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## The Watcher

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## Midnight at the White House: Bush Using Rules to Cement Legacy

The Bush administration is working on a spate of rules it hopes to finalize before its time in power expires. The last-minute rules cover a broad range of policy, but many share a common trait: relaxing existing requirements on businesses. The Bush administration appears to be pushing to deregulate in areas like environmental protection, worker leave, and auto safety. Many of the controversial rules are expected to be finalized in the coming weeks. The administration is pushing to finalize rules in November, not January, in order to assure they cannot be undone by the next president.

### Tying the Hands of the Next Administration

Regulations are considered final upon publication in the *Federal Register*, but generally, federal law requires agencies wait at least 30 or 60 days before making the rules effective. By the time a new president takes the reins of government, the Bush administration hopes to make sure all of its regulations are not only final but effective.

The Clinton administration published many rules in the *Federal Register* in January 2001, just days before leaving office. Because those rules were not yet effective, the incoming president, George W. Bush, took a second look at those rules and suspended many of them. Although

[Bush's move](#) was of questionable legality, it was never challenged in court.

Bush was able to derail a regulation that would have precluded businesses in repeated violation of the law (including tax laws, labor laws, employment laws, environmental laws, antitrust laws, and consumer protection laws) from receiving government contracts.

Now, the Bush administration is pushing rules a future administration might find objectionable. However, by ensuring those rules are in effect by Jan. 20, Bush is preventing the next president from employing the same strategy of suspending last-minute rules.

### **The White House Response**

The White House foreshadowed this November push when, in May, it instructed agencies to finalize rules by Nov. 1. In a [memo](#), White House Chief of Staff Joshua Bolten wrote, "[R]egulations to be finalized in this Administration should be proposed no later than June 1, 2008." All final rules were to be completed by Nov. 1 except in extraordinary circumstances, according to the memo.

Many upcoming rules will miss the Nov. 1 deadline. However, the administration continues to push to finish rules by mid-November — at least 60 days before Bush leaves office.

Bolten claimed the deadline was meant to curtail the usual flurry of last-minute activity that has characterized the final weeks of previous administrations. White House spokesman Tony Fratto made the same [assertion](#) on Oct. 31. He claimed, "What the Chief of Staff wanted to avoid was this very charge that we would be trying to, in the dark of night in the last days of the administration, be rushing regulations into place ahead of the incoming, next administration."

Disputing news reports that claim regulatory activity is increasing, Fratto said, "We're not doing that in this administration." Speaking of the White House Office of Management and Budget's mandatory review of agencies' significant regulations, he said, "There's no great increase in the number of regulations that we're reviewing right now."

According to [an OMB website](#), OMB's Office of Information and Regulatory Affairs (OIRA) reviewed 83 final rules from Sept. 1 to Oct. 31. During the same period in 2007, OIRA reviewed 34 final rules; in 2006, 42 final rules; and in 2005, 33 final rules.

However, it is the quality, not the quantity, of rules that worries critics most. Several rules will rollback existing requirements that prevent environmental pollution. Others will require recipients of government funding to endorse the administration's policies.

The last-minute push is consistent with the Bush administration's Janus-faced view on government regulation — relaxing requirements when they impose burdens on businesses and adding requirements when they impose conservative ideology on regulatory agencies and/or the public.

## **The Rush to Regulate**

Like the Clinton administration, the Bush administration is rushing through rules to ensure an administrative legacy. However, the Bush administration is doing so in a more compressed timeframe. Agencies have truncated the development and review process for some of these rules. For several rules, the Bush administration accepted public comment for only 30 days. The standard comment period for major controversial rules lasts 60 days.

Rushed rulemakings can lead to policy that does not take into account the views of all stakeholders and benefits neither the public nor the regulated community. Eli Lehrer of the Competitive Enterprise Institute, a conservative think tank advocating for a smaller role for government, [recently told Reuters](#), "At this point, in the current economic climate, it would be especially harmful to push through ill-considered regulations in the final days of the administration."

A Department of Labor rule on calculating the severity of on-the-job risks, specifically exposure to toxic chemicals, sped through Labor Secretary Elaine Chao's office without consultation with occupational health experts in the department. The rule is based largely on a report prepared by an outside consultant paid \$349,000 by the department. That report has not been disclosed to the public.

