OMB WATCH
Promoting Government Accountability and Citizen Participation
ACTION CENTER | BLOGS | DONATE
The Watcher
September 12, 2006 Vol. 7, No. 18

Information & Access

Federal Budget

Regulatory Matters

Nonprofit Issues

Five Years Since 9/11: More Secrecy, Less Security

Monday marked the fifth anniversary of the Sept. 11 terrorist attacks, yet the government's efforts to secure the nation against another terrorist attack have been minimal, leaving the country's chemical plants, ports, and other installations dangerously unsecured while increasing secrecy and intrusion into civil liberties.

Domestic Spying

In late 2005, *The New York Times* revealed that President Bush has been secretly authorizing the National Security Agency (NSA) to eavesdrop on domestic phone calls and emails without a wiretapping warrant since soon after 9/11. The NSA program has been faulted not only for its legal basis bur for its apparent lack of efficacy. According to FBI sources interviewed by the *Washington Post*, all of the thousands of international calls by Americans that were subject to NSA eavesdropping turned out to be investigative

dead ends.

After the White House fiercely resisted Congress's attempts to implement even minimal oversight over the wiretapping program, Sen. Arlen Specter (R-PA), an avid critic of the program, caved to pressure and accepted watered-down legislation that would legalize the president's NSA wiretapping program retroactively. The National Security Surveillance Act (S. 3876) would also create a legal framework for future surveillance of American citizens. By retroactively acknowledging that the president has "the constitutional authority of the executive," the bill allows the federal government to wiretap anyone's phone calls or read anyone's emails without judicial approval or oversight.

A federal court recently ruled the NSA spying program unconstitutional. The U.S. Court for the Eastern District of Michigan found the program to be in violation of the First and Fourth Amendments and the separation of powers. The decision came on a case filed by the American Civil Liberties Union challenging the legality of the NSA program by arguing that the rights of several journalists and academics had been violated.

Chemical Security

Even as the administration spies without oversight on its citizens, five years after 9/11, Congress has failed to pass legislation mandating security standards for thousands of chemical facilities across the country. The House and Senate have spent most of 2006 in gridlock on legislation to authorize the Department of Homeland (DHS) to establish reporting requirements and verify the security of chemical facilities.

The Senate Homeland Security and Governmental Affairs Committee passed Chemical Facility Anti-Terrorism Act of 2006 (S. 2145) in July 2006 that fails to require facilities to consider safer technologies or publicly report failed inspections. The bill has reportedly been bogged down because of various objections from more than a dozen senators. In a letter to the objecting senators, Homeland Security and Government Affairs Committee Chairwoman Susan Collins (R-ME) urged her colleagues to allow the bill to reach the Senate floor and settle any differences over the legislation there.

Later in July, the House Homeland Security Committee passed Chemical Facility Anti-Terrorism Act of 2006 (H.R. 5695), which is hailed by public interest groups as substantially better than the Senate version. The bill, sponsored by Rep. Daniel Lungren (R-CA), establishes security requirements for our nation's chemical facilities, and was amended in committee to include requirements that companies, when feasible, use safer technologies and provisions allowing states and localities to establish their own stronger security programs.

The House is expected to finish its business this year, but with many competing objectives and a contentious bill, it is uncertain when the Senate will vote on the bill. That in five years Congress has failed to pass a substantial chemical security law should come as little surprise considering the strong opposition to any regulation from the chemical industry.

Sensitive But Unclassified

In March of 2002, White House Chief of Staff Andrew Card issued a memo ordering agencies to "safeguard" information that is "sensitive but unclassified." This catch-all broadly includes, in each agency's judgment, "information that could be misused to harm the security of our nation and the safety of our people."

A provision codifying the "sensitive but unclassified" category was then slipped into the Homeland Security Act of 2002, drawing little attention and no debate. Specifically, the act instructs the executive branch to "identify" and "safeguard" "homeland security information that is sensitive but unclassified" (often called Sensitive Homeland Security Information (SHSI), which includes any information about terrorist threats, potential vulnerabilities, and disaster response. This even applies to information that has previously been disclosed--particularly disturbing to those who fear it could lead to the withdrawal of vast amounts of information.

Four years later, no government-wide policies or procedures exist to guide agencies through deciding what information should be withheld from the public due to its "sensitive but unclassified" nature. Federal agencies are also without uniform rules governing who makes such decisions and how such information is then handled. As a result, there are over 50 different SBU designations used by the federal government and rampant confusion at the federal, state and local levels. In a GAO report issued this year, first responders, for instance, "reported that the multiplicity of designations and definitions not only causes confusion but leads to an alternating feast or famine of information."

Reclassificaiton and Overclassification

On Feb. 21, Matthew M. Aid of the National Security Archive disclosed the scope of a multiple-agency reclassification program. The reclassification program appears to be a backlash to a 1995 executive order issued by President Clinton that required government agencies to declassify all historical records that were 25 years or older, with national security exceptions. Under the new program, government agencies removed declassified documents from the shelves of the National Archives and considered them for reclassification. Many of the documents were publicly available--some were even published by the State Department and for sale at Amazon.com--leading historians and national security experts to question the validity of their reclassification.

Over 55,000 pages of documents were reclassified. Most of these documents are from the Central Intelligence Agency (CIA), Defense Department, Defense Intelligence Agency, Department of Justice (DOJ), and State Department, often including non-sensitive information and sometimes dating back to World War II. It was not until 2006 that the public, Congress and even some high-level members of the National Archives were even aware of the massive scope of the reclassification effort. Unlike similar efforts, Congress had not authorized the intelligence agencies to undertake the program, nor had there been an executive order, or any funds appropriated for this expensive effort with a price tag estimated to be in the seven digits.

In March 2006, the National Archives issued a moratorium and a formal review. An audit conducted by the National Archives estimated that more than 8,500 of the 25,000 records (nearly one-third) removed from the public shelves of the Archives should not have been removed. Lifting the formal moratorium on the reclassification program, the National Archives plans to issue and encourage the implementation of standardized procedures "to ensure that re-review and withdrawal actions are rare and that collaboration between agencies and National Archives with respect to determining the appropriateness of such action in the first place always occurs with provisions for challenge and appeal."

