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Commentary: The Case for a Second Stimulus

If there's one thing Republicans and Democrats can agree on, it's that the economy has seen better days. Indeed, looking at various employment statistics, it's hard for anyone to express optimism about the nation's economic condition. The national unemployment rate is [9.5 percent](#), and the number of workers unemployed for 27 or more weeks is at an [historic high](#). The nation's present economic state has provided ammunition to critics who argue that [the Recovery Act](#), the \$787 billion package designed to stimulate the economy, has failed. The current economic situation has prompted calls from others for [a second stimulus](#).

The breadth and depth of this recession (or at least its effects, since the recession officially ended months ago) are far worse than originally thought. During the Obama administration's transition into the presidency, its economic team [famously predicted](#) that the highest unemployment would rise would be 9 percent. Therefore, the need for the Recovery Act was

predicated on the notion that unemployment would not go higher than 9 percent, and that without stimulus, the unemployment rate would still be as high as 7 percent in 2011.

Unfortunately, the unemployment rate went beyond 9 percent. It eventually [peaked at 10 percent](#) and has slowly come down to its current level, though some of that decline can be attributed to discouraged persons dropping out of the job market altogether. Future unemployment predictions don't provide a much brighter picture. A recent report by [the International Monetary Fund \(IMF\)](#) projects unemployment in 2011 to stay above 9 percent, and [the president's budget](#) predicts unemployment will be 9.2 percent in 2011. The president's budget also gloomily predicts unemployment will not fall below 7 percent until 2014.

The economy's rough state does not mean that the Recovery Act failed, however. Rather, the high unemployment rate and continued general economic malaise shows that the economy was in worse shape than anyone could have imagined in the beginning. In fact, the Recovery Act has worked rather well. Both [independent government agencies](#) and [third-party analysts](#) have released many reports showing how the stimulus has helped bolster the economy, adding millions of jobs and boosting the nation's GDP. Yes, the economy is not doing well, but without the Recovery Act, it would be even worse off.

The problem is that the Recovery Act was not large enough. According to Ryan Lizza in an [October 2009 New Yorker article](#), Obama's economic advisors, led by Christina Romer, recommended a much larger stimulus package, at least \$1.2 trillion dollars, to help fill what was then predicted to be a \$2 trillion hole in the nation's GDP. But because Congress was seen as unwilling to back a package of that size, "there was no serious discussion to going above a trillion dollars," as one Obama aide noted. Thus, thanks largely to political calculations, the administration supported a scaled-back version, which eventually came out to be \$787 billion (and which is now worth roughly \$862 billion, thanks to rising costs of various kinds), and which was only designed to prevent the nation's economy from outright collapse, not bring it out of recession as soon as possible.

Most of the current stimulus funds have already been obligated by federal agencies, and most of the funds will be paid out over the course of the coming year. In other words, the Recovery Act is beginning to run down, and its ability to pull the nation out of its economic slump is waning. With both the IMF and the White House forecasting 9 percent unemployment through 2011, the recession's effects are clearly going to be staying with us well past the effective end of the Recovery Act.

Since the economy is still struggling – in spite of everything that the underfunded Recovery Act has been able to accomplish – the nation needs a second stimulus. Another infusion of at least several hundred billion dollars will both alleviate the impact of the recession – through aid to the unemployed and support to the states – and help kick-start the economy. The nation is recovering, as demonstrated by rising GDP and falling unemployment, but it is not improving fast enough. States and local governments are still slashing spending and laying off workers, noticeably slowing the national recovery. A significant increase in the right type of federal spending can offset these cuts and further accelerate the economic upturn.

The second stimulus should not follow [the blueprint](#) of the first Recovery Act. About one-third of the Recovery Act was comprised of tax cuts, which, while helpful from a political standpoint, do not help the economy nearly as much as other forms of spending, at least in terms of having a multiplier effect. Of course, that's not to say that Congress should completely ignore the original stimulus' architecture: the act's prioritization of infrastructure projects, of reinvesting in the nation, was a good one, and should be repeated in the second stimulus.

In other words, Congress should immediately pass legislation to extend unemployment insurance to those out of work. That should be followed by a targeted bill that provides aid to states and spends additional funds on infrastructure projects.

Fiscal hawks argue that this prescription is absurd, since the nation is [burdened](#) with high deficits. They will agree to pass extended unemployment insurance but only if it is paid for by cutting other spending – exactly the wrong strategy at this time. These lawmakers raise the specter of ever-increasing debt levels, sky-high interest payments, and declining investor confidence, and they point to the ongoing fiscal crisis in Greece as a warning of what could happen to the United States. But these arguments fundamentally misstate the current economic environment.

Deficits are only problematic when potential lenders to the federal government are concerned by the prospect of government default. The concern is shown by subsequent demand for higher interest rates, which also makes it expensive for the government to borrow. In Greece, as investors began to doubt the nation's ability, or desire, to pay back its debt, the country slipped into a debt crisis. However, market data show no signs that investors think the U.S. is on the brink of default. Rates on 10-year Treasury notes [are still low](#), and more importantly, stable. We are [not even close](#) to a Greece-like situation, as investors are clearly showing. If our nation's leaders believe it is necessary to take on more debt, there will most certainly be buyers.

Moreover, [now is not the time](#) for deficit reduction. It is far more important to get the economy back on track. Potentially having to pay larger interest payments in the future is certainly worth alleviating the very real current effects of the recession and helping get the nation back on its fiscal feet. The sooner the unemployment rate drops, the sooner the economy can begin to grow again and the sooner the nation's tax revenues will rebound, helping to bring down deficits in a self-correcting manner.

