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## **The Omnibus Spending Bill and the Budget Process**

The omnibus appropriations legislation is still pending. While most of the criticism about the bill has focused on the amount of "pork" it contains, the real problem is the seriously flawed budget process it reflects.

The Senate will not consider the omnibus appropriations legislation (HR 2673) until it returns for the new congressional session on January 20, 2004. The legislation, which was passed by the House on December 8, contains funding for Agriculture, Commerce-Justice-State, District of Columbia, Foreign Operations, Labor-HHS, Transportation-Treasury, and VA-HUD for the fiscal year that began October 1, 2003. Under a continuing resolution, all agencies and departments encompassed by the remaining seven appropriation categories will continue to be funded at 2003 levels until January 31, 2004.

Outrage over the omnibus bill has been directed at the massive amount of "pork" contained within the bill. "Pork"

is defined as particular "earmarks" that benefit "special interests" in congressional districts - used by policymakers to demonstrate their ability to "bring home the bacon" for their constituents. For example, Taxpayers for Common Sense has published its top ten list of pork. At the same time, the Heritage Foundation has compiled an even longer compendium of pork projects in the omnibus bill. According to the Heritage Foundation, the 2004 appropriations contain over 10,000 earmarks. "Pork" cost range in the billions.

So, maybe a rainforest in Iowa isn't the best use of our taxpayer dollars...but what about construction of a daycare center for kids and seniors in California, a dental clinic in Mississippi, or bike trails in Arkansas and Florida? What about renovating a bridge in Pennsylvania, replacing traffic lights in New York, buying or renovating buses in Texas and New York, or a creating a transit system in Alaska? What about money for a hospital in North Carolina or support for a soup kitchen for the homeless in California or services for the homeless and addicted in Kentucky? Given huge deficits and a rising national debt, there are some egregious examples of spending that we could do without in the omnibus bill. At the same time, given less and less political will for important government services, a blanket condemnation of all the earmarked spending - including that for infrastructure, transportation, social welfare, research, or even recreation, arts and culture - also misses the point.

The larger point is not the earmarks. The real reason we should care about this omnibus spending bill is because it represents a serious breakdown in the budget process for 2004. One problem is the lack of congressional oversight on the massive bill. Also of major concern is the lack of government accountability to citizens on how their tax dollars really get appropriated. Additionally, the minority party has not been privy to the discussions of compromise for the omnibus bill. In fact, balance of power has shifted to the executive branch, leaving compromises between the President and his party.

This process undermines the checks and balances built into our constitutional framework by giving the executive branch unusual powers. Our system requires the legislative branch to prescribe spending and the executive branch to dispose of the actions. However, under the omnibus bill, the executive branch gained the power to tell the legislative branch what it wants - using the threat of a veto and government shutdown. In this year's scenario, the President was even able to reverse legislative provisions that had already been agreed upon in both the House and the Senate. One example is the FCC media ownership rules. Both the House and the Senate rejected a FCC rule that allowed a company to own TV stations reaching 45 percent of the nation's viewers, rather than the previous standard of 35 percent. However, the President told key leaders that it must be 39 percent. Coincidentally (or not) this allows Viacom Inc., owner of CBS and UPN, and News Corp., owner of Fox, both of which exceeded the percent limit because of mergers, to avoid having to sell any of their TV stations.

What will happen next?

The Senate might not pass the omnibus bill. The portion of government that is funded through the remaining seven appropriations bills could continue to operate under continuing resolutions or even a long-term continuing resolution. This would mean no increased appropriations. But failure to pass the omnibus bill would be a loss for activities that were slated for increases, such as more funding for AIDS and veterans. It would also mean that a scheduled pay increase for civil servants would not occur, and departments and agencies would have to make do with last year's funding.

On the other hand, the Senate might pass the bill, including all the ill-considered pork projects. If the omnibus bill is passed, several policy changes would go into effect; for instance, the Labor Department's overtime provision supported by the administration increased restrictions on travel to Cuba, delay in country of origin labeling of meat, changes in government procurement rules, and the media ownership rules mentioned above.

This year's omnibus spending bill is the result of a seriously flawed budget process. Whether the omnibus is passed or not, flawed results are likely to be the outcome – making the losers the American people.

## **A Call to Action! A Long-Term Tax and Budget Plan**

Help the national economy by working with others to develop a long-term plan on budget and tax issues.

Over the past several years, the public interest community has primarily engaged in short-term, defensive battles on federal tax and budget issues. We at OMB Watch think it is vital to determine how we can seize the initiative and promote what we stand for - a fair, simple and equitable tax system that generates adequate resources to fund the government services and programs that Americans want.

In order to start a conversation about long-term proactive tax and budget priorities, we drafted a [discussion paper](#) that welcomes your comments.

As part of this effort we will also be releasing an Internet survey in January. We hope that you will both take the survey and redistribute it to your networks.

This call to action is meant to spark discussion and communicate the sense of urgency that we, and many others, are feeling. Please let us know what you think by emailing your comments to [taxbudget@ombwatch.org](mailto:taxbudget@ombwatch.org). And let us know if you are willing to disseminate info about the survey.

## **The Bush Tax**

While much has been made of 2001 and 2003 tax legislation, much less attention has been paid to the hidden “Bush Tax.”

The administration points to an average tax cut of over \$1,000 under the Jobs and Growth Act of 2003. The Tax Policy Center estimates an average cut of \$1,217 per tax return from the 2001 and 2003 tax law changes. Most families, however, would receive less since the average is pulled higher by the large tax break received by upper income households – a household earning \$1 million would receive a \$30,000 tax break from the 2003 legislation. (So, for example, for every millionaire, there would have to be 29 people getting no tax break to average \$1,000 per person.)