A rule that could allow government-approved projects to intrude on the habitats of endangered species is also moving rapidly. In response to public outcry, the Department of the Interior extended the comment period to 60 days from 30 days. The Department received about 300,000 comments, mostly negative.

An internal e-mail uncovered by the Associated Press [showed](#) that senior Interior officials pushed staff to review all the comments in just one week. One calculation claims staff would have to review seven comments per minute to meet that mandate.

In October, Interior released a separate document that examines the environmental impact of the rule. As required by law, the document was opened to public comment, but the period only lasted ten days.

Fratto defended the Bush administration's procedures for finalizing regulations saying, "We're going to deal with regulations and ... we're going to do it in an open and transparent way and make sure that the public is involved and that everyone can review the regulations that we put forward."

## **Relaxing Requirements on Industry**

While some rules have been rushed, others have been in development for years. Critics have long feared upcoming rules that will make it easier for power plants to avoid installing pollution controls or allow trucking companies to force their drivers to work 11-hour shifts.

A rule to ease restrictions on mountaintop mining companies was first proposed in January 2004. The rule would allow the companies to dump the waste generated by mountaintop mining into rivers and streams. Critics fear the change will further degrade the environment and endanger public health in the Appalachian region.

Other rules seem to reflect the concerns of industry, and public interest advocates fear what the final rules may hold. An upcoming rule that will make it more difficult for employees to claim unpaid leave for family and medical emergencies mirrors part of the request of the National Association of Manufacturers, a lobbying group.

Industry lobbyists are working hard to make sure their views are known to administration officials. Even amid the hurried pace of rulemaking, White House officials continue to meet with industry representatives. For a rule that would exempt factory farms from reporting air emissions from animal waste, officials from the White House and the U.S. Environmental Protection Agency [met](#) with representatives from the poultry, pork, and turkey farm lobbies.

A controversial rule that will allow factory farms to self-police their runoff into bodies of water was one of the only Bush administration rules to meet the Bolten memo deadline. Clean water advocates saw the Oct. 31 announcement of the rule as proof the administration is trying to secure a pro-industry legacy. "It's outrageous to see the environmental yard sale that marks the Bush Administration's final days in office," [said Jeffrey Odefey](#), staff attorney at the Waterkeeper Alliance. "Clearly, industry lobbyists are picking up last-minute deals intended to preserve their right to pollute for years to come."

### **Imposing an Ideological Agenda**

Other rules reflect a conservative ideology. Several rules currently under development would attach strings to federal funds in order to make sure they are not used for actions inconsistent with the administration's ideological positions.

The Department of Health and Human Services (HHS) is rushing through a rule that would require health care providers receiving federal funds to allow their employees to opt out of providing health care services they find morally objectionable. Critics fear the rule is aimed at restricting funding for abortion and possibly the dispensing of contraception.

Another HHS rule would restrict funds to organizations providing HIV/AIDS relief. The rule would force grantees to choose between adopting government policy (explicitly and unequivocally opposing prostitution and sex trafficking) for their entire organizations or setting up completely separate affiliated organizations. However, the degree of separation proposed is so severe that it is impractical to implement. Another rule would impose similar funding restrictions for grantees providing aid to the victims of sex trafficking.

Critics, including OMB Watch, object to such certification requirements as an unconstitutional coercion of speech. The Bush administration has consistently used the threat of cutting grants to control both the charitable and health services sectors.

## Options for Repeal

The next president will be unable to repeal or reverse any Bush-era regulations that are final and in effect. Short of actions taken by the courts in the face of potential lawsuits, the new administration's only option would be to restart the rulemaking process. A typical rulemaking can take years to complete.

Congress could take advantage of a little-known procedural law that allows lawmakers to nullify agency regulations. The Congressional Review Act gives members of either chamber 60 legislative days to introduce a so-called resolution of disapproval. If the resolution moves to the floor for a vote, it enjoys fast-track status and cannot be filibustered in the Senate.

However, because Congress is currently in recess and may only reconvene for a few days after the elections, fewer than 60 legislative days remain in the current Congress. Under the law, that would give a new Congress a new 60-legislative-day window in 2009 in which to introduce resolutions of disapproval for individual rules.