Commission Examines Wartime Contracting and Inherently Governmental Functions

On June 18, the Commission on Wartime Contracting in Iraq and Afghanistan (CWC) held the [first of two hearings](#) to examine the proper role and oversight of private security contractors (PSCs) in wartime contingency operations. The commission called six individuals from the private, academic, and nonprofit sectors to [testify](#) about the thorny issue of defining and enforcing what should and should not be outsourced to PSCs. While disagreement abounded on the issues, commissioners were able to pick out a few lines of consensus among the witnesses.

It is illegal for functions that are defined as "inherently governmental" to be outsourced, yet there was little dispute that contractors are performing inherently governmental tasks in Iraq and Afghanistan. Witnesses, however, did differ on how the government should go about determining whether it contracts out a function or keeps it in-house. Some witnesses, such as Al Burman – president of Jefferson Solutions, a government acquisition consulting firm – and John Nagl – president of the Center for a New American Security, a security and defense policy nonprofit – advocated for the government to stop focusing on the definition of inherently governmental.

Burman argued that because the definition of inherently governmental is so narrow and so few functions fall under it, the government should instead concentrate on a policy that scrutinizes critical functions. The criticality of a function would determine if the government should keep it in-house or contract it out. Experts generally define a critical function as one that is so intimately related to an agency's mission that the agency must keep at least a portion of the function reserved for government performance to ensure sufficient internal capability to effectively maintain control of the function.

Nagl advanced a similar idea and advocated that the government pick out core functions that it would want to be able to perform without the need for contractors. Theoretically, under this policy, federal agencies would dramatically grow their in-house aptitude to perform these tasks because of their importance.

Commission member Clark Kent Ervin, however, questioned these two approaches. Ervin probed Nagl as to why the government – in a world of constrained resources and budgets – would move toward developing security as a core competency when PSCs are available as an easy alternative. Ervin also asked why focusing on core or critical functions would move the debate over defining inherently governmental beyond its current sticking points of trying to pick between tasks for outsourcing. Nagl failed to formulate a compelling answer for either question.

Other witnesses, like Danielle Brian – executive director of the Project on Government Oversight (POGO) – and Deborah Avant – a professor at the University of California-Irvine – promoted the idea that the government should examine the context of a situation to help determine whether to outsource a function. Commission member Charles Tiefer – a law professor at the University of Baltimore – later summed up this approach as an examination of three risk factors: the likelihood of contractors injuring or killing civilians, whether the operation is taking place in an area with little or no rule of law, and the risk that a PSC could significantly damage U.S. policy.

Allison Stranger – a professor at Middlebury College – advanced an idea that separates so-called "moving" security from "static" security, and classifies the former as an inherently governmental function because of the increased dangers a protection detail faces when moving in a hostile environment. Static security, such as providing security for a base, could be outsourced. Several commission members, and even a few witnesses, however, panned this approach as too simplistic to help with clarifying what most consider an extremely complicated and nuanced issue.

There was also disagreement about at which level of government the decision to outsource a function should be made. Some witnesses, like Stan Soloway – president of the Professional Services Council, the largest government contracting trade group in the country – stressed that the decision should occur as close to the ground as possible, leaving it up to individual commanders. Commission member Dov Zakheim questioned the rationale behind this argument and pointed out that many dubious contracting decisions have been made because the commander in the field often defaults to contractors to perform support activities, since it is easier for the commander to do so.

Most of the other witnesses argued that the decision to outsource a function should happen at a higher level within government, either at the agency level or at headquarters. Similarly, many also advocated for hard and fast inherently governmental rules, which, theoretically, would provide federal agencies with clear guidelines on which functions could be contracted out.

The major consensus of the day was the need for in-sourcing and creating management competency within government to better oversee contractors, as well as the need for more transparency of the contracting process overall, especially in the use of subcontractors. The importance of these reforms is immense, seeing that the State Department – a budget-crunched, human resources-lacking agency – is taking over contracting oversight responsibilities from the Department of Defense in Iraq as the United States begins to draw down combat troops.

Moreover, the issue of how the government decides to outsource functions is not simply an academic matter: the Office of Federal Procurement Policy (OFPP) recently released a [proposed policy letter](#) on reformulating the definition of inherently governmental and is currently evaluating the subject. Later in 2010, the CWC will release its final report to Congress, and depending on the final policy letter from OFPP, recommendations could include further congressional action on inherently governmental policy.

Obstructions Continue To Hinder Media Access to Oil Spill

Despite statements from the Coast Guard and BP supporting media access to sites related to the Gulf of Mexico oil spill, journalists continue to be threatened, intimidated, and denied access as they attempt to cover what many consider to be the worst environmental disaster in the history of the United States. Considering the unprecedented and unknown impacts of the spill, the public is relying heavily on unimpeded journalists to uncover the causes, responses, and consequences of the disaster.

The Coast Guard recently restricted access to large portions of the spill area, threatening large fines and criminal charges against violators. Journalists are also reporting that local law enforcement officers have been working with – and for – BP to restrict media access.

Following reports of restricted media access in the first several weeks of the spill response, Thad Allen, the retired Coast Guard admiral now in charge of the oil spill cleanup efforts, [announced](#)

on June 6 that "media will have uninhibited access anywhere we're doing operations" unless there are "safety or security" concerns.

On June 9, BP's chief operating officer, Doug Suttles, issued a [notice](#) promising that "BP has not and will not prevent anyone working in the clean up operation from sharing his or her own experiences or opinions."

Yet since these pronouncements, journalists covering the spill [continue to report](#) on obstructions put in their way. Reporters and photographers are encountering BP contractors, local police, and federal officials – combined with federal policies – aimed at restricting access, thereby limiting the public's knowledge and understanding of the oil spill.