This tax policy, unfortunately, comes with a high hidden burden. As of Dec. 11, 2003, the national debt was \$6.9 trillion. This is about a \$1 trillion increase since the beginning of the Bush administration. With a US population of 293 million people, this translates to an increase in the public debt by over \$4,100 per person. This equates to an increase in the average future tax liability that must eventually be paid off by the American people.

Over the next ten years, from 2004-2013, under currently policy, we can expect an additional \$5.9 trillion debt, which translates to an additional \$2,000 per year/per person debt!

By not dealing with the problem now, this tax burden will be passed onto taxpayers in the future – potentially saddling future generations with overwhelming levels of debt. The administration is thus leaving a legacy of a higher tax burden – the “Bush Tax” – for years to come.

## **Economy and Jobs Watch: Employment and Output Data**

Get to know your data: The employment survey and GDP revisions.

### **Employment: Which Survey is More Accurate?**

Recently there has been a good deal of misleading rhetoric over the use of two separate employment numbers produced by the Department of Labor. The problem has arisen because employment numbers from a survey of households seem to show a different employment picture than a survey of business establishments. Labor Secretary Elaine Chao has recently added to the confusion by saying that “experts may argue about the advantages and disadvantages of each survey.”

This issue is important because according to the payroll survey, employment has fallen by 2.4 million since the start of the recession in March 2001; while according to the household survey, employment has risen by 600,000 since the start of the recession.

Despite the claims by Secretary Chao and other conservative commentators, there really is no debate – the payroll survey is the more accurate of the two (in part because it’s sample size is over 600 times as large as the household survey); and serious government and non-government analysts – including the Federal Reserve – rely only on the payroll survey data.

The Economic Policy Institute has issued a report detailing the features of the household survey and the payroll survey, and explains why the payroll survey is the most accurate, and why there is really no serious disagreement over this issue.

In short, the report indicates that:

“The payroll survey has a clear advantage in measuring employment trends in the U.S. economy. The payroll survey employment numbers are based on one-third of total non-farm payroll employment and are benchmarked to the complete enumeration of non-farm payroll employment yearly. Overall, the payroll survey provides a more precise and less volatile measure of employment and employment trends than the household survey.”

## **GDP Revisions**

This month the Bureau of Economic Analysis (BEA) released a comprehensive revision to the National Income and Product Accounts (NIPA) for the U.S., including data on gross domestic product (GDP) dating back to 1929.

This revision is part of ongoing efforts to improve the quality of economic measures.

One often cited revision is that 2000 third quarter GDP growth was shown as a slight negative (-0.5 percent) rather than a slight positive (+0.6 percent). Many commentators cited the revision as evidence that the recession started before the 2000 election. However, 2000 fourth quarter GDP growth was revised from 1.1 percent to 2.1 percent indicating that the current administration inherited a stronger economy than previously thought.

Other highlights include:

- Over that past 20 years, GDP has grown at a 3.2 annual rate, the same as previously estimated.
- The 2001 recession saw a decline in GDP of 0.5 percent rather than the 0.6 percent decline previously estimated.
- Corporate profits for 2002 were revised upwards from 6.3 percent to 7.2 percent of GDP.

## **OMB Watch Submits Comments on Peer Review Today**

OMB Watch filed comments with Office of Management and Budget (OMB) today on its [draft bulletin for peer review](#). Public interests groups, academics, and regulators were all concerned with the bulletin because it could severely hamper agencies by creating burdensome peer review requirements that are too vulnerable to industry manipulation. Most federal agencies currently have peer review guidelines that function well. While the deadline for public comments ends today, federal agencies may continue to submit comments on the draft bulletin until Jan. 15.

## **States' File FOIA Request for Clean Air Act Information**

Several states and the District of Columbia filed Freedom of Information Act requests Dec. 4 with the Environmental Protection Agency (EPA), Department of Energy, and the White House Council on Environmental Quality in order to obtain information about proposed changes to the Clean Air Act. The requests are part of a larger lawsuit aiming to overturn the recent rollback of New Source Review standards that would significantly increase pollution from power plants and other facilities.

Wisconsin, Illinois, Massachusetts, New Jersey, New York, Maryland, Connecticut, and D.C. filed the FOIA requests seeking communications on the new rule between federal agencies and utilities. The request targets specific communications from Vice President Dick Cheney's Energy Task Force, the Utility Air Regulatory Group, First Energy Corporation, Edison Electric Institute and several others.

In a Dec. 4 [press release](#), Connecticut Attorney General Richard Blumenthal pointed to the need for open government to determine whether special energy interests influenced the decision to exempt some facilities from installing pollution control equipment. He cited the rule as "the most significant sellout of environmental interests in our nation's history" and believes the public has a right to know how the decision was made.

For more information about the lawsuit, see the [Nov. 3 Watcher article](#).

## **Second Lawsuit Filed Under the Data Quality Act**

The Public Employees for Environmental Responsibility (PEER) filed a lawsuit Dec. 9 against the Army Corp of Engineers alleging the Corp released a status report that violates the Data Quality Act. The Corp failed to respond to a request for correction under the Department of Defense's data quality guidelines filed by PEER on Aug. 20.