The [Congressional Review Act](#) has only been successfully used once. It is difficult for Congress to utilize because the president may veto the resolution, and he is unlikely to accept congressional disapproval of his administration's own policies. Congress's only successful use of the act came in the early days of the Bush administration when a Clinton-era rule that would have required better ergonomics in the workplace was rejected.

Even if Congress and the courts are able to overturn Bush-era regulations eventually, the public may feel the impact for years to come. Contaminated water is difficult to clean up. It can be nearly impossible to reverse some public health damage. Is that the legacy the Bush administration really wants to leave?

*The Bush administration is attempting to finalize many controversial regulations before its time in office expires. A White House memo instructed agencies to finalize rules by Nov. 1. Although many rules will miss that deadline, OMB Watch believes the administration will push to finalize rules in the coming weeks so they are in effect when a new administration comes into office. (Regulations are considered final upon publication in the Federal Register, but generally, federal law requires agencies wait at least 30 or 60 days before making the rules effective.)*

*This list is a broad sample of so-called "midnight regulations."*

## CIVIL LIBERTIES

Rule Description	Proposal Date	Current Status
<p><b>Department of Justice</b> – The rule would expand the power of state and local law enforcement agencies to investigate potential criminal activities and report the information to federal agencies. The rule would broaden the scope of activities authorities could monitor to include organizations as well as individuals, along with non-criminal activities that are deemed "suspicious."</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from OMB Watch</a></li> </ul>	<p>July 31* (<a href="#">Proposal</a>)</p>	<p>Final rule has not been sent to OMB.</p>

## TRAFFIC SAFETY

Rule Description	Proposal Date	Current Status
<p><b>Federal Motor Carrier Safety Administration (Department of Transportation)</b> – The rule would allow truck drivers to drive up to 11 consecutive hours. Because of the effects of fatigue, longer hours-of-service periods put both truck drivers and other motorists at risk.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from Public Citizen</a></li> </ul>	<p>Dec. 17, 2007 (<a href="#">Interim rule</a>)</p>	<p>Final rule sent to OMB Oct. 21.</p>
<p><b>National Highway Traffic Safety Administration (DOT)</b> – The rule would improve the national safety standard for roof strength in passenger vehicles. However, NHTSA's proposal is not as strict as auto safety advocates and some congressional members hoped and will make only minor safety improvements for passengers involved in rollover crashes. NHTSA also proposed preempting state law, including damages claims.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from OMB Watch</a></li> </ul>	<p>Aug. 23, 2005 (<a href="#">Proposal</a>)</p>	<p>Final rule has not been sent to OMB; DOT is under court order to finish the rule by Dec. 15.</p>

## ENVIRONMENT

Rule Description	Proposal Date	Current Status
<p><b>Office of Surface Mining (Interior)</b> – The rule would allow mining companies to dump the waste (i.e. excess rock and dirt) from mountaintop mining into rivers and streams.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from Earthjustice</a></li> </ul>	<p>Aug. 24, 2007 (<a href="#">Proposal</a>)</p>	<p>Final rule sent to OMB Sept. 22.</p>