State Secrets

Based on the 1953 Supreme Court ruling in *Reynolds v. United States*, the state secrets privilege allows the executive branch to declare certain materials or topics exempt from disclosure or review. The Bush administration has used this privilege almost half the number of times it was invoked in the entire period between 1953 and 2001, when the combined use of 8 presidents -- Eisenhower, Kennedy, Nixon, Ford, Carter, Reagan, the first Bush and Clinton -- amounted to 55 claims of state secrets.

As reported by *The New York Times*, the administration recently used the state secrets privilege to compel the courts to dismiss a lawsuit brought by a German man who had been held in Afghanistan for five months after being mistaken for a suspected terrorist with the same name. The Justice Department has also claimed state secrets privilege when it asked the courts to throw out three lawsuits against the National Security Agency's warrantless domestic spying program. Additionally, the state secrets privilege was used to shut down a lawsuit by national security whistleblower Sibel Edmonds, an ex-translator for the Federal Bureau of Investigation, who was fired after accusing coworkers of security breaches and intentionally slow work performance.

In each of these cases, the Department of Justice has used the state secrets privilege to shut down cases against the federal government, claiming that any discussion of the lawsuit's accusations would endanger national security. With a growing array of challenges to the government's handling of terror suspects and warrantless domestic wiretapping, target cases for this tactic are in far from short supply.

Result: More Secret But Not More Secure

Shortly after the 9/11 terrorist attacks, OMB Watch raised concerns that the government might impinge on important democratic principles such as government transparency and civil liberties. We argued that increased secrecy would not only make us less safe, it would undermine our values of an open, democratic society - and allow terrorists a significant victory. Today we are even more troubled. Many basic liberties have been eroded, but are we any safer?

Until our chemical plants, ports, and other installations are secured, until the public has evidence that dangers in our communities are removed, and until oversight is strengthened to provide checks on a largely unaccountable executive branch, we have much to do. As Justice Louis Brandeis said in 1933, "Publicity is justly commended as a

remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." We would argue that Brandeis' quote applies equally in an age of terrorism.

Government Receives Poor Grades on Secrecy

Government secrecy continues to expand across a broad array of agencies and actions, according to a new report from OpenTheGovernment.org. The Secrecy Report Card 2006 is the third of its kind produced annually, reviewing numerous indicators to identify trends in public access to information.

Featuring prominently in this year's report card are a number of troubling signs of growing government secrecy:

- In 2005, the Foreign Intelligence Surveillance Court approved *all* 2,072 requests for secret surveillance orders made by U.S. intelligence agencies, rejecting none.
- In 2005, "black" programs accounted for 17 percent of the Defense Department acquisition budget of $315.5 billion. Classified acquisition funding has nearly doubled in real terms since FY 1995, when funding for these programs reached its post-Cold War low.
- President George W. Bush has issued 132 signing statements challenging over 810 provisions of federal laws. In the 211 years of our nation's history preceding 2000, presidents issued fewer than 600 signing statements that took issue with the bills they signed.
- For every one dollar the government spent on declassifying documents, the government spent $134 maintaining the secrets already on the books. To put this number in context, from 1997-2001, the government spent less than $25 per year keeping secrets for every dollar spent declassifying them.

In a statement accompanying the report, Patrice McDermott, director of OpenTheGovernment.org and co-author of the report explained, "Every administration wants to control information about its policies and practices but the current administration has restricted access to information about our government and its policies at unprecedented levels. The result has been the suppression of discussions about our country's direction and its security. How can the public or even Congress make informed decisions under such circumstances? The movement away from public accountability must be reversed."

Several bills currently making their way through Congress counteract this trend toward secrecy, fostering transparency and accountability. For example, language inserted in HR 5441, the 2007 Department of Homeland Security Appropriations bill, would curtail the growth of "sensitive security information," a type of "sensitive but unclassified" information (SBU). SBU designations are used to keep unclassified information hidden from the public. The Secrecy Report Card 2006 identifies 50 SBU designations, but acknowledges the existence of more than 60 designations.

Other legislation highlighted by the report card includes the "Federal Funding

Accountability and Transparency Act," (HR 5060, S 2590) legislation to require the administration to establish an online, searchable database for grants and contracts, which was agreed to by the Senate late last week and is expected to pass in the House this week.

Another bill, H. Res 688, would require the House to make the text of legislation and conference reports publicly available online for 72 hours before it is voted on.

Openness allows citizens and lawmakers to make informed decisions and in this way helps ensure a fully functioning democracy. As the report states, "Openness is not only a keystone value of our democracy, more practically it helps root out abuse of power, bad decisions or embarrassing facts that may put lives at risk."

OpenTheGovernment.org is a coalition of journalists, consumer and good government groups, environmentalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles. OpenTheGovernment.org is co-chaired by OMB Watch's executive director Gary Bass.

DHS Fails to Protect Critical Infrastructure

On Sept. 1, the Department of Homeland Security (DHS) issued a final rule for procedures for handling information about critical infrastructure. The rule amends the interim rule issued in February 2004, for which OMB Watch submitted comments. Unfortunately, DHS ignored OMB Watch's suggested modifications, and the final rule opens the door to misuse by the private sector, allowing companies to restrict public access to information that is vital to protecting public health and safety.

"Critical infrastructure information, does need certain disclosure restrictions," explains Sean Moulton, OMB Watch's director of federal information policy, "but, DHS has implemented a series of procedures which will lead to unnecessary secrecy and greater agency confusion."

The Critical Infrastructure Information Act (CIIA) of 2002 (passed as a subtitle in the Homeland Security Act of 2002) requires DHS to create and implement procedures for the collection and protection of critical infrastructure information. Critical infrastructure information includes data on vulnerabilities and other vital information relating to our nation's communications, transportation, manufacturing, energy and other critical industries. According to government figures, the private sector owns more than 70 percent of the country's critical infrastructure. The act attempts to protect this information by encouraging the private sector to voluntarily submit such information and by preventing its public disclosure and use.

There are a number of problems with CIIA which DHS could have minimized in the final rule. For instance, the Act stipulates that once declared to be critical infrastructure information, company information cannot be used in civil court proceedings, even if the information clearly demonstrates that a company or individual is in violation of state or

federal law or is liable for an accident or disaster. Moreover, once designated as critical infrastructure information, documents are immune from disclosure under the Freedom of Information Act (FOIA) and cannot be used by agencies for regulatory enforcement purposes. Hence, companies voluntarily submitting critical infrastructure information to DHS that might be incriminating are shielded from public scrutiny, government oversight, and court actions. The final rule by DHS compounds the original act's overly broad provisions with poor rulemaking language that provides coverage for bad actors who endanger our nation's security instead of strengthening our nation's security by protecting sensitive information.