According to the lawsuit filed in the U.S. District Court of D.C., the monthly status report on the Upper Mississippi River – Illinois Waterway System Navigation Study contains data from economic models that do not abide by the data quality standards of objectivity, utility and integrity of information. The Corp's currently disseminates the report on its website. PEER believes the report uses flawed economic models, which were developed as proprietary models by the Corp and were never peer reviewed. Under the OMB and Department of Defense's (DoD) guidelines, information can be presumed to be of acceptable objectivity if it has been subject to formal, independent, external peer review.

DoD previously recognized the data quality problems in the economic models and contracted with the National Research Council to evaluate the models for use in the navigation study. This review never took place. PEER contends that reliance on this information inhibits the development of any scientific study to address the navigation system.

Under the data quality guidelines, government agencies have 60 days to respond to a request. The deadline passed on Nov. 19 and PEER subsequently filed the suit. The lawsuit asks that the court withdraw and renounce the report until the economic models are properly peer reviewed.

This suit could be the first test of whether the data quality guidelines are judicially reviewable. The Competitive Enterprise Institute (CEI) and the White House Office of Science and Technology Policy (OSTP) settled a previous data quality lawsuit out of court, leaving the question unanswered.

For more information on PEER's administrative request for correction see <http://www.ombwatch.org/article/articleview/1880>. Also see <http://www.ombwatch.org/article/articleview/1733> for information regarding the CEI lawsuit.

## **Missouri and Kansas Proposing New Sunshine Law Exemptions**

Officials in both Missouri and Kansas are pushing for exemptions under state sunshine laws that would restrict public access to information. Both measures would counter recent efforts in the states to improve access laws.

A recent recommendation by the Missouri Homeland Security Advisor would create a new exemption under the state sunshine law that mirrors federal Critical Infrastructure Information (CII) provisions. The recommendation, being considered by the joint legislative committee on terrorism and homeland security, would allow state officials to collect infrastructure information for entities such as nuclear power plants, but would exempt the information from public disclosure. This would prevent the public from identifying security problems in their communities in order to make them safer.

This counters legislation introduced in November by State Rep. Jeff Harris (D-Columbia) and a number of other legislators that would significantly improve access to government information. The legislation, supported by the Freedom of Information Center at the University of Missouri School of Journalism, would include upgrades to allow public access to email correspondence between public officials, prohibit voting on public business without a public meeting, respond to FOIA requests via email, and require public meeting notices for internet meetings.

Kansas open meetings legislation may face an amendment that would prohibit the public from attending meetings. City officials in Overland Park believe that the law's current 49 exemptions allow for some private meetings about homeland security, but they would like to close all meetings that discuss the preparation or prevention of acts of terror. It is unclear how "terror" is defined. Under this approach the public would be uninformed about their communities' plans for dealing with possible terrorist threats. Groups, such as the Reporters Committee for Freedom of the Press, expressed concern over such an exemption saying the government is simply protecting itself from revealing its vulnerabilities to the public.

As reported in the [last Watcher](#), Kansas state legislators recently began reviewing the over 360 exemptions under the Kansas Open Records Act; all of which set to expire in 2005. The lengthy process aims to improve public access to information by weeding out unnecessary exemptions and only reinstating appropriate restrictions.

## **In Honor of Bill of Rights Day: A look at the First Amendment**

On this day, December 15, National Bill of Rights Day, OMB Watch would like to pay tribute to our nation's First Amendment. This 45-word phrase, drafted by James Madison more than 210 years ago, has guaranteed freedoms and liberties through more than two centuries – allowing for freedom of speech, freedom of religion, freedom of the press, freedom to peaceably assemble, and the freedom to access public information.

This special feature of the Watcher, in honor of Bill of Rights Day, looks into our First Amendment rights during the years of the Bush administration. This article is by no means a comprehensive assessment of all the issues involving the First Amendment; however, it is a brief overview of how the First Amendment has shifted during the years of the Bush administration -- with a special focus on a nonprofit perspective. Please note, that this analysis is just the first of many on this issue. Missing from this analysis is the mention of the Patriot Act and its effect on First Amendment rights.

**“Congress shall make no law... abridging the freedom of speech, or of the press;”(U.S. Constitution, Amendment I)**

The Bush administration has been creative in its use of agency authority to censor or chill dissent. For instance, the federal government began using its grant system to control or limit the voices and actions of those receiving federal funds. Some examples are:

- The Bush administration has taken the highly unusual step of sending a letter to Head Start programs warning that advocacy on issues relating to the controversial reauthorization of the program may be a violation of federal law. Conversely, the right of nonprofits to use private money or volunteers for this purpose is protected by the First Amendment to the Constitution. HHS had to send out a new, corrected letter after the National Head Start Association sued them in federal court. For more on this issue see [OMB Watch's article, Head Start Group Sues HHS Over Threatening Letter.](#)
- After a group of activists booed Secretary of Health and Human Services (HHS) Tommy Thompson at an international AIDS conference in Barcelona last year, a cadre of congressional Republicans called for investigations of the hecklers' organizations. Once again the administration was using its control over federal funds to quiet those who ideologically oppose their policies. [See OMB Watch's article, Congressional Letter to HHS Sparks Fears of Retribution for Advocacy Activities.](#)