<p><b>Department of the Interior</b> – The rule would alter implementation of the Endangered Species Act by allowing federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts responsible for species protection. Currently, consultation is required.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from Reg•Watch</a>, OMB Watch's regulatory policy blog</li> </ul>	<p>Aug. 15* (<a href="#">Proposal</a>)</p>	<p>Final rule has not been sent to OMB, but Interior officials are hastily reviewing public comments.</p>
<p><b>Environmental Protection Agency</b> – The rule would ease current restrictions that make it difficult for power plants to operate near national parks and wilderness areas.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from the House Oversight and Government Reform Committee</a></li> </ul>	<p>June 6, 2007 (<a href="#">Proposal</a>)</p>	<p>Final rule sent to OMB Oct. 30.</p>
<p><b>Environmental Protection Agency</b> – Under the rule, concentrated animal feeding operations, i.e. factory farms, could allow farm runoff to pollute waterways without a permit. The rule circumvents the Clean Water Act, instead allowing for self-regulation.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from the Natural Resources Defense Council</a></li> </ul>	<p>March 7, 2008 (<a href="#">Proposal</a>)</p>	<p>Final rule announced by EPA Oct. 31. (<a href="#">Final rule</a>)</p>
<p><b>Environmental Protection Agency</b> – The rule would change EPA's New Source Review program, which requires new facilities or renovating facilities to install better pollution control technology, by subjecting fewer facilities to its requirements.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from the Senate Environment and Public Works Committee</a></li> </ul>	<p>May 8, 2007 (<a href="#">Proposal</a>)</p>	<p>Final rule has not been sent to OMB.</p>
<p><b>Environmental Protection Agency</b> – The rule would exempt factory farms from reporting air pollution emissions from animal waste.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from OMB Watch</a></li> </ul>	<p>Dec. 28, 2007 (<a href="#">Proposal</a>)</p>	<p>Final rule sent to OMB Oct. 24.</p>
<p><b>National Oceanic and Atmospheric Administration (Department of Commerce)</b> – The rule would transfer the responsibility for examining the environmental impacts of federal ocean management decisions from federal employees to advisory groups that represent regional fishing interests. The rule would also make it more difficult for the public to participate in the environmental assessment process required by the National Environmental Policy Act.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from Pew Charitable Trusts</a></li> </ul>	<p>May 14, 2008 (<a href="#">Proposal</a>)</p>	<p>Final rule has not been sent to OMB.</p>

<b>Environmental Protection Agency</b> – EPA proposed two options: 1) to impose no new requirements on oil refineries; or 2) to impose minimal requirements. EPA is responding to a congressional mandate that it control toxic emissions from refineries, but option 1 would ignore that mandate, and option 2 would not go far enough, environmentalists say. <ul style="list-style-type: none"> <li>• <a href="#">Find out more from the Natural Resources Defense Council</a></li> </ul>	Sept. 4, 2007 ( <a href="#">Proposal</a> )	Final rule approved by OMB Oct. 30.
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## WORKER RIGHTS AND SAFETY

Rule Description	Proposal Date	Current Status
<b>Department of Labor</b> – The rule would change the way federal regulators calculate estimates for on-the-job risks. The rule would also add an extra comment period to new worker health standards, creating unnecessary delay. <ul style="list-style-type: none"> <li>• <a href="#">Find out more from Reg•Watch</a></li> </ul>	Aug. 29* ( <a href="#">Proposal</a> )	Final rule has not been sent to OMB.
<b>Mine Safety and Health Administration</b> – The rule would require mine operators to test employees in "safety-sensitive" positions for drug and alcohol use. <ul style="list-style-type: none"> <li>• <a href="#">Find out more from Reg•Watch</a></li> </ul>	Sept. 8* ( <a href="#">Proposal</a> )	Final rule has not been sent to OMB; MSHA held a public hearing Oct. 28.
<b>Employment Standards Administration (Labor)</b> – The rule would limit employee access to family and medical leave. Among other things, the rule would make it more difficult for workers to use paid vacation or personal time to take leave and would allow employers to speak directly to an employee's health care provider. <ul style="list-style-type: none"> <li>• <a href="#">Find out more from the National Partnership for Women and Families</a></li> </ul>	Feb. 11, 2008 ( <a href="#">Proposal</a> )	Final rule sent to OMB Oct. 20.

## HEALTH AND HUMAN SERVICES

Rule Description	Proposal Date	Current Status
<b>Department of Health and Human Services</b> – The rule could reduce women's access to federally funded reproductive health services. The rule would require health care providers to certify they will allow their employees to withhold	Aug. 26* ( <a href="#">Proposal</a> )	Final rule has not been sent to OMB.

<p>services on the basis of religious or moral grounds or risk losing funding.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from the National Partnership for Women and Families</a></li> </ul>		
<p><b>Department of Health and Human Services</b></p> <p>– The rule would require HIV/AIDS grantees to choose between adopting government policy (explicitly and unequivocally opposing prostitution and sex trafficking) for their entire organizations or setting up completely separate affiliated organizations. However, the degree of separation proposed is so severe that it is impractical to implement.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from OMB Watch</a></li> </ul>	<p>April 17, 2008 (<a href="#">Proposal</a>)</p>	<p>Final rule sent to OMB Oct. 24.</p>
<p><b>Department of Health and Human Services</b></p> <p>– As required by Congress, the rule would require organizations providing aid to the victims of sex trafficking to certify they do not promote, support, or advocate prostitution or risk losing U.S. funding.</p>	<p>Feb. 26, 2008 (<a href="#">Proposal</a>)</p>	<p>Final rule sent to OMB Oct. 24.</p>