DHS's final rule contains a number of additional shortcomings which may lead to increased secrecy on vital public right-to-know issues and greater bureaucracy and agency confusion:

Increased Secrecy and Coverage

The final rule allows for the Program Manager of the Protected Critical Infrastructure Information (PCII) program "to designate certain types of infrastructure information as presumptively valid PCII in order to accelerate the validation process." In order to speed up the certification process, the agency will not review each individual piece of information in these categories and will instead automatically grant protection. Additionally, companies will be permitted to submit large documents that contain some PCII without having to selectively remove such information from the document and otherwise allow its public release and use.

The final rule also states that information once designated as PCII "will not thereafter lose its protected status except under a very narrow set of circumstances." The final rule removed the requirement that information lose its protected status if the information can be publicly accessed through legal means. It also removed the requirement that information lose its protected status if DHS establishes requirements for submission of the information.

There is also no requirement for reevaluation of PCII status. Once information is given protected status, even if someone makes a FOIA request of such information 10 or 20 years later, there is no requirement that the information's status be reviewed. This could lead to the over-protection of important, non-threatening information. Essentially, under this rule, once information is accepted as PCII, it is highly unlikely that the information's protected status will ever be changed.

Agency Interference and Poor Information Management

The final rule fails to establish proper information handling requirements to avoid agency confusion and regulatory interference. For instance, the rule allows for indirect submissions of PCII through agencies other than DHS. Additionally, the original act included a clause that prevented any information required under other federal laws or regulations from being submitted and protected as PCII. The final rule, though, limits this provision to only DHS requirements for information. The poor drafting of these two provisions alone mean that, even if the Environmental Protection Agency, for instance,

requires companies to submit information on toxic pollution, a company could claim the information is PCII and could prevent the EPA from sharing or using the information, should DHS accept the claim. This could have severe implications for the operations of other government agencies.

The final rule also does not establish a deadline for reviewing PCII submissions. Establishing such deadlines is a basic principle of information management and its omission could have detrimental implications. After information is submitted as PCII but before DHS has a chance to review it, the information is automatically treated as PCII until the program manager determines differently. If DHS encounters a backlog of submissions, years could pass before information is reviewed, and massive amounts of information may be unjustifiably restricted from public access.

States Group Resolved Against EPA's Plans to Cut Toxics Reporting

On Aug. 29 the Environmental Council of the States (ECOS) passed a resolution urging the Environmental Protection Agency (EPA) to withdraw its proposals to reduce reporting under the Toxic Release Inventory (TRI). The resolution, by a national association of state and territorial environmental agency leaders, underscores the fact that states are firmly opposed to the EPA's plans to cut the national pollution reporting program.

Late last year, EPA announced three significant changes it planned for TRI reporting, in order to reduce paperwork for companies. Since EPA's announcement, opposition to the plans has continued to mount from almost every direction. The EPA has received more than 122,000 comments from the public, nearly every one opposing the plans. Agencies and officials from more than 23 states submitted formal comments to EPA opposing the plans. The House of Representatives passed an amendment to one of its spending bills to prevent the EPA from spending money to finalize the proposals. The EPA's own Science Advisory Board sent a letter with unsolicited advice on the issue, expressing concern that the TRI changes would "hinder the advances of environmental research used to protect public health and the environment."

ECOS members passed the resolution at their 2006 annual conference in Portland, Oregon. The resolution lists 14 reasons for the organization's position, including the House amendment and the numerous comments from state agencies and officials opposing the proposals. Generally, the resolution seems most concerned that the EPA's proposals would harm an important, effective tool for reducing toxic pollution without actually reducing any reporting burden on companies.

Interestingly, the administration's nominee to direct EPA's Office of Environmental Information, which runs the TRI program, Molly O'Neill, currently works at ECOS as Executive Coordinator for the Exchange Network Leadership Council (ENLC) and the Network Operations Board. During her nomination hearing, O'Neill sidestepped several questions on the proposed TRI changes, refusing to take a position either supporting or opposing the plans. Recently, two senators placed a hold on O'Neill's nomination until

EPA withdraws the proposed TRI cuts.

Getting Congress to Punch the Clock

Following Congress's failure to pass meaningful lobby reform, the Sunlight Network has launched a two-month grassroots campaign to increase transparency about the actions and activities of our elected representatives. The Punch Clock Campaign offers rewards to the public for persuading lawmakers to post their daily schedules on the internet.

Under the campaign, Sunlight is offering over $680,000 in "good-will bounties" to encourage citizens to ask for lawmakers' commitment to this transparency effort. Groups and individuals can receive $1,000 for each member of Congress, and $250 for each candidate, that they convince to sign the "Punch Clock Agreement."

The agreement simply states:

I believe citizens have a right to know what their Member of Congress does every day.

Starting with the next Congress, I promise to publish my daily official work schedule on the Internet within 24 hours of the end of every work day. I will include all matters relating to my role as a Member of Congress. I will include all meetings with constituents, other Members, and lobbyists, listed by name. (In rare cases I will withhold the names of constituents whose privacy must be protected.) I will also include all fundraising events. Events will be listed whether Congress is in session or not, and whether I am in Washington, traveling, or in my district.

The Sunlight website provides downloadable agreement/pledge sheets, a database and map tool to find lawmakers and candidates, their responses to requests, and related materials.

Earmark My Word: Boehner Promises House Action This Week

Last Thursday, House Majority Leader John Boehner (R-OH) announced the House will take up legislation as soon as this week to overhaul the process allowing individual lawmakers to slip funding for special projects into large appropriations bills.

Earlier this year, Congress seemed sure to address the enormously embarrassing loopholes riddling the nation's lobbying laws and Congress' own lax ethics rules in the aftermath of the Jack Abramoff scandal and the resignation of disgraced former Rep. Randy "Duke" Cunningham (R-CA).

"Earmarks" -- lines of funding legislation in appropriations bills that members of Congress designate for specific projects for their districts -- became a dirty word in Washington over the winter, evoking visions of a $250 million "bridge to nowhere,"

questionable projects bearing the name of a congressional sponsor, and a seamy cash-for-favors culture.