Contrary to Allen's assertion that the media would have "uninhibited access," the Coast Guard [announced](#) on June 30 a policy prohibiting anyone, including media, from approaching within 65 feet of any response vessel or boom deployed on land or water. Violation of this order could have resulted in up to a \$40,000 civil penalty, and willful violations could have resulted in a "class D felony" and a possible one- to five-year prison sentence. Because of the narrow geography of many portions of the Gulf's shoreline and wetlands, and the fact that many booms are situated on or near beaches, the 65-foot rule would have [effectively prevented](#) any media coverage of those areas.

The reaction by many journalists was defiant. [According](#) to one Associated Press (AP) photographer, "Often the general guise of 'safety' is used as a blanket excuse to limit the media's access, and it's been done before.... The total effect of all these restrictions is harming the public's right to know." In response to the criticism from media organizations, late on July 12, Adm. Allen revised the policy. The [new policy](#) will allow media representatives who obtain special credentials from the Coast Guard to enter the 65-foot "safety zone."

According to the Coast Guard, "The safety zone has been put in place to protect members of the response effort, the installation and maintenance of oil containment boom, the operation of response equipment and protection of the environment by limiting access to and through deployed protective boom." The action was not taken until 70 days after the Deepwater Horizon rig sank, and after more than [2.76 million feet](#) of boom had already been deployed.

The Federal Aviation Administration (FAA) has also instated a [policy](#) restricting air traffic over the spill zone. Aircraft not involved directly in the spill clean up must fly above 3,000 feet. The restriction requires media outlets to get special permission to fly below 3,000 feet. Flying at such heights makes it [more difficult](#) for photographers to get clear photos of the ground or sea surface.

Local police and BP contractors are also working to keep journalists from covering certain locations. The [reports of obstructions](#) against media access are widespread. Journalists have been prevented from or intimidated against speaking with cleanup crews. Access to public beaches has been denied. Vessels containing media personnel have been turned away from sites impacted by the spill. BP contractors are responsible for many of these actions.

Reporters for PBS recently recounted the difficulties they and other reporters have had investigating a health center [set up](#) by the U.S. Department of Health and Human Services to treat cleanup workers and area residents. The journalists, who were seeking data on the quantity and types of spill-related health problems, were repeatedly [denied access](#). Scientists and public health advocates in the Gulf Coast region have [raised concerns](#) about the need for more information on health impacts. Such impediments to journalists harm efforts to protect public health.

Numerous reports indicate that local law enforcement officers have been cooperating with BP to restrict journalists' access to the spill, and the intimidation of reporters is not limited to locations where the oil's impacts are visible.

A photographer working for the nonprofit media organization ProPublica was [detained by police](#) and his personal information given to BP security guards. The photographer had been photographing a BP refinery in Texas.

An activist with the [American Birding Association](#) was filming BP's Deepwater Horizon response command center in Houma, LA, from a public lot across the street when a police officer approached and [warned him](#), "Let me explain: BP doesn't want any filming. So all I can really do is strongly suggest that you not film anything right now. If that makes any sense." The activist left the area but was later pulled over by the officer and BP security guards and interrogated further. [Later reports](#) revealed that the officer who stopped the activist was not on duty at the time. Rather, the officer was working as a security guard for BP. Law enforcement officers in Louisiana are allowed to wear their uniforms when off duty, even while working for a private corporation.

Such reports of restricted media access prompted the American Civil Liberties Union (ACLU) to send a [letter](#) to all Louisiana sheriffs in coastal parishes clarifying journalists' rights. The letter explains that "members of the public have the right under the First Amendment to the U.S. Constitution to film, record, photograph, and document anything they observe in a public place. No one – neither law enforcement nor a private corporation – has the legal right to interfere with public access to public places or the recording of activities that occur there. Nor may law enforcement officials cooperate with private companies in denying such access to the public."

Although the Coast Guard has provided access to the spill via boat, plane, and helicopter, journalists [argue](#) that this type of government-controlled access cannot provide a full account of the causes, responses, and impacts of the oil spill. By allowing journalists access – including access to non-contaminated areas far from the spill, like BP's command center or nearby refineries – there is a greater chance that important issues will be identified and disclosed to the public.

Media organizations have [decried](#) the impediments being thrown in front of journalists and [urged](#) the White House and federal agencies to remedy the situation. The restrictions on journalists weaken the public's ability to hold corporations and the government accountable. Images of oil-soaked wildlife, polluted beaches, and the methods used to clean up the oil are

[crucial to informing](#) the public about what is transpiring and how effective the response is. Without the ability to capture such images, the media is denied an important tool for communicating the story. Without access to individuals on the front lines of the response, the public does not hear an important perspective on the clean up. Denying access to health centers treating exposed citizens hinders journalists who are working to piece together a broader picture of the health impacts of the spill and could consequently delay or prevent improvements to the treatment of sick workers and residents.

Media stories that break new ground, uncover incompetence and failure, or disclose neglected problems depend on more than official statements, press briefings, and government-controlled access to spill sites. As one ACLU official in Louisiana [stated](#), "How is anybody to know what's going on, if the media doesn't have access to the story?"

Courts Block Deepwater Drilling Moratorium, Salazar Issues Revisions in Response

On July 8, the Fifth Circuit Court of Appeals rejected the Obama administration's attempt to block deepwater oil drilling in the Gulf of Mexico. In a three-paragraph ruling, the court denied by a 2-1 vote the administration's request to stay an earlier ruling by a federal district court that struck down the moratorium. In response, Interior Secretary Ken Salazar has revised the moratorium.

The panel's majority [held](#) July 8 that the administration failed to demonstrate the likelihood that the district court's ruling would cause irreparable injury during the time that the administration's appeal is pending. One judge dissented, saying that he would have granted the administration's request to leave the moratorium in place until the court could hear arguments on the merits of the case, scheduled for the week of August 30.

