consistent problems in the federal procurement process, particularly in defense contracting. In addition, federal government employees who are supposed to oversee contracting are overworked and undertrained. While this workforce has increased 6.8 percent since President Bush took office, federal contracting dollars have increased close to 100 percent (from $219.8 billion in FY 2001 to $430.1 billion in FY 2007).

It is clear more oversight is needed, and the DPC hearings are making an important contribution to that effort. Yet because the hearings are being held in a political setting (the DPC was established by an act of Congress but operates to promote Democratic Party policies), they will be less effective in building momentum for enactment of reforms than traditional Senate hearings. The DPC is filling an oversight void left in the Senate by inaction from the usual, bipartisan committee structure on corruption and waste in federal contracting. The Senate Homeland Security and Governmental Affairs Committee (HSGAC) has held only six hearings since the beginning of 2007 related generally to federal procurement, and only one hearing during that period covered contracting in Iraq. The House counterpart, the Oversight and Government Reform Committee, held 13 hearings related to federal procurement, and 11 of those hearings were directly related to the Iraq war.

Unfortunately, the DPC hearings are unlikely to further contracting reform efforts in the Senate because of the partisan perception of the hearings. The HSGAC needs to focus more attention on the federal contracting process, an apparatus in need of immediate and drastic reform, in order to advance any number of common-sense reforms.

Veterans Administration Bars Voter Registration Drives for Wounded Soldiers

On April 25, the Department of Veterans Affairs (VA) issued Directive 2008-023, "Voting Assistance for VA Patients," allowing voter registration drives in VA hospitals, only to reverse itself on May 5 with Directive 2008-025. Without registration drives, it appears that each veteran will have to request support individually, placing the burden on veterans who are staying in hospitals, long-term care facilities, or nursing homes. Litigation on the issue is pending.

Under the April directive, viewed as a positive response to pressure from voting rights advocates and Capitol Hill, all VA facility directors were to ensure "that the facility has a policy

that addresses assistance to VA patients who seek to exercise their right to register and vote."

The May VA policy states, "It is VHA policy to assist patients who seek to exercise their right to register and vote; however, due to Hatch Act (Title 5 United States Code (U.S.C.) §§ 7321-7326) requirements and to avoid disruptions to facility operations, voter registration drives are not permitted."

A May 6 letter from Sens. John Kerry (D-MA) and Dianne Feinstein (D-CA) to Secretary of Veterans Affairs James B. Peake expressed skepticism about the VA rationale, saying, "The Office of Special Counsel has made clear that federal employees, even those who are considered to be in sensitive positions, may 'assist in voter registration drives.' It is also clear from numerous policy statements issued by the Office of Special Counsel that federal employees can participate in nonpartisan voter registration drives on federal property and on official time. Moreover, the veterans the VA should support are not subject to any restrictions under the Hatch Act — because they are not federal employees." The letter also said, "It appears to us that the Department took one step forward for our veterans and the right to vote by directing that assistance be provided with voter registration and with securing absentee ballots, but then took a large step back by prohibiting voter registration drives."

VA Has Opposed Voter Registration Drives for Months

The VA's latest rejection of voter registration drives follows months of determined opposition by the VA in response to calls for the agency to help veterans vote. Kerry and Feinstein had earlier requested that the VA be designated a "voter registration agency" under the National Voter Registration Act (NVRA) — also known as the "Motor Voter Act." The Act requires states to offer voter registration opportunities at all offices that provide public assistance, services to the disabled, and motor vehicle registration services.

VA Secretary Peake responded to the earlier appeal in an Apr. 8 letter, obtained by AlterNet's Steven Rosenfeld. Peake wrote, "The VA remains opposed to becoming a voter registration agency pursuant to the National Voter Registration Act, as this designation would divert substantial resources from our primary mission." In their May 6 letter, the senators responded by saying, "We would appreciate knowing the type of disruptions the VA envisions might occur during voter registration drives by nonpartisan organizations, such as the League of Women Voters or veterans' organizations, and why any potential disruption could not be addressed by less restrictive means."

California Secretary of State Takes Action

In a request similar to that made by Kerry and Feinstein, California Secretary of State Mary Bowen sent a letter to Peake on May 1, also requesting that the VA register as a "voter registration agency." In her letter, Bowen wrote, "Offering the opportunity to register — or re-register — is particularly important for veterans who change their address as a result of accepting federal benefits, such as entering a VA nursing home, emergency housing, or rehabilitative care center. My goal as Secretary of State is to provide voters with a simple and

convenient registration process."

In a connected case, on June 12, the U.S. Court of Appeals for the Ninth Circuit will hear oral arguments in *Preminger v. Nicholson*. The case challenges the absence of a uniform published VA policy on voter registration, as well as the distribution of unpublished instructions that authorize staff to exercise discretion in allowing or prohibiting voter registration activities. This case follows a decision by the U.S. Court of Appeals for the Federal Circuit in August 2007 in *Preminger v. Secretary of Veterans Affairs* that permitted the VA to exclude voter registration by third-party groups in VA facilities.