Initial action on lobbying overhaul legislation occurred fairly quickly this year. The Senate acted first, passing the Lobbying Transparency and Accountability Act of 2006 (S 2349,) on March 29, with the House passing its bill (HR 4975) on May 3. In addition to addressing earmarks, the bills would have clamped down on gifts from lobbyists and required ethics training and more frequent reports by lobbyists on their activities. But after these bills passed both chambers and the Abramoff outcry had quieted, they languished in conference all summer long.

Until late last week, Boehner had sounded notably cagey about the possibility of earmark reform. Yet with Congress nearing the end of its session and elections fast approaching, the unfinished business of lobby reform suddenly looks like a poster child for this do-nothing Congress. Boehner has now reversed course and is now floating a resolution to address earmarks.

Boehner's proposal would establish a new point of order against consideration of a committee report or conference agreement on spending or tax legislation unless earmark sponsors are listed in the report.

This proposal only covers a tiny fraction of the scope of the original reform bills. The change would only apply to committee-reported bills, not new legislative vehicles such as those that carried the pension and "trifecta" measures before the August recess. And, technically, Boehner's proposal would not be a law, but merely a change in the House rules, automatically expiring at the end of the current Congress. Some Republican may be banking, however, that even this small change may be enough to take to voters as proof of their reform bona fides come November.

Boehner's office has said he will take all necessary action to make this a sustained rule and practice in the House. But House appropriators have issued loud protests. In particular, Appropriations Committee Chairman Jerry Lewis (R-CA) warns that he will oppose any earmarks provision that applies only to the appropriations bills that go through his committee and not to tax and authorizing bills,.

Boehner and other GOP leaders have made efforts to broaden the definition of earmarks to the appropriators' satisfaction but it is unclear if the changes will be broad enough to garner Lewis' support.

Another outstanding issue in the House regarding how broadly earmarks are defined was outlined well in an article published by Citizens for Tax Justice:

> House leaders want the rules to treat tax break proposals as earmarks, or as "targeted tax provisions" only if they benefit just one person. As of [September 8], House appropriators are reportedly opposed to this plan because they think it lets the House Ways and Means Committee (which writes the tax proposals) off the hook too easily. But their definition of a "targeted tax provision" that should be considered an earmark is also laughably loose. They reportedly would include any

> tax break that benefits fewer than a hundred people. So a tax break that benefits only the richest fraction of one percent could never be considered an 'earmark' because it benefits more than a hundred people.

Having gone as far as promising floor action on the earmarks measure this week, Boehner and the House GOP now risk considerable embarrassment should efforts to reach a compromise with Lewis and other appropriators fail. Though limited in both scope and tenure, the House earmarks measure nevertheless would stand as a notable step toward increasing transparency in the budget process.

Trifecta Bill May Resurface in Senate This Month

The fate of the "trifecta" bill and middle-class tax cuts remains uncertain, as GOP leaders send mixed signals about their intentions and the GOP ranks appear restless.

In late July, the House passed a so-called "trifecta" package (H.R. 5970) that would roll back estate taxes, increase the minimum wage, and extend several business and other tax credits. Solely because of the inclusion of the estate tax cut, the package failed in the Senate, falling three votes short of the 60 necessary to end debate.

Unfortunately, the GOP leadership has refused to design a strategic alternative to the trifecta bill. Many members of the business community have been vocal in calling for action on the highly-popular tax credit extensions ("extenders") - even recently publicly questioning the Republican strategy to attach those provisions to the estate tax. By any measure, this is "must-pass" legislation and will cause corporate and small business losses if not renewed by the end of the year. But it was lashed to the mast of the estate-tax, a poison-pill for any Senate bill, no matter how broadly supported.

House Majority Leader John A. Boehner (R-OH) and Senate Majority Leader Bill Frist (R-TN) have painted themselves into a rhetorical corner, insisting repeatedly that the trifecta is an all-or-nothing proposition.

Boehner was emphatic last week about staying the course with the trifecta bill at a press conference, stating, "Will we break it up? Absolutely not. Do I need to spell it? Absolutely not. That bill is the bill and will be the bill and if anybody wants any part of the bill they get to vote for all of it or none of it."

Likewise, Frist has not yet backed off his pronouncements in August that members will not have the opportunity to vote separately on the elements of the trifecta. He is considering the idea of sweetening the minimum wage provision by fixing the penalty on workers in states that do not count tips as wages. He has also suggested he might add some middle-class taxes cuts to the trifecta package. Frist has ruled nothing out, saying all options are still on the table.

Still, Frist is getting some tacit push-back from Republican colleagues who are seeking to break the logjam.

Sen. Charles Grassley (R-IA), who complained bitterly about the extenders he championed sinking along with the trifecta, is now talking about pushing off any vote on the extenders until a post-election lame-duck session of Congress. Sen. Jon Kyl (R-AZ) told reporters last week that the package remains three votes shy of the 60-vote threshold needed for passage and he doubts the bill could be altered to attract three more supporters.

Democrats remain almost entirely united in opposition to the trifecta bill because of the estate tax provision, which they say will bankrupt federal coffers by giving unnecessary tax breaks to the wealthiest Americans.

Without question, GOP rank-and-file pressure on leadership to relent and allow a separate vote on the extenders and minimum wage prior to the Nov. 7 election is building, as members in tight races are desperate to deliver legislative accomplishments.

If Frist and his cohorts do not bring the trifecta to the floor or refuse to break it up into three bills, other options may be available. The trifecta notwithstanding, Frist and the House Republican leadership have been murmuring about extending largely middle-class tax cuts, specifically the 2001 child tax credit expansion and the reduction of the "marriage penalty." Finding themselves in a desperate struggle to maintain control of both houses of Congress, Republicans might seek to garner key middle-class votes by making these provisions permanent.

Spending Transparency Bill Passes Senate, House Approval Imminent

After a month of secret holds, back-room maneuvering, stall tactics and butting of heads, the Senate quietly passed the Federal Funding Accountability and Transparency Act (S. 2590) on Thursday, Sept. 7 by unanimous consent. The bill will dramatically increase government accountability and public access to federal spending data, by creating a free, public, searchable website of all federal spending, including government contracts and grants. The House is expected to amend the bill slightly before passing it this week.