- HHS targeted Advocates for Youth and other comprehensive sex-education programs for not conforming to the abstinence-only education programs that both the Secretary and the President wanted. Advocates for Youth, a federal grantee for 15 years, got audited three times in one year. In July 2001, the Washington Post published a leaked memo from the Department of Health and Human Services in which Advocates for Youth was described as ardent critics of the Bush administration. This charge apparently came as the result of several Advocates for Youth press releases that railed against the president's backing of the global gag rule, which prohibits any funding to foreign agencies that counsel, perform or facilitate abortions. In the leaked memo, it was also suggested that the Advocates for Youth programs did not go over well with HHS because the secretary [Tommy Thompson] is a devout Roman Catholic. [Read more.](#)
- President Bush has urged Congress to increase support for the abstinence-only programs by tens of millions of dollars for fiscal year 2004. As a condition of receiving the federal funds, schools must promote abstinence until marriage exclusively with the earmarked funds and are prohibited from mentioning contraceptives as a way to prevent pregnancy or disease, except to discuss their failure rate. These conditions set by the Bush administration ultimately prohibit schools that are in desperate need of funds for sex education from speaking freely on important issues. Teen pregnancy rates have been declining since 1990 but studies have indicated the decrease has been due to both increased use of contraceptives along with an increase in the number of teens practicing abstinence. [Read more.](#)
- HHS targets over 150 NIH-funded scientists. In early October, congressional Republicans sent a list to the National Institutes of Health (NIH) identifying more than 150 scientists with grants to conduct research on HIV and sexual behavior. NIH responded by contacting these researchers to inform them that they may need to answer questions about their government-funded work. [Read more.](#)

In addition to using grant money, the Bush administration has used other levers of powers to control the voices of opposition. From the Defense Department to the Federal Communications Commission, those in opposition to Bush's policies experience authoritative backlash. Some examples include:

- The unusual federal prosecution of Greenpeace has posed a threat to first amendment rights. Greenpeace is being prosecuted by John Ashcroft's Justice Department because of the protest actions of two of its supporters. Last year, two Greenpeace activists climbed aboard a ship carrying Amazon mahogany wood into the Port of Miami. The two activists posted a banner that said, "President Bush: Stop Illegal Logging." They were arrested and charged with misdemeanors. Now Greenpeace has been indicted in Miami with violating an obscure 19th century law meant to keep boarding house owners from boarding arriving ships to recruit sailors. The trial is set for December in Miami, Florida. If convicted, Greenpeace could be fined up to \$10,000, placed on probation and required to report to the government on its activities. It could also lose its

tax-exempt status. [Read more.](#)

- The Federal Communications Commission (FCC) bans the song “Your Revolution” by Sarah Jones. Read the [FCC final decision](#), which concluded that the Sarah Jones' song did not violate the applicable statute or the Commission's indecency rule, and that no sanction was warranted. Read more about the [ban](#).

**Congress shall make no law...abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances (U.S. Constitution, Amendment I)**

After President Bush invaded Afghanistan and declared war on Iraq, the right to assemble and to petition the government for a redress of grievances once again became of significant importance. Hundreds of the thousands of people took to the streets in opposition to the war. While the government did not blatantly shut down these many protests the Bush administration did, however, use behind-the-scene tactics in effort to belittle the significance of the message protesters were trying to send.

For example, Attorney General John Ashcroft sent a memo to the Secret Service telling them to get protesters out of sight. At events attended by President Bush and other senior federal officials around the country, the Secret Service has been discriminating against protesters in violation of their free speech rights. According to ACLU legal papers, local police, acting at the direction of the Secret Service, violated the rights of protesters in two ways: people expressing views critical of the government were moved further away from public officials and the press, while those with pro-government views were allowed to remain closer; or everyone expressing a view was herded into what is commonly known as a “protest zone,” leaving those who merely observe, but express no view, to remain closer. According to the [New York Times](#), the FBI has been collecting and disseminating extensive information on the tactics, training, and organization of antiwar protesters who are doing nothing more than exercising their right to protest and dissent. [Read more.](#)

**“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ...”(U.S. Constitution, Amendment I, the Establishment Clause)**

Until recently, one could not argue that the state of the law surrounding the separation of church and state was unclear – direct government financing of inherently religious activities is unconstitutional based on the First Amendment. However, the Bush administration has aggressively worked to shift that clear definition. Today, court battles loom over what type of religious activities government can fund directly. It would be unfair to attribute all this change to the Bush administration alone. The introduction of Charitable Choice into the welfare reform act (or Personal Responsibility and Work Opportunity Reconciliation Act of 1996), sponsored by then Senator John Ashcroft and signed by President Clinton, led to creation of (then Governor) George W. Bush's Faith-Based Initiative.

As a Presidential candidate, Bush promised that he would create a “level playing field” for faith-based organizations to compete for government funds for delivering social services. He proposed an executive office of Faith-Based Action to promote charitable choice. Indeed, once elected, President Bush did what he promised and created the White House Office of Faith-Based and Community Initiatives (FBCI). During the President's first two years in office, he and the new FBCI pushed Congress to pass legislation that would allow for faith-intensive organizations to partner with government in providing social services. However, because of dissent within Congress on many issues, the legislation never made it through both houses. Nevertheless, the President found another avenue to push his agenda forward – executive order of regulatory and policy changes for federal agencies.

The order -- which allowed for all federal agencies to award grants or contracts to religious organizations that discriminate in hiring on the basis of religion, and provide services in facilities that display religious icons and art -- specifies that a religious organization can maintain its structure and pursue its religious mission, “provided that it does not use direct federal financial assistance to support any inherently religious activities, such as worship, religious instruction or proselytization.”

This began the transformation of the Establishment clause. For the law no longer forbade direct funding of faith-intensive organizations for their secular activities (i.e., social services). And as Ira Lupa and Robert Tuttle explain in their report, State of the Law 2003, it is quite clear that law permits indirect financing of any religious activities. A needy person receiving aid through a voucher program or sub-award may have to sit through religious services before they actually receive aid from their social service provider. Yet the extension of the church-state relationship did not stop there. Below are other examples that illustrate how the Establishment clause of the First Amendment has been rapidly transforming during Bush's years in office.