In response to the April explosion of BP's Deepwater Horizon oil rig that caused the deaths of 11 workers and the biggest oil spill in U.S. history, the Obama administration imposed a six-month [moratorium](#) on "all pending, current, or approved offshore drilling operations of new deepwater wells in the Gulf of Mexico and the Pacific regions" in order to evaluate and improve safety equipment, practices, and procedures.

The oil industry opposed the moratorium, arguing that it would cause economic harm to their businesses. Hornbeck Offshore Services, joined by other members of the oil industry, brought a suit against the Department of the Interior, challenging the legality of the moratorium and asking for an immediate injunction. In a June 22 ruling, Judge Martin Feldman of United States District Court in New Orleans [granted the injunction](#), agreeing with Hornbeck's argument that the policy was too broad. To justify his ruling, Feldman cited a lack of information regarding the specific cause of the explosion, as well as insufficient evidence that similar oil rigs could pose the same risk of harm as the Deepwater Horizon.

Feldman's decision has been criticized due to his financial ties to the oil industry. According to his most recent [financial disclosure documents](#), Feldman owns or has owned interests in numerous energy, drilling, and exploration companies, including ExxonMobil and Transocean, the company that owns the Deepwater Horizon oil rig. During his career on the district court, the judge has also taken all-expense paid trips to attend conferences on energy issues, funded entirely by the Liberty Fund, a foundation which gives money to conservative groups like the Cato Institute and the Center for the Study of Federalism.

Following Feldman's injunction, a coalition of environmental groups filed a [motion for disqualification](#), calling on Feldman to recuse himself due to his financial ties to the oil industry. Although Feldman claims to have sold some of his controversial stock on the day of his ruling, the coalition argued that a judge must recuse himself if he has a financial interest in a case on the filing date. When the case was filed on June 7, Feldman still owned stock in both ExxonMobil and Transocean. The coalition filed a separate motion calling for the judge to withdraw his earlier ruling to enjoin the moratorium. If the coalition is successful in its bid to have Feldman removed, the Fifth Circuit's decision would be voided, and the case would move back to the district court to be heard by a different judge.

Under federal law, a judge must recuse himself either when he could gain financially from his own ruling or when his personal or financial interests could merely give the appearance of bias. For example, in the U.S. Supreme Court's most recent term, Justice John Paul Stevens recused himself from a case brought by an association of Florida beachfront property owners. While not a member of the association, Stevens cited his ownership of beachfront property in Florida as a personal conflict of interest that could create the appearance of bias. Judges are generally given broad discretion when it comes to determining whether or not their financial or personal interest in a case gives cause for recusal.

The Alliance for Justice (AFJ) has also criticized the two judges on the Fifth Circuit panel that issued the July 8 majority ruling because of their ties to the oil industry. Judge W. Eugene Davis was twice treated to an "environmental seminar" at a resort ranch in Montana by the Foundation for Research on Economics and the Environment (FREE), a think tank that is funded in part by ExxonMobil, according to an [AFJ report](#). Davis also holds stock in various energy companies. Judge Jerry E. Smith attended seminars in Key West and San Diego paid for by the Liberty Fund, as well as two trips to Montana resorts funded by FREE, AFJ found. No legal objections to either judge's presence on the case have been raised at this stage in the appeal.

The implications of the Fifth Circuit's ruling are not entirely certain. The main basis for the court's decision to leave the district court's injunction in place was that there were currently no plans by the oil industry to commence the type of deepwater drilling operations barred by the moratorium. If there were plans for such operations to move forward before the late-August hearing, the administration would be permitted to file an emergency injunction to halt drilling. It appears as though, for now, operations barred by the moratorium will not take place, despite the current injunction against the moratorium.

Another possibility is that the August appeal will not take place at all. On July 12, Interior Secretary Ken Salazar released a [revised moratorium](#) aimed at addressing the district court's concerns by narrowing the scope of prohibited drilling and providing further justification for halting some drilling operations until the end of November. "The May 28 moratorium proscribed drilling based on specific water depths; the new decision does not suspend activities based on water depth, but on the basis of the drilling configurations and technologies," the Interior Department said in a [statement](#).

Hornbeck Offshore Services, the named plaintiff in the case before the Fifth Circuit, [announced](#) July 13 that it would review the revised moratorium to determine if it is consistent with the district court's ruling. If oil industry representatives believe that the revised moratorium is inconsistent with the ruling, the industry will have to file a new suit in district court.

After Crises, Companies Continue to Place Public and Workers at Risk

In the wake of high-profile regulatory failures, including the worst mine disaster in recent history, the companies responsible continue to run afoul of laws and regulations meant to protect public health and worker safety.

On July 1, an electrician was killed in a West Virginia mine owned by Massey Energy when the worker was run over by an underground vehicle. 31 of the 40 miners killed on the job in 2010 have worked in Massey mines, [according to the Department of Labor](#).

An April 5 explosion in West Virginia's Upper Big Branch mine, also owned by Massey, killed 29 miners. The incident, the worst mining disaster since 1984, has [prompted scrutiny](#) of federal mine safety policy, including the regulations and practices of the Mine Safety and Health Administration (MSHA).

Another Massey-owned mine, the Tiller No.1 mine in Virginia, avoided placement on MSHA's pattern-of-violations list when on June 8, a Federal Mine Safety and Health Review Commission (FMSHRC) judge dismissed 10 of the 29 citations the company contested. The judge ruled that only 19 of the violations were "significant and substantial." Mines can be placed on the list if 25 violations are proved.

Mining operations frequently contest MSHA citations in order to avoid placement on the list, which triggers stricter oversight. As a result, FMSHRC has a backlog of approximately 16,000 cases. A recent Department of Labor Inspector General report [also found](#) that MSHA is not aggressively pursuing new listings, in part due to resource limitations.

Problems with mine safety policy are illustrative of the broader difficulties regulators face in the wake of major incidents, which often highlight long-standing deficiencies such as resource constraints or lack of regulatory authority. With quick fixes seldom available, agencies are often ill-equipped to gain leverage with regulated industries or prevent future crises.