After amassing an impressive group of cosponsors including both the Senate Majority and Minority leaders, the bill was unanimously approved by the Homeland Security and Government Affairs Committee in late July. It was widely expected the bill would pass the Senate quickly before the chamber broke for its summer recess in August, especially after Sens. Susan Collins (R-ME) and Joseph Lieberman (D-CT), the committee's chair and ranking member respectively, jointly requested the bill be fast-tracked and brought to the Senate floor for a quick vote.

Yet the bill ran into some unexpected resistance when two Senators placed anonymous holds on the legislation, preventing it from passing quickly. The irony of a "secret hold" being used to stop a bill promoting transparency and disclosure of government information was not lost on supporters of the legislation nor the media.

Blogs from across the political spectrum including Porkbusters and TPMMuckraker,

public interest and watchdog groups teamed up to launch an effort to expose the mystery senator or senators. New of the effort spread quickly through the blogosphere and activists and regular citizens called senators' offices *en masse* to ask them to publicly disavow having placed the hold. Eventually this effort uncovered two senators who placed holds: Ted Stevens (R-AK) and Robert Byrd (D-WV). Once exposed, Byrd relinquished his hold - saying he had had sufficient time to review the bill and no longer objected.

Stevens hold remained for a time, however, as he repeatedly claimed he was concerned that the legislation would be too costly and that it would create excessive bureaucracy. A number of Capitol Hill insiders, however, have speculated that the hold was placed as a personal pay-back against Coburn for holds he had placed in 2005 on legislation Stevens cosponsored. Nevertheless, the obstacle was eventually removed after increased public pressure on Sen. Majority Leader Frist led him to bring the bill for a vote despite the hold.

Shortly after the Senate approved S. 2590, an agreement was reached with cosponsors of a weaker House version, which passed earlier this year, to bring up the Senate version for a House vote before adjournment. The weaker House bill only included required public access to information on grants and other kinds of federal assistance spending, omitting all federal contracts.

The House will take up S. 2590 this week on the suspension calendar - a procedure for non-controversial legislation. It is expected to pass by a wide margin. Since it will be slightly modified from the Senate version, the bill passed by the House will quickly be passed by the Senate once again and then sent to the president for his signature.

While the enactment of this bill is certainly a victory for transparency and access to information for the American people, it does not guarantee the online database will be easy to use and accessible for novice users and analysts alike. In order to make sure the government implements S. 2590 appropriately and adequately, OMB Watch will launch a similar database in early October. The new website, FedSpending.org, will allow users to search and download current government spending data in an easily accessible format for free.

Congress Squanders Year As Appropriations Remain Unfinished

With the beginning of the new fiscal year less than three weeks away, not one of this year's appropriations bills has been signed into law. The Senate shoulders most of the blame for the standstill, having now passed just two of its 12 appropriations bills. Because there is so little time left, Congress will have to finish up its appropriations work in a lame-duck session after the November election.

Last week, the Senate passed its version of the Department of Defense spending bill, only the second appropriations bill it passed this session, the first being the Department of Homeland Security spending bill. Clearly, Senate leadership has not considered

appropriations bills a priority this session. Instead of appropriations bills, the GOP leadership has brought up the estate tax roll-back on three distinct occasions, as well as attempted to pass two unpopular constitutional amendments. None of these measures passed, while 10 must-pass appropriations bills have received no consideration.

The appropriations process this year seemed doomed from the start as the Senate did not schedule enough time in session to finish all its appropriations bills. When it adjourns in October, the Senate will have spent 125 days on the job, the lowest count in at least the last 20 years.

The House, on the other hand, has passed every appropriations bill except for a divisive Labor-Health and Human Services (Labor-HHS) bill. The Labor-HHS package was amended in committee to include a raise in the minimum wage that many House conservatives have objected to. Further, House Republicans do not agree on the bill's proper funding totals or funding for some specific programs, with moderate Republicans asking for amendments that would add billions to the Health and Human Services budget. Moderates have also protested the House Appropriations Committee's Labor-HHS proposal that would zero out funding for 56 individual programs.

Despite the time needed to iron out good-faith compromises on these issues, House leaders will most likely wait until the last minute before adjournment to take up the Labor-HHS bill making good compromises next to impossible. And with so little work done this far into the budget cycle, Congress will have to hold a lame-duck session after the November election to complete all appropriations bills.

In order to avoid a government shut down, Congress will have to pass "continuing resolutions" that temporarily fund federal programs until appropriations bills have been signed into law. This year, all the unfinished appropriations bills will most likely be combined into one large "omnibus" bill. This will allow for far less oversight and scrutiny of specific funding levels and will likely lead to program terminations and cutbacks to funding levels that ordinarily would not pass Congress.

For a second straight year, Congress has done a shameful job of fulfilling its most basic duty: appropriating federal resources to keep essential government programs funded.

Senate Finance Committee Looks at Executive Compensation Excesses

A Sept. 8 Senate Finance Committee hearing demonstrated that a 1993 tax code reform has failed to curb the growth of extravagant CEO compensation packages. In fact, the reform created loopholes that have opened the door for outrageous salaries and bonuses, and unscrupulous behavior by company executives and boards of directors.

Senate Finance Committee Chairman Chuck Grassley (R-IA) vehemently denounced the loopholes in the tax code created by the 1993 reforms.

Prior to the hearing, Grassley told the *Wall Street Journal* that the original purpose of

the 1993 law was to "make sure that there wasn't a great deviation between what executives got paid and what people further down the ladder" got paid.

"It really hasn't worked at all," Grassley said, explaining why he had called for the hearing. "I want to know what went wrong and how we can fix it."

Echoing Grassley's remarks, Christopher Cox, Chairman of the Securities and Exchange Commission, testified at the hearing that "as a Member of Congress at the time, I well remember that the stated purpose was to control the rate of growth in CEO pay. With complete hindsight, we can now all agree that this purpose was not achieved. Indeed, this tax law change deserves pride of place in the Museum of Unintended Consequences."

The 1993 reforms applied to Section 162(m) of the tax code. Under 162(m), publicly traded corporations can deduct no more than $1 million in base pay for each of their five highest paid executives. More compensation of top executives can be deducted only if it is tied to job performance.

Despite the 1993 reform, executive pay continues to grow much faster than average worker's earnings, with much of it being deducted as "performance-based" pay. According to a recent report from United for a Fair Economy, the average executive made 40 times as much as a worker in 1980, but by 2005 made more than *400 times* as much as a worker.