- The Compassion Capital Fund, a federal program that distributes funds to intermediary grantees, in October 2002 enlisted 21 faith-based and community organizations to give grants to faith-based and community

groups for capacity building. One of the 21 intermediaries is Operation Blessings, a religious charity created and run by TV evangelist, Pat Robertson. Americans United for the Separation of Church and State executive director, Rev. Berry Lynn stated, "Giving religious groups control over public funds is a blatant violation of the Constitution." Lynn added, "Under the First Amendment, religious ministries shouldn't become an arm of the government."

- The Department of Housing and Urban Development (HUD) changed its rules after Bush's executive order. The new HUD rule allows funds to be granted to faith-based organizations for construction or renovation of houses of worship. Buildings used for worship as well as federally funded programs can now receive rehabilitation and construction funding so long as funds are not used on the principal room used for prayer. However, there are no accountability procedures in place.
- One of the major provisions that halted Bush's faith-based initiative in Congress was reinterpretation of civil rights laws that would allow faith-based organizations that federal grantees to discriminate in hiring on the basis of religion for positions providing secular social services . However, Bush infiltrated this controversial language into his executive order. The provision could require applicants for federally funded jobs to pass a religious litmus test. For example, a Jewish person applying for a position as a teacher in a Head Start program housed in a Catholic church could not be hired, regardless of experience and expertise.

There are more First Amendment battles still to be fought. OMB Watch has set up a web forum in which you can further discuss these issues of the First Amendment. Today, it is everyone's duty to take some time to think about our Bill of Rights, and what it means to have such a document that defines our certain inalienable rights.

## **Supreme Court Upholds Campaign Finance Law**

On Dec. 10 the Supreme Court ruled on the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), upholding most of its provisions, including the ban on soft money contributions to political parties and “electioneering communications” restrictions. It is not clear what impact the ruling will have on charitable organizations. Federal Election Commission (FEC) rules implementing BCRA exempt charities from the ban on electioneering communications. However, Rep. Chris Shays (R-CT) and Marty Meehan (D-MA) have filed a lawsuit challenging the rule, saying it is contrary to the intent of Congress.

See the text of the decision and the Common Cause summary.

The ruling in *McConell v. FEC* was the last step in legal challenges to BCRA and the election of 2004 will now proceed under its rules. The ban on soft money contributions to political parties means that all contributions and expenditures will be subject to limits and disclosure requirements of the Federal Election Commission. The ban on corporations, including nonprofits, and unions from spending funds on broadcasts that identify federal candidates within 60 days of a general election or 30 days of a primary will go into effect on a schedule set by the FEC.

### **Impact on Nonprofits**

Candidates and political parties cannot receive soft money contributions, and under the Supreme Court’s interpretation of the law, they also cannot contribute to nonprofits that spend money on federal election activity, such as voter registration and voter education activities.

The primary impact on nonprofits will be the rules on electioneering communications, which applies only to broadcasts, but not the Internet, direct mail or phone banks. There are two parts to the rule -- a ban on corporate and union funding for broadcasts within the time period before the election, and permissible broadcasts that are funded solely by individuals. Donors to these funds must be disclosed to the FEC. Nonprofits that wish to mention names of federal candidates in broadcasts during the election season and are not 501(c)(3) organizations will have to set up separate segregated funds with money from individual donors to pay for them.

The FEC rules exclude organizations exempt under Section 501(c)(3) from these rules because the Internal Revenue Code forbids charitable groups from supporting or opposing candidates for office, either directly or indirectly. Shays and Meehan’s legal challenge to this exemption is based on the fear that soft money donors will attempt to abuse 501(c)(3) protection by funneling money through sham charities.

In early December two campaign reform groups, the Campaign Legal Center and Democracy 21 filed a complaint to the IRS asking that a new charity sponsored by Rep. Tom DeLay (R-TX) be denied charitable status. The group, Celebrations for Children, Inc., is planning to raise funds in New York during the Republican National Convention by giving donors access to members of Congress at various social events. The National Committee for Responsive Philanthropy condemned the scheme as influence peddling. Executive Director Rick Cohen said, "The new DeLay venture evades campaign finance laws through political fundraising disguised as charity. This so-called 'charity' is set up to divide its contributions between helping poor children and electing the very politicians whose policies help keep those children impoverished. It goes beyond hypocrisy to so exploit exploited children in the name of helping them. This is as shameful as it is shameless, and the IRS should not grant Congressman DeLay's latest creation the tax-exempt status intended for true charities. To do so would further erode public confidence in the nonprofit sector, which is already struggling in the wake of scandals, a soft economy, increased human need and cuts in public funding."

## **IRS Says E-Filing for Form 990 Ready for 2004 Filing Season**

The Internal Revenue Service's manager for electronic program initiatives has said the IRS will be ready to accept electronic submission for Form 990, the annual financial and activity report filed by most nonprofits, during the first quarter of 2004.

Several software firms have developed programs for online preparation of Form 990 in order to be available for the May 15, 2004 deadline for groups that have the calendar year as their fiscal year. Related forms will also be available, including Form 990EZ, Form 8868 (to extend time for filing) and Form 1120-POL (for political action committees with taxable income). E-filing for private foundations and unrelated business income will be available in 2005.

OMB Watch is part of an effort to promote and facilitate timely implementation of electronic filing, along with public disclosure of Form 990s on a searchable web site. For more information see the Electronic Data Initiative for Nonprofits (EDIN) website.