Like Massey, Toyota Motor Corp. continues to experience public struggles after a major safety crisis. On July 2, Toyota announced a [recall](#) of more than 138,000 Lexus vehicles for engine problems that can lead to stalling while the vehicle is in motion. Toyota says the event of a stall is unlikely and is unaware of any injuries or crashes as a result of the defect.

Toyota [recalled](#) millions of vehicles in 2009 and early 2010 after multiple crashes were linked to sudden, unintended acceleration. Toyota has blamed floor mats and human error for the crashes, but investigators have yet to determine a definitive cause. Toyota has also recalled thousands of Lexus sport utility vehicles after discovering problems with the electronic stability controls, which make the vehicles more susceptible to rollover.

Congress is considering legislation to strengthen the hand of the Department of Transportation and to require new vehicle safety measures. Among other things, the bill would raise the penalty cap for safety violations, currently set at \$16.4 million, which Toyota paid in response to the sudden acceleration defects.

However, auto industry lobbyists are fighting tough new protections, and safety advocates fear the industry has already succeeded in weakening aspects of the bill. Original plans to eliminate the penalty cap have already been scuttled; instead, a Senate version of the bill sets the cap at \$300 million, while the House version sets it at \$200 million, [the Los Angeles Times reports](#). Without the cap, Toyota's liability for the sudden acceleration defect could have been in the billions of dollars.

Perhaps the most high-profile of recent regulatory failures, the BP Deepwater Horizon oil spill disaster, continues to endanger not only the environment but worker safety and health. As of July 4, BP and the Occupational Safety and Health Administration (OSHA) [have recorded](#) 1,337 injuries and illnesses among cleanup workers. Most of the incidents, such as insect bites and heat stress, are minor, OSHA says. The April 20 explosion that sunk the rig and led to the spill killed 11 workers.

OSHA is keeping close tabs on cleanup efforts. According to the [agency's website](#), OSHA has visited cleanup sites in the Gulf almost 2,000 times and has 146 staff members stationed in the area.

However, the regulatory situation remains muddled, especially for rig workers. OSHA only maintains regulatory authority up to three miles off of U.S. coasts, at which point the U.S. Coast Guard takes over. In the case of offshore oil rigs, OSHA has no regulatory authority for occupational safety and health – the Coast Guard and the Department of Interior share responsibility.

Nonprofits Active in Voting Rights Issues before Midterm Elections

As the midterm elections approach, nonprofit organizations are staying active in voting rights issues. Nonprofits have played key roles in the settlement of a New Mexico voting rights case, opposition to the state of Georgia's challenge to the federal Voting Rights Act, and advocacy supporting the Fair Elections Now Act. Through these and other activities, nonprofits are advocating for a process that ensures that their constituencies' interests are represented.

New Mexico Voting Rights Case

On July 7, New Mexico settled *Valdez v. Herrera*, a case resulting from the state's failure to implement the National Voter Registration Act (NVRA), also known as the "Motor Voter Act." Congress passed the NVRA in 1993, and the law mandates that voter registration be made available when people apply for or renew their driver's licenses. Section 7 of the act also requires that voter registration applications be made available at state offices providing services to persons with disabilities and at all state agencies offering public assistance programs, including Food Stamps, Temporary Assistance for Needy Families (TANF), and Medicaid.

The New Mexico settlement is the end result of efforts that nonprofits began one year ago to force New Mexico to implement the law. In July 2009, Project Vote, the Lawyers' Committee for Civil Rights Under Law, and Dēmos, along with Advocates for Justice and Reform Now, Freedman Boyd Hollander Goldberg & Ives, and DLA Piper LLP, sued New Mexico Secretary of State Mary Herrera and other state officials for failing to implement the NVRA.

The groups filed the lawsuit on behalf of four New Mexico residents, including Cecilia Valdez, who applied for licenses and/or benefits at various state agencies but were not asked or advised about registering to vote or updating their voter registration information. ACORN was also a plaintiff in the case until it ceased operating in New Mexico earlier in 2010.

According to [Project Vote](#), as a result of the settlement, the New Mexico Motor Vehicle Division (MVD) "must update computer systems, websites, training practices, monitoring, reporting, and other oversight details to offer voter registration with the same degree of assistance as any other MVD license, identification card, or renewal. The Secretary of State will designate a State NVRA Coordinator to oversee statewide compliance, and a local NVRA Coordinator will be assigned to every MVD office. Signs will be posted in MVD offices to inform the public that voter registration services are available, and the Secretary of State website and MVD websites will be updated to include additional voter registration information."

Robert Kengle, co-director of the Lawyers' Committee Voting Rights Project, applauded New Mexico for agreeing to the settlement and noted in a [press release](#) that "[t]housands of New Mexico residents now will have the opportunity to register to vote simultaneously with applying for a driver's license or a state identification card."

Georgia's Challenge to the Voting Rights Act

Nonprofits have also been actively engaged in another voting rights case. On July 6, the American Civil Liberties Union (ACLU), the ACLU of Georgia, and the Lawyers' Committee for Civil Rights Under Law filed a [motion to intervene](#) in *Georgia v. Holder*, the State of Georgia's challenge to the Voting Rights Act. Georgia filed suit against the U.S. Department of Justice because the state wants the federal government to allow Georgia to verify each voter's citizenship before allowing him or her to vote.

The Justice Department has declined to approve the request under [Section 5](#) of the [Voting Rights Act](#), over concerns that Georgia's citizenship verification procedure unfairly targets minority voters. Section 5 requires all or part of 16 states, including nine states in their entirety, to seek federal approval before changing election rules or procedures due to past laws and practices that discriminated against and disenfranchised racial minorities.