## GUN CONTROL

Rule Description	Proposal Date	Current Status
<p><b>National Park Service (Interior)</b> – The rule would end the 25-year-old ban on carrying loaded weapons in national parks.</p> <ul style="list-style-type: none"> <li>• <a href="#">Find out more from the National Coalition of Park Service Retirees</a></li> </ul>	<p>April 30, 2008 (<a href="#">Proposal</a>)</p>	<p>Final rule has not been sent to OMB.</p>

### Notes:

\*The rule missed the deadline set forth in a White House memo instructing federal agencies to propose by June 1 any rule they wished to finalize by the end of the Bush administration.

## Joint Economic Committee Holds Hearing on the Need for Economic Stimulus

On Oct. 30, a group of economic experts testified before the Joint Economic Committee (JEC) on the necessity and scope of a second economic stimulus package. While committee members and witnesses agreed on the severity of the ongoing economic situation, there was a clear ideological divide on which course of action Congress should pursue. At the center of the divide were the competing concerns for families facing certain hardships inflicted by a contracting economy and for the consequences of an increase in the federal budget deficit, which would be required to aid those families and help reverse the current economic trend.

The hearing commenced within hours of a Bureau of Economic Analysis report that indicated gross domestic product (GDP) shrank in the third quarter of 2008. The 0.3 percent decrease in real GDP — a significant decline from the 2.8 percent annual growth rate measured in the second quarter — reflected declines in both consumer spending and investment. While consumer spending, residential investment, and disposable income all fell dramatically, spending on goods and services by the federal government increased, with the bulk of that increase due to defense spending.

Rep. Carolyn Maloney (D-NY), acting chairwoman of the JEC, asked each economist on the panel to give his outlook on the current state of the economy, as well as his recommendations for future policy. In her opening statement, Maloney, citing the weakness of the economic expansion of the past eight years, stressed the urgency of enacting a second round of economic stimulus at a time when declining consumer spending and rising unemployment are putting recessionary pressure on the economy. "Falling home values and rising debt have driven family balance sheets to their worst condition in decades, while at the same time banks have been curtailing access to credit," said Maloney. "As consumers cut back on their spending, this drags down the economy further."

Acting vice chair of the JEC, Rep. Kevin Brady (R-TX), voiced concerns that a likely stimulus package would be too small to impact the economy in any meaningful way. He equated the U.S. economy to a 100-yard football field, stating that a stimulus plan would represent no more than one yard; like many other fiscal conservatives, Brady is not convinced that adding to the current record-high budget deficit would be worth the additional hundreds of billions of dollars in federal spending that would be required to significantly boost economic growth.

Testifying before the committee, Nouriel Roubini, distinguished Professor of Economics at New York University, asserted that a new round of fiscal stimulus in the form of direct government spending on goods and services should be implemented as soon as possible. Roubini, who [eerily predicted the current financial crisis in 2006](#), stated that government inaction will lead to a deeper, longer, and more protracted recession, with a cumulative fall in GDP of about four percent.

Roubini asserted that a second stimulus plan should provide about \$350 billion and should be targeted at individuals most likely to spend the additional income. It should include grants to state and local governments; increased unemployment benefits; investment in infrastructure and green technology; and tax rebates for lower income households.

Citing excessive debt and insolvency as major factors in prolonging the severity of the economic downturn, Roubini stated that debt relief for households and the financial sector would be necessary to boost economic growth. While Roubini admitted that the cost of economic stimulus to the Treasury is high, he believes the cost of inaction may be even higher.