## **IRS Must Disclose Determinations of Tax-Exempt Status**

On Dec. 2, the United States Court of Appeals reversed a U.S. district court decision that the IRS can keep documents on determinations for organizations' tax-exempt status private.

The court found that the Treasury Department's regulations under the IRS Code affirming nondisclosure for determinations that deny or revoke tax-exempt status of organizations violates the Code's disclosure provision. The Treasury Department's regulations were added to the IRS Code in 1976 in an effort to protect the confidentiality of tax returns. However, the appeals court ruled that the disclosure of determinations could be presented in a redacted format, thereby keeping the privacy of the organizations involved.

## **OMB Watch Asks OMB To Deny HHS Request to Survey Head Start Grantees**

OMB Watch has asked the Office of Management and Budget (OMB) to deny a request from the Department of Health Human Services (HHS) to conduct a national survey of Head Start program executive salaries and travel costs because it duplicates information HHS already has and places an unnecessary burden on Head Start programs. The survey was HHS's response to a request from two members of the House Education and Workforce Committee, which asked for a "review of the financial management of Head Start grantees nationwide." See the full text of the OMB Watch Comments and summary of issues surrounding this information collection request.

## **Istook Strikes Back - Another Attack on Nonprofit Speech**

Rep. Ernest Istook (R-OK) is seeking to muzzle all organizations that promote the legalization or medical use of any substance listed in schedule I of section 202 of the Controlled Substances Act. In doing so, Istook is stripping the free speech rights of all organizations that fight for better medical treatment for ailing patients.

It all started in Washington, D.C. where Istook encountered ads in the Metro system's ad space suggesting for marijuana to be legalized and taxed. Outraged by the ad, Istook began taking steps of retaliation. In a Nov. 10 letter to Jim Graham, chairman of the Metro board, Istook exclaimed that Metro had "exercised the poorest possible judgment, so I must assure that [Metro] will learn the proper lessons from this experience and will only accept appropriate ads in the future."

Metro was giving ad space to nonprofits until recently. While some believe that Metro stopped the program because it was too controversial, Metro upholds that they just did not have enough money to give away the space. In the meantime, Change the Climate Inc., a Massachusetts-based nonprofit, sought ad space for marijuana reform. The ad, available at [www.changetheclimate.org](http://www.changetheclimate.org), shows a picture of a man holding a woman in his arms with a tag line, "Enjoy better sex! Legalize and Tax Marijuana."

Metro had initially rejected the ad. The American Civil Liberties Union (ACLU) threatened a lawsuit on behalf of Change the Climate, Inc. But realized a lawsuit, if filed, could take years and cost considerably more than the ad space. They knew this because other transit authorities have faced similar lawsuits.

For his assurance, Istook took matters into his own hands and added language to this year's omnibus appropriations bill that would cut \$92,500 from Metro's budget. This amount is actually double what it would have cost Change the Climate, Inc. to run the marijuana ad, but Istook wanted to send a message to Metro and other transit agencies. Included in his rider to the omnibus appropriations bill is a provision that would prohibit any transit agency receiving federal funds from running advertising from groups that want to decriminalize marijuana and other Schedule I substances for medical or other purposes.

Those who are familiar with Istook's work know that he is not a fan of nonprofit advocacy. In fact, in 1995, Istook sponsored a rider to appropriations legislation that would limit the advocacy voice of the entire nonprofit sector. A unified coalition of thousands of nonprofit organizations spoke out against these Istook amendments. Eventually Istook lost his fight. However, this time Istook has added his amendment to the giant \$373 billion omnibus-spending bill. Asking members of Congress to vote against the passage of the omnibus is also asking for them not to fund government.

## **Update on Faith-Based Initiative**

The Supreme Court heard oral arguments on a case that raises the issue of whether state scholarship aid can be used for religious training. In the same week, White House Faith-Based Office Director Jim Towey says “fringe” religions should be ineligible for federal grants.

Should state scholarships for college students be available for theology majors? Joshua Davey, a student at an accredited college affiliated with the Assemblies of God, sued the state of Washington and Governor Locke when he was denied a scholarship after declaring a double major, in business administration and pastoral ministries. Davey claims the state’s action violated the Free Exercise Clause of the First Amendment by penalizing him for selecting a theology major and discriminating against religion.

Washington, along with 36 other states, has its own constitutional provisions requiring stricter separation of church and state than the federal Constitution. These provisions, known as “Baby Blaine amendments,” bar transfer of state funds or property to religious institutions. They passed in states in the 1870’s after a similar national amendment failed. At that time anti-Catholic prejudice fueled much of the support for the amendments.

Baby Blaine amendments may cause significant barriers for federal agencies that want to increase involvement of faith-based organizations in seeking and administering social service programs funded with federal dollars. Most federal grants are passed through states rather than sent directly to grantees. States with Baby Blaine amendments may in turn be prohibited from considering faith-based organizations for grants. If the Supreme Court decision focuses on this issue, it would impact all states currently upholding the Baby Blaine amendments.

However, other issues in the case are equally or more likely to be central to a Supreme Court decision. Davey has claimed his free exercise of religion was penalized, and religious education discriminated against. The state of Washington argued that it did not penalize him, but did not offer a subsidy (the scholarship) in the particular major he chose. States may not withhold subsidies for reasons that violate civil rights, such as race or sex. The court’s ruling may depend on whether they see the scholarship as a subsidy or denial of the scholarship as a penalty for pursuing a major in theology.