"The suit says if the federal court declines to approve Georgia's voter verification process, it should declare Section 5 of the Voting Rights Act unconstitutional," according to the [Atlanta Journal-Constitution](#).

Civil rights groups are intervening to protect the rights of minority voters. "The many U.S. citizen minority voters in Georgia who were incorrectly flagged as non-citizens under the state's voter-verification procedures can attest to the fact that discrimination in voting continues and the need for Section 5 remains," said Laughlin McDonald, of the ACLU Voting Rights Project, [in a press release](#).

Fair Elections Now Act

Nonprofits have also played an important role in pushing for public financing legislation, particularly the Fair Elections Now Act. Common Cause and Public Campaign have been leading efforts to get the legislation passed. The two groups plan to spend up to \$15 million on a campaign to pass the legislation, according to [The Washington Post](#).

The legislation, sponsored by Reps. John Larson (D-CT) and Walter Jones (R-NC) as [H.R. 1826](#) and Sen. Richard Durbin (D-IL) as [S. 752](#), has been referred to the House Administration Committee and the Senate Committee on Rules and Administration. The House Administration Committee has already held hearings on the legislation; there is no word on when the Senate plans to hold a hearing or markup its bill.

The legislation would create a voluntary public financing system for congressional candidates. Participants would be required to raise a minimum amount of money from a certain number of in-state donors who could contribute no more than \$100. Participants would then receive \$400 for every \$100 raised after meeting a certain threshold.

There is a slight funding difference between the House and Senate versions. [The Washington Post](#) notes that the "House bill would generate funds through a fee on auctions of unused

portions of the broadcast spectrum, and the Senate bill would rely on a fee paid by large federal contractors based on how much government business they have."

According to the *Post*, on July 15, Common Cause and Public Campaign "plan to unveil details about [their] campaign, which will include TV ads targeting wavering lawmakers and grass-roots efforts in 24 states."

Nonprofits have a history of engaging in election-related activities and ensuring that individual voting rights are protected. Nonprofit actions can significantly impact elections by removing barriers from the voting process and ensuring that the electoral process is fair and transparent.

For-Profits Use Nonprofit Structure to Avoid Earmark Ban

In response to intense criticism of congressional earmarks, House Appropriations Chair David Obey (D-WI) announced a ban on all earmarks to for-profit organizations. These companies and their congressional patrons wasted little time in funneling earmarks to nonprofit organizations in order to circumvent the ban. Using nonprofits to circumvent the ban on earmarks raises questions about the practice itself, as well as the policy of ending all earmarks to for-profit corporations.

In March, the House Appropriations Committee [announced](#) that it will not approve requests for earmarks that are directed to for-profit entities, and agency Inspectors General will audit at least 5 percent of all earmarks directed to nonprofits to ensure for-profits are not masquerading as nonprofits. Additionally, the announcement detailed plans to create an online "one-stop" page containing all House members' earmark requests.

However, this ban has not stopped earmarks to for-profit companies. These companies have partnered with nonprofit organizations, many of which are controlled by the for-profit company that had previously received earmarks. In at least one case, the for-profit company spun off a tax-exempt nonprofit organization in order to continue receiving earmarks. In March, [The Washington Post](#) predicted this situation would occur, noting that earmarks would take the form of "cooperative ventures with nonprofits" to maintain the transfer of money to businesses.

[The New York Times](#) recently highlighted several examples of earmarks going to nonprofits serving as a pass-through to a for-profit company. In some cases, a member of Congress intervened to encourage the nonprofit to serve as a fiscal agent. In one case, according to the *Times*, the day after Obey's announcement, the vice president for marketing of a defense contracting firm, Imaging Systems Technology, created a nonprofit, the Great Lakes Research Center, that specializes in work similar to the for-profit company. (Notwithstanding the *Times* claim, the Center's website says it was started in 2009, before Obey's announcement.) The Center's executive director is the vice president for marketing at Imaging Systems Technology, and the address of the Center is the same as the for-profit company.

Subsequently, Rep. Marcy Kaptur (D-OH), a member of the Appropriations Committee, requested \$10.4 million in new earmark requests for the Center. In the past four years, she was able to get \$8.4 million sent to Imaging Systems Technology, which is based in her district. The *Times* notes that Kaptur has received campaign contributions from those working at Imaging Systems Technology, a family-owned company.

Kaptur, along with other members pushing earmarks to nonprofits, argue that they are not looking for ways to circumvent the ban. Instead, they have encouraged companies to form partnerships with universities, think tanks, and other nonprofits so that funding can continue for potentially breakthrough technologies that will yield jobs while providing tools for protecting the nation.

All told, the *Times* identified requests totaling \$150 million that would indirectly benefit for-profit companies. In July, the Huffington Post Investigative Fund [found 18 instances](#) where seven members of the House Appropriations Committee "are seeking to keep alive previous earmarks to businesses by listing a university, research center or other nonprofit as the recipient this time around." These earmarks did not include the Kaptur provision mentioned by the *Times*. Coincidentally, three of the seven members mentioned in the Investigative Fund's report made their requests just after being cleared of ethics charges earlier in 2010.

In uncovering this information, the Investigative Fund and the *Times* seem to suggest unsavory activities are occurring. Yet it is not unusual for nonprofits and for-profits to partner. Moreover, if a member of Congress feels a piece of work is essential, it should not be surprising that he or she would encourage a for-profit company to partner with a nonprofit organization in order to be eligible for an earmark. The irony in forcing for-profits to partner with nonprofits is that these "partnerships" mean that less money is going toward the targeted purpose of the earmark, and more taxpayer dollars are flowing into overhead.

Moreover, as the Investigative Fund's piece notes, efforts to ban earmarks to for-profit entities will do little to prevent earmarks as a whole, given that 90 percent already go to nonprofit institutions. Lawmakers will always look for ways to direct spending to their districts, or perhaps, help those who have offered campaign contributions. Open government advocates like OMB Watch say real reform would make the process more transparent and changes would be written into law, as opposed to being short-lived as committee-imposed rules.