Part of this increase was fueled by section 162(m). Under the provisions of the reform, the nature of compensation for executives changes. Base salaries now take up only a minor portion of CEO compensation packages, while alternative types of compensation that qualify as "performance-based" pay, such as stock options, are increasingly common.

Not only did 162(m) fail to achieve its intended purpose, but it also made executive compensation more difficult to monitor. Harvard Law School Professor Lucien Bebchuk, who testified at the hearing, estimates that abuse of the performance-based provisions of 162(m) has cost the Treasury at least $20 billion. The IRS has launched a "Corporate Executive Compliance" initiative in response, hoping to improve the accuracy of reporting of executive compensation.

Witnesses at the hearing also discussed how 162(m) contributed to an up tick in stock options fraud. Stock options are automatically considered "performance-based" and have become a popular way of providing deductible executive compensation. Companies can "backdate," or choose the date from which the options would be issued, to change the value of the stock option. Stock backdating is not necessarily illegal, but it can make it easier for companies to hide the true extent of an executive's pay. Many companies that used backdating are now being investigated by the SEC for issuing fraudulent disclosures of executive pay, as well as possibly violating accounting rules.

Cox told the hearing that the SEC is ready to make new rules that would cut down on fraudulent disclosures, and Grassley expressed his intention to move forward on

additional reform proposals, though he did not explicitly say what actions he would take.

Criticism of Draft Risk Assessment Bulletin May Delay Implementation

InsideEPA, a Washington trade publication, reports that criticism from federal agency officials could prevent the Office of Management and Budget from finalizing a bulletin on risk assessments.

On Jan. 9, 2006, the OMB released a draft bulletin governing how agencies perform risk assessments. If enacted, the new standards would create a one-size-fits-all standard, requiring more information and analysis before agencies could act to protect the public.

The Environmental Protection Agency and other federal agencies have been vocal in criticizing OMB's draft bulletin. Now, according to InsideEPA, industry officials are worried this criticism could delay OMB's ability to finalize the bulletin.

EPA Calls Bulletin Burdensome

In comments to the National Academies of Science (NAS), which is charged with peer reviewing the draft bulletin, EPA noted that OMB's bulletin would burden the agency with new analytical requirements and would require the use of assumptions that fail to adequately protect vulnerable populations, according to InsideEPA.

As OMB Watch noted in its comments on the bulletin, the draft bulletin requires that agencies consider expected risks and, therefore, conflicts with laws governing clean air, drinking water and pesticides, which explicitly require EPA to consider the harms imposed on the most susceptible populations, like children or the elderly.

"Discussion of the notion of expected risk, (not a specifically defined term, to our knowledge) in a risk assessment usually involves a particular exposure distribution and relies on a series of judgments about whom we expect to be exposed," according to the EPA comments obtained by InsideEPA.

Department of Labor and Other Agencies Raise Concerns

The Department of Labor (DOL) also commented that the risk assessment bulletin "could add significant time" to risk assessments by the Occupational Safety and Health Administration (OSHA) without improving the usefulness of the assessments, according to the BNA Daily Report for Executives. DOL pointed out that the broad scope of the document could require OSHA and MSHA to perform risk assessments on "non-regulatory informational products" including guidelines for employers and employees to avoid workplace hazards. The Center for Disease Control raised similar concerns.

The draft bulletin could also undermine the scientific integrity of OSHA's risk analysis, DOL said:

To make its determinations of the significance of the risk, OSHA relies on analyses of scientific and statistical information and data that describe the nature of the hazard associated with employee exposures in the workplace, and derive[s] estimates of lifetime risk assuming that employees are exposed to the hazard over their working life (usually taken to be 45 years).

The DOL comments went on to say that OMB's bulletin would require "all plausible assumptions and models be quantitatively evaluated," when possible. According to DOL, this standard could potentially have negative impacts on OSHA's evaluation of risk. "OSHA would prefer that the bulletin make clear that quantitative evaluation of risk be based on those assumptions and models that are clearly consistent with supporting scientific evidence, for example, regarding a chemical agent's mode of action," the comments stated.

The Consumer Product Safety Commission, the Food and Drug Administration, the Department of Transportation, and the Fish and Wildlife Service also raised concerns about the scope of the risk assessment guidelines. As FDA put it in comments, "risk assessment is a tool for addressing public health problems and should be scaled to fit the public health problem at hand." The level of scrutiny required under OMB's bulletin may not always be appropriate.

Risk Assessment Bulletin Puts the Public at Risk

As OMB Watch pointed out in comments submitted to OMB last month, if enacted, the risk assessment bulletin would so burden risk assessment and other risk-related determinations that agencies would wind up paralyzed, unable to establish a case for protecting the public.

Broad scope would drown agencies in analysis. The bulletin uses a definition of "risk assessment" that sweeps in a much broader universe of agency information than has ever been contemplated by any standard, widely accepted definition. In fact, the definition of risk assessment is so broad that it would include a large number of activities that would never normally be considered risk assessments, including heat and hurricane advisories from the National Weather Service and food preparation notifications provided by the Department of Agriculture.

"Expected" risk estimates ignores harms to most vulnerable populations. The bulletin also requires agencies to not only investigate how a particular harm would impact the most vulnerable individuals but also to determine the "expected" risk. The bulletin requires risk ranges, central estimates and efforts to downplay worst-case scenarios, and population-wide risk estimates, even though many risk management decisions require point estimates of risks to individuals in worst-case scenarios. These approaches are in some cases contradictory to the risk assessment approaches outlined in law. For instance, the Resource Conservation and Recovery Act specifically require that EPA consider the individuals most highly exposed to harm when setting standards.

In fact, preliminary analysis conducted by Reps. Bart Gordon (D-TN), John Dingell (D-MI), Henry Waxman (D-CA) and James Oberstar (D-MN) found that "the analytical

approach mandated in [the bulletin] represents a significant departure from approaches contained in the many statutes governing health, safety, and the environment, and from statutory direction to federal agencies to protect human health, safety, and the environment." The representatives determined that the bulletin conflicts with statutory mandates including separation of cost-benefit analysis and risk analysis, and noted that Congress has traditionally guided agencies individually in their risk assessment practices.