Davey’s religious discrimination claim could have a significant impact on religious organizations as nonprofit corporations. The central question is: can government treat religious organizations and activity differently than

other activities because of its religious nature? If the answer were no, then many special privileges religious organizations currently enjoy would end. For example, religious organizations are not required to file an annual IRS Form 990, which details their financial status and is made available to the public. Exemption for zoning regulations and the obligation to pay Social Security taxes for employees are just a few of the legal benefits religious organizations would lose if the Court decides the case on a strict neutrality/non-discrimination basis. U.S. Solicitor General Theodore Olson argued in support of Davey's discrimination on behalf of the Bush administration.

The Washington scholarship program, known as "Promise Scholarships," are available to first and second year college students that were high academic achievers in high school and whose families meet income eligibility requirements. To receive the scholarship, they must attend an accredited college in the state. This structure makes Promise Scholarships similar to the Cleveland school vouchers that were held constitutional by the Supreme Court last year. The theory behind the decision in *Zelman v. Simmons-Harris* is that the subsidy goes to the individual, not the institution, and the individual exercises are "free and independent choice" in selecting a school.

Meanwhile, in the same week, Director of the White House's Office on Faith-Based and Community Initiatives H. James Towey has been receiving streams of phone calls and letters from pagans and pagan sympathizers asking for an apology.

When asked if pagan groups should be given the same consideration as any other group that applies for government funds during a White House-sponsored online chat, Towey proclaimed, "I haven't run into a pagan faith-based group yet, much less a pagan group that cares for the poor! Once you make it clear to any applicant that public money must go to public purposes and can't be used to promote ideology," he continued, "the fringe groups lose interest. Helping the poor is tough work, and only those with loving hearts seem drawn to it." Outraged by these inaccurate insults, pagan groups have been adamantly confronting the director to retract his comments.

Claire Buchan, deputy White House press secretary, in returning calls for comment simply explains, "Mr. Towey did not intend to convey any ill will toward anyone."

## **Rep. Serrano Urges Congress to Drop Restriction on Legal Services**

On December 8 Rep. Jose Serrano (D-NY) raised the issue of restrictions on use of privately raised funds by legal service programs.

He said, "there is growing concern that limits on the uses of private money donated to independent LSC grantees are hurting America's low-income families and imposing unwarranted government restrictions on the private sector. The administration does not tolerate such interference with the privately funded religious activities of its faith-based grantees. It-and we-would not tolerate such interference with privately funded secular activities also dedicated to helping families in need. I am hopeful that next year we can address these restrictions on privately donated funds."

Nonprofit organizations and 16 members of Congress have written to Rep. Frank Wolf (R-VA), Chair of the House Appropriations Subcommittee on Commerce, Justice, State and Judiciary, and Rep. Serrano, Ranking Minority Member seeking removal of the private money restrictions.

To see the text of Rep. Serrano's floor statement and the two letters [click here](#).

## **Bush Administration to Ease Mercury Controls**

The Bush administration recently issued standards that will weaken and delay efforts to reduce highly toxic mercury emissions from power plants, which can fall to the ground with rain and enter bodies of water.

People are most commonly exposed to mercury -- which can cause severe neurological and developmental damage in humans, particularly in fetuses and young children -- by eating contaminated fish. In the past, the Food and Drug Administration (FDA) cautioned pregnant women against eating shark, swordfish, king mackerel and tilefish because of elevated mercury levels. The agency is currently planning to issue a broad mercury advisory for at-risk populations -- including pregnant women, nursing mothers, women who may become pregnant, and young children -- concerning consumption of tuna, other fish and shellfish.

Despite the increasing severity of mercury pollution, the Bush administration is taking a relaxed approach. The

new plan calls for mercury emissions to be reduced by 70 percent by 2018, down to 15 tons annually. Under existing law, however, mercury pollution would be reduced by up to 90 percent by Dec. 2007, according to the Clean Air Trust.

The new proposal represents a major shift in the way mercury is treated under the Clean Air Act (CAA). In Dec. 2000, as part of a settlement with the Natural Resources Defense Council (NRDC), EPA issued a determination that mercury and other hazardous air pollutants should be subject to regulation under Section 112 of the CAA. This meant new standards, which were to be set by Dec. 15 of this year, would be based on the control technology employed at the best performing 12 percent of existing emissions sources (known as maximum achievable control technology or MACT).

The Bush EPA, however, now argues that the Clinton administration misread the law and that mercury need not be subject to such strict controls. Rather, the mercury reductions laid out in the Bush administration's proposal would be achieved through a looser cap-and-trade program. Under this system, plants that can reduce pollution under a set cap are awarded "credits," which can then be sold to other plants that want to exceed their pollution limits.

This approach is inappropriate for dealing with a highly toxic substance like mercury, which has a localized impact, and could create lingering "hot spots" around power plants. In fact, in nine out of the top 10 states with mercury hot spots, more than 50 percent of mercury contamination comes from local sources, according to a recent report by the group Environmental Defense.

The administration also recently announced standards on power plant emissions of sulfur dioxide (SO<sub>2</sub>), which causes acid rain, and nitrogen oxide (NO<sub>x</sub>), which contributes to smog. Like the mercury proposal, this measure offers fewer benefits than simply implementing and enforcing current law.

The SO<sub>2</sub> and NO<sub>x</sub> standards have been greatly overshadowed by the controversy surrounding the mercury rollback -- just the opposite of what the administration intended. "The acid rain and smog initiative was supposed to overshadow that unconscionable mercury proposal," John Walke of NRDC told Grist Magazine. "The EPA's plan was to roll out all the rules together to soften the mercury blow." An agency source, however, leaked a copy of the mercury proposal to outside parties before the entire package was unveiled.