Following Roubini, Simon Johnson, professor of Entrepreneurship at the Massachusetts Institute of Technology, testified that a stimulus package would have to expend about \$450 billion (roughly three percent of GDP) to cushion the effects of the looming recession. And like

Roubini, Johnson advocated for programs that encourage spending, rather than saving, in the short run and that promote investment and growth in the long run. Johnson cited direct aid to state and local governments, extended unemployment benefits, expanded food stamp aid, and loan modifications for distressed homeowners as part of a short-term proposal, while investment in infrastructure, job retraining programs, and expanded loans for students and small businesses should comprise the bulk of a longer-term package. Referring to the consumer-focused design of the first economic stimulus plan enacted in February, Johnson stated his preference for the emphasis of a second round of stimulus to be on infrastructure spending. "Given the choice, we would rather see investments in infrastructure than in consumption of flat screen TVs," he said.

The final witness, Richard K. Vedder, professor of economics at Ohio University and visiting scholar at the American Enterprise Institute, testified that the federal government's policies have already been too aggressive and interventionist. He urged the American people and Congress not to panic, because, although periods of sharply eroding public confidence have negative consequences, they do pass.

He objected to enacting a second economic stimulus package, citing two reasons: First, economic stimulus would not promote short-term recovery, and second, expansionary fiscal policy would "aggravate[e] an explosion in inflationary expectations that [he] already fears will erupt, having detrimental effects on labor and financial markets." And because of the practical difficulties of enacting and executing infrastructure spending in a timely manner, Vedder does not believe such spending on infrastructure is a short-term solution to relieve economic hardships on American families. He said that "if you're going to have a stimulus package, certainly a tax cut ... is preferable to a spending increase that would certainly take time to implement, and of course a tax cut would have some more positive long-run incentive effects" In his cautionary note to Congress, Vedder advised Congress that it "[has] done enough for now, probably more than enough," and it ought to "[r]elax and recover from [its] labors and allow the healing properties of markets to be asserted again."

Although this hearing did not present any consensus on the necessity of passing a second economic stimulus package, additional support for a package from Federal Reserve Chairman Ben Bernanke, House Speaker Nancy Pelosi (D-CA), and Minority Leader John Boehner (R-OH), not to mention tacit support from President Bush, are promising signs that Congress will act. It appears the main debate will center on how to deliver the stimulus and how large the package will be.

It is still unclear if Congress will act quickly after the election during a lame duck session or if it will wait a short period until the new president and Congress are sworn in in January.

## **Court Rules CIA Can Keep Any Secret It Wants**

On Oct. 29, a [federal court refused](#) to examine statements made by Guantanamo Bay detainees during their tribunals; the statements were redacted by the Central Intelligence Agency (CIA).

The statements, which reportedly contain allegations of torture committed against the detainees while they were in U.S. custody, come at a time when the British government is seeking to investigate the treatment of one of its own residents held at the detention facility.

The Department of Defense posted redacted versions of the statements to the agency's [website](#) and released copies of the redacted material to the American Civil Liberties Union (ACLU) in response to a 2007 Freedom of Information Act (FOIA) request. The documents include statements made by high-value detainees Khalid Sheikh Muhammad, Hambali, and Bashir Bin Lap. After unsuccessful administrative appeals asking for the redacted information, the ACLU filed a lawsuit to obtain the material.

Wendy Hilton, a CIA information review officer, issued a sworn [affidavit](#) on behalf of the agency, in which she described the details that were not publicly released as "the conditions of the detainees' capture, the employment of alternative interrogation methods, and other operational details." The CIA contends that disclosure of such information is likely to degrade the agency's ability to effectively question terrorist detainees and elicit information necessary to protect the American people. The agency believes that public disclosure of the CIA's methods would allow al Qaeda and other terrorists to train in "counter-interrogation" tactics.

Chief Judge Royce Lamberth of the U.S. District Court in Washington, DC, turned down the option to review the documents *in camera*, which occurs when a judge reviews potentially sensitive material privately in chambers to determine the veracity of a party's claims. Lamberth issued an [opinion](#) that the CIA's declaration was in good faith and that he was "disinclined to second-guess the agency in its area of expertise."

The ACLU [criticized](#) Lamberth for not exercising appropriate judicial oversight on a key issue of the Bush administration's detainee policy — torture allegations. The ACLU argues that the redacted statements contain detainee allegations of torture. Ben Wizner, an ACLU staff attorney, said that the information was initially redacted by the CIA to "protect itself from criticism and liability. It is unlawful for the government to withhold information on these grounds."