The Earmark Transparency Act ([H.R. 5258](#) and [S. 3335](#)) would allow the public to more easily take notice of the earmarking process. Currently, there is no comprehensive list of earmark requests, which makes it hard to find out which members of Congress are requesting earmarks for whom. In 2009, Congress required that members disclose their earmark requests online, but the information is not in one place. It is up to each member to post his or her earmarks on his or her own website.

Obey's March announcement included a promise to provide a "one-stop" link to all House members' earmark requests. It remains unclear how this will be executed. OMB Watch has signed onto a petition that calls on Congress and the Obama administration to make public all

earmark information in one place. This data could be used to make the process more transparent.

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Commentary: The Case for a Strong Estate Tax

On Capitol Hill, there exists a debate about the future of the Bush tax cuts and the federal estate tax. While President Bush's 2001 tax policy eliminated the estate tax for 2010, it is set to return to pre-Bush tax cut levels in 2011 unless Congress intervenes. How Congress chooses to address the estate tax will have significant implications for the federal budget deficit and the fair distribution of the nation's prosperity.

The estate tax is the country's most progressive tax, and it affects only the super-wealthy. In 2009, the first \$3.5 million (\$7 million for a couple) of a family's wealth was exempt from the estate tax. For amounts over that exemption, the tax rate was 45 percent after first allowing the family to reduce the size of the estate through various means, such as giving money to a charitable cause. Should the tax return at pre-tax cut levels, the exemption will drop to \$1 million (\$2 million for a couple), and the taxable rate will be higher than in 2009.

Conservatives are pushing to kill the estate tax outright, but the chances of full repeal are low. However, Congress might reach a compromise between repeal advocates and estate tax supporters that severely weakens the tax. Both short- and long-term economic considerations, however, argue for a robust estate tax that brings in vital revenue and prevents an extreme concentration of wealth in the hands of a few.

At the end of 2009, when Congress was debating permanently extending the estate tax, the range of policy solutions within the debate was defined by two proposals. One proposal, sponsored by Sens. Blanche Lincoln (D-AR) and Jon Kyl (R-AZ), which would have raised the exemption level to \$5 million for individuals (\$10 million for couples) and lowered the taxation rate to 35 percent, would have essentially [gutted](#) the estate tax. Compared to current law, the Lincoln-Kyl bill would have reduced revenues by some \$500 billion over ten years.

Another proposal, put forward by President Obama in his FY 2011 budget request, would extend the 2009 estate tax rates and index them for inflation. Although the Obama proposal would raise significantly more revenue than the Lincoln-Kyl proposal, it would cost the Treasury about \$250 billion over ten years. Congress eventually incorporated the president's proposal into a bill introduced by Rep. Earl Pomeroy (D-ND), which the House [adopted](#) before the winter recess. The Senate, however, could not come to an agreement on the bill, and the estate tax disappeared on Jan. 1.

In June, Sens. Bernard Sanders (I-VT), Tom Harkin (D-IA), and Sheldon Whitehouse (D-RI) pushed the spectrum of available policy options slightly to the left by introducing [a more progressive estate tax bill](#). The [Responsible Estate Tax Act](#), which OMB Watch, along with over 70 national and state organizations, recently [called on senators to co-sponsor](#), would keep the 2009 estate tax exemption level of \$3.5 million but would institute a more progressive rate structure. The tax rate would range between 45 percent for estates just above the exemption threshold to 65 percent for billionaires.

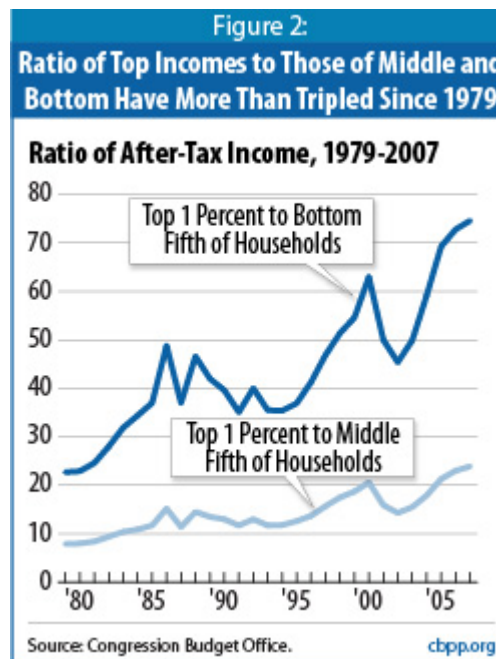
With Washington consumed by fears of high deficits, Congress is scaling back annual budgets when federal programs in education, health, infrastructure, nutrition, and other priorities still lack full investments. A strong, progressive estate tax could help fund these priorities. Conversely, a weak estate tax would only further hinder the government's ability to make important investments in the nation. The White House [forecasts](#) that without an estate tax, the government will lose close to \$15 billion in 2010 alone.

Beyond the immediate financial needs of the country, though, there is another very important reason to have a robust estate tax: to help break up extreme concentrations of wealth. When the federal government enacted the estate tax in 1916, it did so with the recent memory of the robber barons and with the explicit intention of keeping the country from turning into an oligarchy.

Concerns about the U.S. slipping into an oligarchy are cropping up once more. Sanders, [writing](#) in *The Nation*, examined the specifics:

The 400 richest families in America, who saw their wealth increase by some \$400 billion during the Bush years, have now accumulated \$1.27 trillion in wealth. Four hundred families! During the last fifteen years, while these enormously rich people became much richer their effective tax rates were slashed almost in half. While the highest-paid 400 Americans had an average income of \$345 million in 2007, as a result of Bush tax policy they now pay an effective tax rate of 16.6 percent, the lowest on record.