The mercury and SO<sub>2</sub> and NO<sub>x</sub> proposals mirror the President's polluter-friendly Clear Skies Initiative, which is stalled in Congress.

## **Enforcement of Environmental Laws Lagging Under Bush Administration**

The Bush administration is pursuing and punishing far fewer polluters than the two previous administrations, according to the Philadelphia Inquirer.

The newspaper obtained 15 years of environmental records for 17 different categories and subcategories of enforcement activity through Freedom of Information Act requests. In 13 of these categories, the Bush administration had lower average numbers than the Clinton administration, according to the Inquirer, and in 11 categories, the 2003 average was lower than the 2001 average, revealing a downward trend.

For instance, the monthly average of violation notices, which are a key enforcement tool, has dropped 58 percent since the Bush administration took office compared to the monthly average under President Clinton, according to the Inquirer. The Bush administration has issued an average of just 77 citations each month, well below the Clinton and Bush I administrations, which averaged 183 and 195 citations a month respectively.

“It’s a sign that this administration is flat-out falling down on the job,” Dan Esty, a deputy assistant EPA administrator during the first Bush administration and now director of the Yale University Center for Environmental Law and Policy, told the Inquirer.

## **Administration Eases Rules for Endangered Species Consultation for Forest Projects**

The Bush administration recently issued standards that will allow federal agencies to conduct fewer consultations under the Endangered Species Act (ESA) when considering timber sales and other forest thinning projects.

Previously, when land management agencies, such as the Bureau of Land Management (BLM) or the U.S. Forest Service, were planning a forest project that could affect a listed species or designated critical habitat, they were required to formally consult with the federal wildlife agency responsible for protecting the species (such as the U.S. Fish and Wildlife Service or the National Marine Fisheries Service).

The new standards allow the land management agencies to make their own determinations as to whether projects will have an adverse effect on endangered species. BLM, the Forest Service, and other agencies will continue to conduct formal consultations with wildlife agencies in cases where a forest project is found likely to have an adverse impact.

“This change creates the classic example of the ‘fox guarding the henhouse’ by having the agencies most focused on logging make these important decisions without any input from the agencies responsible for wildlife protection,” wrote the Defenders of Wildlife, which recently released a report examining the Bush administration’s efforts to undermine ESA.

The new measure was unveiled Dec. 3, hours after President Bush signed the Healthy Forest Restoration Act into law.

## **Meet and Comment on EPA's Draft Report on the Environment**

Resources for the Future (RFF) will be holding a seminar this Wednesday, Dec. 17 from 12:30 pm - 1:30 pm on future steps for the Environmental Protection Agency's (EPA) Draft Report on the Environment.

Kimberly T. Nelson, U.S. EPA Chief Information Officer and Assistant Administrator for Environmental Information; and Paul Gilman, U.S. EPA Science Advisor and Assistant Administrator for Research and Development will be present to discuss the report and outline the next steps in the initiative. Copies of the report will be available at the meeting, and an online version is also available at <http://www.epa.gov/indicators>. For more information and directions to RFF, see their [website](#).

EPA is accepting public comments on the report until Dec. 22. Comments may be submitted in writing or through the agency's EDOCKET system. More information can be found at <http://www.epa.gov/indicators/edocket.htm>. OMB Watch will be submitting comments before the deadline.

## **Documents Destroyed in Terrorism Case**

The accidental destruction of documents justifying the federal government's eight-year investigation into a former University of South Florida professor raises questions about whether the government will be allowed to proceed in a case hailed as a key part of the war against terrorism.

According to the [Associated Press \(AP\)](#), the documents were accidentally shredded by court clerks instructed to destroy old records in misdemeanor and petty offense cases. The destroyed documents included search warrants obtained for a 1995 search. That search and the information obtained from it became the basis for a lengthy investigation culminating in the professor's arrest earlier this year.

One defense attorney called the destruction a significant development. Defense attorneys could ask the court to suppress evidence gathered from the 1995 search. [However, now a defense attorney questions whether the professor, Sami Al-Arian, can get a fair trial.](#)

Roughly 6,400 people were investigated for terrorism-related crimes, and two of every three people investigated were not charged with any crime. The median prison sentence for those convicted was merely fourteen days, and only five people were given sentences of twenty years or more, according to an [analysis of government data](#) by the Transactional Records Access Clearinghouse.

## **GAO Issues Report on Terrorist Financing**

The General Accounting Office (GAO) has published a report by two Senators that reviews use of alternative financing mechanisms for terrorism and recommends changes to address challenges. The report, *Terrorist Financing: U.S. Agencies Should More Systematically Assess the Use of Alternative Financing Mechanisms (GAO-04-163)*, has implications for nonprofits.

GAO notes three major alternative financing means used by terrorist networks: selling contraband cigarettes and drugs, misusing charities, and moving commodities (such as gold). Since Sept. 11, 2001, use of these mechanisms has increased due to “deterrence efforts focused on terrorists’ use of the formal banking or mainstream financial systems...”—the study reports. However, the extent to which terrorist networks have turned to alternative funding mechanisms is unknown.

The report recommends that the Federal Bureau of Investigation and other relevant agencies collect and analyze information to learn more. The report notes that the Secretary of the Treasury and the Attorney General are overdue on a report to Congress on the links between terrorism and use of precious stones as commodities.

GAO’s last recommendation directly affects nonprofits. GAO recommended that the Internal Revenue Service (IRS) establish procedures, in consultation with state charity officials, to share information about charities. The IRS agrees that this should happen, but has not had the resources to implement, due to competing priorities.



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