Agencies must act in fact of uncertainty. OMB's approach to risk assessment demands that agencies identify all potential sources of harm when conducting risk assessments. In many cases, this would be an incredibly time-consuming task that would delay agency actions to prevent harm to the public, as adverse effects could be attributed to myriad different sources. The proposed bulletin would deprive agencies of the discretion to determine the best approach to risk assessments given the particular circumstances involved, such as the urgency for agency action. But the subject matter in risk assessments also varies widely between agencies, and what is the best approach to risk assessments for one agency may not be the best approach for another.

A free pass to industry. In contrast to the extensive requirements for agency risk assessment activities, the proposed bulletin gives a free pass to assessments used in characterizing risk on product labels if the label is required to be approved by a federal agency. This is despite the fact that such risk assessments are among the most in need of guidelines to ensure quality and objectivity. In many cases, the risk assessments used by agencies in approving labeling for a product are conducted or sponsored by the manufacturer of the product. Manufacturers clearly have an incentive to downplay the harm associated with their product, and a number of studies reveal bias in manufacturer assessments. This giveaway to manufacturers undermines the purpose and objectivity of the proposed bulletin.

Report Finds Dudley Unfit to Serve

Public Citizen and OMB Watch released a report today on Susan Dudley, the nominee to become the new regulatory czar within the Bush administration, concluding that she is unfit for Senate confirmation.

The report, *The Cost is Too High: How Susan Dudley Threatens Public Protections*, presents a case for rejecting Dudley as the next regulatory czar, whose official title is Administrator of the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget.

As OIRA administrator, Dudley would have an enormous range of powers, including:

-
- overseeing nearly all governmental regulations published by agencies,
- reviewing every agency action that would collect information from 10 or more people,
- setting policy that govern information dissemination by the agencies, and

- coordinating statistical policy.

OIRA not only checks for duplication in regulatory and information practices, its stated purpose, but can alter the content of agency actions. OIRA was created through the Paperwork Reduction Act of 1980. The act does not grant OIRA any regulatory review authority. Instead, this authority was granted to OIRA initially through Executive Order 12291, issued by President Reagan within the first month of taking office. Thus, from the day it opened its door, OIRA was largely a regulatory review agency running roughshod over the agencies to promote the policies and priorities of the president. It has changed little over the years.

In a statement accompanying the report, Joan Claybrook, president of Public Citizen, said that Dudley was "unfit" to be administrator of OIRA. She described Dudley's opposition to federal regulations to require air bags in automobiles as one example of her radically free-market ideas.

Margaret Seminario, Director of Safety and Health at the AFL-CIO, made the case that Dudley has a strong bias against regulation, a very dangerous position when it comes to protecting the lives of workers. Seminario added that Dudley's emphasis on cost-benefit analysis and the near determinative role that such economic analyses would have in Dudley's decisions run counter to various laws, such as the Occupational Safety and Health Act which places the safety of workers above cost-benefit decisions.

According to Robert Shull, the report's primary author--who recently left OMB Watch to lead Public Citizen's auto safety and regulatory policy division--**Dudley**:

- **Has rarely met a rule that she likes.** Dudley's "market failure" test would make it impossible for agencies to justify public health, safety, civil rights, environmental, or other public interest protections.
- **Has a radical agenda for gutting federal regulations.** She supports regulatory sunsets which would put agencies on a treadmill of having to revisit rulemakings that have previously been done, whether it deals with child consumer protections or broader health protections. She also supports regulatory budgets, a concept promoted since the Reagan administration, but opposed by Congress and the public.
- **Is too cozy with industry.** She has been the head of the industry-funded Mercatus Center, heavily influenced by major corporate interests. Even Dudley's conservative colleagues think she is a bit out there. According to the Public Citizen/OMB Watch report, the managing editor of a Cato Institute publication said, "The material that they send to us, they try to tone down. Cato is more of a public policy research organization. We may be a little more academic than they are."

It is unclear when hearings on the Dudley nomination will take place. Sen. Joe Lieberman (D-CT), the ranking Democrat on the Homeland Security and Governmental Affairs Committee, sent out a press release calling for "stringent scrutiny" of Dudley. The chair of the committee, Sen. Susan Collins (R-ME), has not indicated a hearing date.

IRS Drops Case Against NAACP

On Aug. 31 the National Association for the Advancement of Colored People (NAACP) announced that, after an investigation lasting nearly two years, the Internal Revenue Service (IRS) found the group did not violate the ban on partisan electioneering in 2004. The group will thus retain its tax-exempt status. The case raised questions about the right of charities and religious organizations to criticize elected officials' policies, the role of partisan politics in IRS investigations, and the legality of the new IRS enforcement program. The results of this case should reassure nonprofits of their right to speak out on the issues of the day.

The NAACP announced the IRS action at an Aug. 31 press conference. NAACP Board Chair Julian Bond, whose 2004 convention speech criticizing Bush policies was the focus of the investigation, told reporters at the event, "We'll continue to speak truth to power."

NAACP President and CEO Bruce S. Gordon, told reporters, "Tax-exempt organizations should feel free to critique and challenge governmental policies under the First Amendment without fear of IRS intervention." He said the investigation was a cloud that hung over the group's activities, diverting resources from its principal mission of fighting racial discrimination. Bond added, "It has never been a crime or violation for American citizens to criticize government policies and it is not a crime or a violation to do so now."

The NAACP criticized the IRS for taking nearly two years to complete the investigation, conducted under a "fast-track" process the IRS established in 2004 and continues to use in 2006. The IRS letter informing the NAACP of its decision claims the investigation was delayed because the NAACP had not complied with an administrative summons asking for documentation about the 2004 convention. (The NAACP had refused to comply with the summons, claiming its timing violated IRS rules.) The IRS letter states the agency was able to complete its investigation by watching a video of Bond's speech, noting that the "video footage allowed the Service to gain information regarding the context in which Mr. Bond's speech was made. That additional information, when added to the information that the Service had previously been able to gather, indicated that political intervention did not occur."

Bond, however, called the IRS's justification for its delay "dishonest and disingenuous," noting that the video and full text of the speech had been available on the NAACP website throughout the investigation and that no new evidence had emerged.

Some have accused the IRS of playing partisan politics by opening the investigation one month before the 2004 election. Although the IRS letter to the NAACP said the investigation was launched "as a result of information received from the general public," the NAACP obtained documents from its IRS file that show several Republican members of Congress requested the probe. The NAACP used Freedom of Information Act requests to obtain over 1,500 pages of documents in the IRS files. These documents show complaints against the NAACP to the IRS were made by several members of Congress, including Sens. Lamar Alexander (R-TN) and Susan Collins (R-ME); then-Senator Strom Thurmond (R-SC); Reps. JoAnn Davis (R-VA.) and Larry Combest (R-TX); and then-

Reps. Robert Ehrlich (R-MD) and Joe Scarborough (R-FL).