The British government is also [accusing](#) the U.S. of withholding information concerning torture allegations by a British detainee. Baroness Patricia Scotland, the Attorney General of Great Britain, is reviewing evidence for possible criminal proceedings against American officials who allegedly abused a British resident, Binyam Mohamed, while he was imprisoned in Morocco and Afghanistan. Mohamed has been in Guantanamo since 2004. According to reports, the review was requested by Home Secretary Jacqui Smith, who obtained access to secret evidence that U.S. officials, as well as British Foreign Secretary David Miliband, are attempting to suppress.

## **Climate Change Disclosure Becomes an Investor Thing**

Recent actions by investors and the New York State Attorney General are pressuring

companies to disclose their greenhouse gas emissions and the risks they face from climate change. Many regard such information as essential to investors' right to know about the potential liabilities facing thousands of industries as the climate warms and new emissions regulations become a near certainty.

Numerous industries face high risks from the environmental changes already resulting from greenhouse gas emissions. Companies tied to industrial agriculture, for example, face financial risks from increased droughts, more frequent and severe floods, and the rising costs of fossil fuel-based inputs like synthetic fertilizer and pesticides.

### **Investors Demand More Disclosure**

On Oct. 22, the Investor Network on Climate Risk (INCR) sent a letter to the Securities and Exchange Commission (SEC) requesting the agency require greater disclosure of the climate change risks that businesses face. The INCR [letter](#) was sent in response to an SEC request for public comment on its [21st Century Disclosure Initiative](#), which proposes to modernize the current SEC disclosure system. The 14 signatories to the letter include institutional investors such as California's Public Employees' Retirement System (CalPERS) and the California State Teachers Retirement System (CalSTRS), and the Maryland, New Jersey, New York City, and New York State public pension funds or treasurers.

The signatories found that "significant material risks exist" to the companies in their portfolios because of climate change, triggering a need for disclosure on SEC filings. According to Nancy Kopp, the Maryland State Treasurer, "Action by the SEC to require disclosure of climate risks — as well as additional environmental, social and governance risks — would result in better, more informed decisions for investors."

"What we seek is not radical, but rooted in the SEC's duty to follow the most fundamental investor protection principle there is: the right to know," said California State Treasurer Bill Lockyer.

The INCR is a network of institutional investors and financial institutions overseeing more than \$7 trillion in assets, according to the group's [website](#). The INCR is a project of Boston-based [Ceres](#), a national coalition of investors, environmental organizations, and other public interest groups. Ceres works with companies and investors to address sustainability challenges such as global climate change.

### **Attorney General Subpoenas Corporate Climate Change Data**

On Oct. 23, the day after the INCR letter, New York State Attorney General Andrew Cuomo announced that, in response to a subpoena issued by his office, a large energy company had agreed to voluntarily disclose information about its climate risks, including its annual greenhouse gas emissions. Dynegy, a Texas-based company operating coal, oil, and natural gas power plants, was one of five large energy companies the attorney general subpoenaed in the fall of 2007 to investigate whether investors were informed about the financial risks of

operating the plants. Another energy company, Xcel Energy, agreed in August to disclose its climate risks.

"Investors have the right to know all the material financial risks faced by coal-fired power plants associated with global warming," Cuomo said in a [statement](#). The attorney general was joined in his announcement by former Vice President Al Gore.

Dynegy and Xcel Energy have agreed to disclose analyses of their material risks from present and future climate change regulations, litigation, and the physical impacts of climate change. Additionally, they will report current carbon emissions, projected increases in emissions from their coal-burning plants, and strategies for managing the emissions. The attorney general last year petitioned the SEC to require such disclosures in securities filings.

### **Future Climate Change Disclosures**

These actions by the New York Attorney General and by investors represent a growing interest in evaluating and disclosing the risks businesses will face when greenhouse gases are eventually regulated, as well as the financial risks to industries impacted by the physical changes wrought by climate change. If a price is imposed on greenhouse gas emissions, as is likely under several regulatory proposals, emitters, especially energy producers, would be hit by increasing costs to continue polluting. The greater the emissions, the greater the potential financial risk to investors.