Group Plans to Challenge IRS Election Standard

The Alliance Defense Fund (ADF), an Arizona nonprofit organization, has launched an effort to encourage ministers to "preach from the pulpit a sermon that addresses the candidates for government office in light of the truth of Scripture." "Pulpit Freedom Sunday" is planned for Sunday, Sept. 28, slightly more than a month before the presidential election. The group will intentionally use sermons to challenge the Internal Revenue Code's ban on partisan electioneering by 501(c)(3) organizations. It hopes any investigations lead to a lawsuit and a court decision finding the prohibition to be unconstitutional.

The May 9 Wall Street Journal reports this as "the latest attempt by a conservative organization to help clergy harness their congregations to sway elections." ADF argues the ban on election intervention is government intrusion that prevents clergy from advising their congregations, forcing pastors to choose between speaking about candidates and losing their tax-exempt status. Its executive summary states, "Churches have too long feared the loss of tax exempt status arising from speech in the pulpit addressing candidates for office. Rather than risk confrontation, pastors have self-censored their speech, ignoring blatant immorality in government and foregoing the opportunities to praise moral government leaders."

An ADF white paper describes the group's initiative in further detail, outlining its rationale for this effort. ADF believes that the electioneering ban:

- Violates the Establishment Clause by requiring invasive government monitoring of religious organizations' speech to ensure they are not intervening in an election
- Violates the Free Speech Clause because it requires the government to discriminate against speech based solely on the content of the speech; therefore, there are conditions of tax exemption based on refraining from certain speech
- Violates the Religious Freedom Restoration Act (RFRA), which requires that before any law can burden the exercise of religion, there must be a compelling reason, and the government has no compelling reason for the ban

ADF would like 40 or 50 houses of worship to take part. As a part of this litigation strategy, ADF will prepare and provide legal defense for participating pastors. An ADF frequently asked questions sheet explains that the sermons will be written "with the assistance and direction of

the ADF to ensure maximum effectiveness in challenging the IRS. Should the IRS investigate the church, the church may then participate as a client in a lawsuit against the IRS and will assist the ADF in winning the lawsuit by communicating with the ADF and following counsel's advice concerning litigation strategy."

Americans United for Separation of Church and State (AU), a group which often initiates complaints to the IRS of prohibited partisan activity, responded with a press release denouncing the initiative, saying the "Religious Right group's plan to ask churches to violate federal tax law on electioneering is deplorable." Other opposition to this effort includes the Interfaith Alliance, which issued a statement noting, "When religious leaders endorse candidates from the pulpit, they weaken both the sanctity of religion and the integrity of democracy."

This project overlooks some fundamental rights of 501(c)(3) organizations and the capacity of church leaders as individuals. 501(c)(3)s can discuss issues, even those of importance to an election. Religious organizations may engage in voter education campaigns, invite candidates to speak at their facilities, or release voter guides, as long as such activity does not support or oppose a candidate. In addition, as individuals, church leaders may endorse candidates without any negative consequences to the church.

However, given vague rules and unclear enforcement by IRS, many places of worship are likely to be confused. ADF references the All Saints Episcopal Church case as an example of such ambiguity; the IRS closed the examination without penalizing the church, even though the agency determined that the church engaged in direct campaign intervention.

Rep. Walter Jones☼ (R-NC) introduced related legislation, H.R. 2275, which would repeal the prohibition on campaign intervention for all 501(c)(3) organizations. If the bill were enacted, religious organizations and charities could engage in campaign activities without risking their tax exemption but would still have to abide by appropriate campaign finance laws. Jones introduced similar bills in past congressional sessions, but those only exempted houses of worship. S. 178, the Religious Freedom Act of 2007, introduced by Sen. James Inhofe☼ (R-OK), would only exempt houses of worship. OMB Watch has opposed the Inhofe bill, arguing religious organizations should not be able to engage in activities that would remain prohibited for secular 501(c)(3) groups. At the core of the prohibition is the principle that taxpayers should not be required to fund partisan activities through tax exemption.

A recent Congressional Research Service report, *Churches and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, noted, "The line between what is prohibited and what is permitted can be difficult to discern. Clearly, churches may not make statements that endorse or oppose a candidate, publish or distribute campaign literature, or make any type of monetary or other contribution to a campaign.... In many situations, the activity is permissible unless it is structured or conducted in a way that shows bias towards or against a candidate. Some biases can be subtle and whether an activity is campaign intervention will depend on the facts and circumstances of each case."

The blurry line between what is and is not considered partisan electioneering has led to calls for the IRS to issue a bright-line rule so that nonprofits can comfortably know what they can and can not do prior to an election.

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