Ehrlich, who is currently governor of Maryland, said his request was only a constituent service because he was following up on a complaint from Richard Hug. According to the *Baltimore Sun*, Hug is Ehrlich's chief campaign fundraiser. The IRS denies the charge, saying its decisions are made "without regard to political considerations."

The case has raised questions about the legality of the IRS's new procedures for enforcing the ban on campaign intervention by charities and religious organizations. Prior to the 2004 election cycle investigations into possible violations did not begin until after a 501(c)(3) organization filed its annual information return (Form 990). The new procedures allow the IRS to initiate investigations before the Form 990 is filed, in order to prevent repeat violations.

The Political Activities Compliance Program (PACI) would have been contested in court if the IRS had not closed its investigation of the NAACP when it did. In January the NAACP moved to force resolution of the case by paying the excise tax it would have owed if the IRS found it had violated the ban on partisan activity. The excise tax rate is 10 percent of the cost of a prohibited communication. The organization then filed for a refund, giving the IRS six months to act before the NAACP would be entitled to go to court for a review of its claim.

The IRS may not have avoided a court battle by acting just before the end of the six-month deadline. NAACP officials are still seeking further disclosure of relevant IRS files under the Freedom of Information Act, some of which the IRS has withheld.

FEC Deadlocks on Grassroots Lobbying Broadcast Exemption

On Aug. 29 the Federal Election Commission (FEC) voted down a proposed interim rule that would have exempted grassroots lobbying broadcasts from a federal rule banning ads that mention an incumbent before an election. The vote on the grassroots exemption failed on a 3-3 party-line vote, with Democrats rejecting all proposals. (A majority of the six FEC commissioners, of which three are appointed by each major political party, must approve any action undertaken by the commission.) So the 60-day blackout period applies to this election season, and nonprofit groups cannot lobby members of Congress up for reelection through broadcast ads.

The grassroots exemption proposal was sponsored by FEC Commissioner Hans A. von Spakovsky, a Republican. It was released on Aug. 3 and was supported by his Republican colleagues. It would have allowed nonprofits, corporations and unions to fund grassroots lobbying advertisements 60 days before a general election or 30 days before a primary, on either television or the radio if the following conditions were met.

The broadcast *must*:

- Be directed at the lawmaker in his capacity as an incumbent officeholder, not a

candidate;
- Discuss a public policy issue currently under consideration;
- Urge either the officeholder or the general public to take a specific position on an issue, and in the case of the general public, urge them to contact the officeholder.

But the broadcast *could not*:

- Discuss the officeholder's character or fitness for office;
- Reference any political party or election; or
- Promote, support, attack or oppose any candidate for federal office.

The proposed interim final rule was spurred by a February 2006 petition for rulemaking filed by the AFL-CIO, Alliance for Justice, the U.S. Chamber of Commerce, the National Education Association and OMB Watch. It would have been effective through Sept. 2007, at which point the FEC would have considered a final rule.

During FEC discussions of the possible exemption, Commissioner Ellen Weintraub, a Democrat, objected to the proposal because a full rulemaking process had not taken place. However, the three Democrats then voted to block such a process and also blocked a motion authorizing the FEC's attorneys to prepare draft rules for discussion, claiming they want to wait for guidance from the courts.

The Notice of Disposition of Petition for Rulemaking, which lays out the FEC's decision, states the FEC "may consider a rulemaking on this subject in the future." This is unlikely, however, to occur before two cases challenging application of the rule to specific situations are resolved by the courts. For more information about those cases see Grassroots Lobbying Issue Hits FEC and the Courts (*OMB Watcher* Apr. 18, 2006) and Federal Court Rejects Challenge to Limitations on Grassroots Broadcasts (*OMB Watcher* May 16, 2006).

Nonprofits Mobilize to Fight Voter Suppression

A growing body of state laws and regulations governing voter registration and the voting process create barriers to voting that discriminate against minorities, new citizens and the elderly. Nonprofits are challenging these new voter suppression tactics, including filing several lawsuits. These voter drives build off efforts that support election reform programs mandated by the Help America Vote Act of 2002, and these developments illustrate just how important nonprofit organizations are as vehicles of civic participation.

Recently federal courts have struck down state rules limiting the ability of nonprofits to register voters in Florida and Ohio. In Florida the League of Women Voters, the AFL-CIO, and American Federation of State and Municipal Employees were forced to stop registering voters until the court blocked enforcement of a new state rule. The rule mandated that nonprofits turn in voter registration cards within 10 days or pay stiff penalties for late submission. Groups were engaged in statewide voter registration drives

and said the law created a logistical impossibility.

In Ohio, Project Vote, People for the American Way Foundation, and Common Cause Ohio successfully challenged a law that would have required all voting registrars (including nonprofit volunteers) to complete an online training course and to submit the registrations personally instead of through the nonprofit sponsor, or face criminal penalties. A similar proposed rule in New Jersey requiring forms to be turned in within five days of registration is being challenged by the Brennan Center for Justice.

New, stringent voter identification requirements are also being challenged. In Ohio the Brennan Center has filed suit on behalf of naturalized citizens challenging a law that allows poll workers to request that voters produce documentation proving their U.S. citizenship. The law does not apply to citizens born in the United States.

In Washington the Association of Community Organizations for Reform Now (ACORN), Service Employees International Union, Washington Citizens Action, and the Washington Association of Churches won a case challenging a state law that would have kept citizens from voting if their identification information did not match government databases exactly. This would have kept otherwise eligible voters off of voter rolls if there had been even a minor typographical error. However, in Missouri a state judge recently sided with the state on a similar issue, even while acknowledging the potential high cost of compliance with the law by several voters.

In Congress, a bill (H.R. 4844) would require all citizens that want to register to vote to show proof of citizenship. It is possible the bill could come up for a floor vote in the House of Representatives during the week of Sept.18. This action follows up on an effort by a group of Republican lawmakers to hold up the passage of the landmark Voting Rights Act Reauthorization this summer. It was eventually passed, but not before an attempt to limit its scope and protections was made.