The disclosures sought by the investors and the attorney general would also help to prepare businesses for reporting to an eventual registry of greenhouse gas emissions. Before any cap-and-trade program or other regulations can be instituted, there must be a thorough accounting of how much companies are emitting. Currently, businesses may report their emissions to the [Carbon Disclosure Project](#) or to the [Climate Registry](#), two nonprofit organizations that collect mostly voluntary reports from states and businesses on their greenhouse gas emissions.

Though no mandatory national government registry exists, the Department of Energy manages the [Voluntary Reporting of Greenhouse Gases Program](#). Also, in December 2007, Congress required the U.S. Environmental Protection Agency (EPA) to propose a [reporting rule](#) for industrial plants and other large sources of greenhouse gases. The EPA missed the Sept. 26 deadline and has yet to comply with the law.

### **Complaints about Church Electioneering Continue**

The 2008 election cycle has produced a number of complaints about religious and charitable organizations illegally opposing or endorsing candidates. The final weeks leading up to the election were no exception, as Americans United for Separation of Church and State (AU) filed three new complaints to the Internal Revenue Service (IRS).

On Oct. 22, AU [announced](#) it asked the IRS to [investigate the Roman Catholic Diocese of](#)

[Paterson, NJ](#), for a letter Bishop Arthur J. Serratelli published on the Diocese's website and in its newspaper that attacked presidential candidate Barack Obama.

Unlike [Pulpit Freedom Sunday's](#) recent endorsements from the pulpit, AU says the Oct. 9 [column in \*The Beacon\*](#), the Diocese newspaper, indirectly opposed the election of Obama because of his pro-choice stance on abortion. While the Bishop did not mention Obama by name or expressly tell parishioners not to vote for him, he said, "Along with 108 members of Congress, the present democratic candidate for President continues his strong support for the Freedom of Choice Act. In a speech before the Planned Parenthood Action Fund last year, he made the promise that *the first thing* he would do as President would be to sign the Freedom of Choice Act. What a choice for a new President!" AU executive director Rev. Barry Lynn said, "Bishop Serratelli is essentially telling congregants that they have to vote against Obama or they'll lose basic freedoms."

AU also wants the IRS to investigate [Rock Christian Fellowship](#) in Espanola, NM, for posting a large display that encourages voters to support Republican candidates over Democratic candidates. According to the AU [complaint](#), the display had a [picture](#) of an aborted fetus with the last names Obama, Udall (referring to Tom Udall, a Democratic U.S. Senate candidate in New Mexico) and Lujan (referring to Ben Ray Lujan, Jr., a Democratic congressional candidate for New Mexico's 3rd district) underneath it. Next to that picture is a photo of a healthy baby with the last names of Republican presidential candidate John McCain, Steven Pearce, the Republican Senate candidate, and Daniel East, the Republican congressional candidate from New Mexico's 3rd district, underneath it. AU also notes that Michael Naranjo, the pastor of the church, told the *Santa Fe New Mexican* that his purpose is "educating on who stands pro-life and who is pro-death" and that "I'd rather lose my 501(c)(3) than my soul."

On Oct. 30, AU filed an IRS complaint against the General Baptist State Convention of North Carolina for engaging in partisan electioneering. The Convention hosted Michelle Obama, wife of Democratic presidential nominee Barack Obama, at an event on Oct. 29. According to AU, Michelle Obama praised her husband and told the group about the type of president that her husband would be. AU also stated in its IRS complaint that Ms. Obama's "appearance took on the trappings of a campaign rally, and during it Ms. Obama promoted her husband's candidacy and appealed for votes." Rev. Rule 2007-41 provides factors that determine if prohibited campaign intervention has occurred when a political candidate speaks at a tax-exempt organization's event. One factor used is whether the organization gave an opportunity for the opposing candidate to appear. It is not known if the McCain campaign was provided an opportunity to speak. In his [letter](#) to the IRS, Lynn said that the "appearance by Ms. Obama before this religious group raises a host of issues, and I urge the IRS to investigate the matter."

Many IRS complaints that have surfaced over the past few months may be eliminated if the organizations that are engaging in the potentially prohibited activities have more guidance up front. A bright-line rule would not only prevent organizations from unknowingly participating in prohibited activities, but it would also enable organizations to engage in issue advocacy without the fear of unintentionally violating rules that are too vague for many organizations to

understand.

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