At the same time, middle- and lower-class families have been decimated by stagnant wages, higher costs for necessities, and an historic loss of wealth due to the financial markets collapse spurred on by the bursting of the housing bubble. These details bear out in [research](#) conducted by the Center on Budget and Policy Priorities in June, represented most clearly by this shocking graph:



Much of this is due to the Bush tax cuts of 2001 and 2003 and the associated whittling away of the estate tax.

Beyond preventing an oligarchic concentration of wealth, the estate tax also has [implications for addressing unmet needs](#). For example, a family can make contributions to charity to reduce the taxable size of an estate. This incentive has helped to create foundations and has provided needed resources to charities and churches throughout the United States. These contributions supplement needed revenue at the federal and state levels and provide another key reason why the estate tax is of vital importance to communities across the country.

Without a strong estate tax, which must have a progressive rate structure to capture the wealthiest of the wealthy, this country will continue to slip toward the very few controlling most

of the wealth, undermining the basis of an egalitarian society envisioned by its founders.

Congress' Spending Slump

The month of August is seen as an important time in every Congress because the weeks-long recess breaks up the legislative calendar. As the number of legislative days dwindles, Congress is faced with a slew of spending bills, including a war supplemental bill, a small business jobs bill, and a slow-starting appropriations process. The sheer amount of spending bills that remain on the docket, and the tardiness of these bills, nearly guarantee at least one continuing resolution in the fall.

At the top of Congress' priority list is the war supplemental bill. Both the House and Senate have passed a version of the bill, which provides additional funds to the wars in Iraq and Afghanistan. The House version, passed July 1, is significantly larger; in addition to \$59 billion in war spending, it includes \$20 billion in assorted other measures, such as \$10 billion to prevent teacher layoffs and funding for Pell Grants. On July 22, the Senate [rejected the House version](#) and sent back a slimmed-down bill with only the \$59 billion in war spending.

[In June](#), Defense Secretary Robert Gates warned that the Defense Department would have to start making "stupid" budget cuts if the bill was not passed before July 4. Now, almost a month later, it is up to the House to decide if it should pass the Senate version as-is, sending the bill to the president to sign, or delay the bill even longer for the chance to include much-needed domestic spending on a must-pass piece of legislation. While it remains to be seen how the House reacts to the Senate bill, the Pentagon is "[seriously planning](#)" as if Congress will not pass the bill before the August recess.

As the House debates how to handle the war supplemental, the Senate is dealing with another long-delayed bill, a [small business jobs bill](#) passed by the House in June. The legislation, which has been on and off the docket for the past several months, contains \$12 billion in tax expenditures and a \$30 billion loan program. The loan program is proving to be controversial, with Republican members of the Senate [comparing](#) it to the unpopular financial bailout bill, the Troubled Asset Relief Program (TARP). While the lending program survived a cloture vote on July 22, Democratic leaders may still have to drop it in an effort to pass the bill, leaving only the tax cuts, which would necessitate another trip to the House for approval. A vote on the bill has been tentatively scheduled for later in the week of July 26.

Both houses are finding it difficult to pass their yearly appropriations bills on time, an indication of how badly split Congress is, at least when it comes to major spending decisions. Only [six appropriations bills](#) have been approved by the full appropriations committees, one in the House and five in the Senate, when in an average year, most, if not all, bills are out of committee by August. The full House usually votes on a great deal of them before leaving town for the August recess. The cause for this delay has been the lack of a budget resolution, which reflects a broader rift within the Democratic Party over appropriate spending levels and the looming

deficit. Since neither house could pass a resolution, the appropriations subcommittees were forced to wait for spending guidelines, which both the House and Senate passed in mid-July.

In what could be a problem in the coming months, the [House's allocations](#) are \$7 billion higher than [the Senate's](#), largely due to a larger Labor-Health and Human Services-Education appropriations bill. Usually, when Congress passes a budget resolution, the two chambers agree on spending limits, which results in somewhat similar appropriations bills. Without a resolution, the House and Senate may now find it difficult to agree on a final level for the Labor bill. Both houses, though, set spending guidelines lower than [the president's budget request from February](#).

While the small business bill and the war supplemental could be finalized before the recess begins, the appropriations cycle will continue for months to come. With little chance of Congress passing all twelve bills by October 1, Congress will almost certainly be forced to pass a series of continuing resolutions to fund the government. It may also face the prospect of completing the annual appropriations process during a post-election, lame-duck session.

Chemical Security Bills Reduce Risk, but Secrecy Weakens Program

Sen. Frank Lautenberg (D-NJ) has introduced two related chemical facility security bills that would reduce the consequences of a catastrophic accident or terrorist attack at many of the nation's chemical plants and drinking water and wastewater treatment facilities. The legislation addresses many of the issues raised by a coalition of environmental and openness groups, but it fails to provide the accountability and transparency needed to ensure the government's chemical security program would actually make facilities and communities safe.

Lautenberg's legislative package would require facilities to assess available safer technologies that would eliminate the potential for a release of poisonous gases following a disaster. The most dangerous facilities would be required to convert to using the safer technologies – but only if several conditions are met. The bills would also require facilities to involve workers in the formulation of security plans. The package includes [S. 3598](#), the Secure Water Facilities Act, which deals with water facilities, and [S. 3599](#), the Secure Chemical Facilities Act, which covers chemical plants.

The bills build on [compromise legislation](#) that the House passed in November 2009, incorporating a number of valuable provisions to drive conversions to safer chemicals and processes, protect workers, and expand the number of covered facilities. However, like the House legislation, the Senate package allows the government to conceal basic regulatory data that the public needs to hold agencies and companies accountable and to ensure the program is working as well as it should.

The Lautenberg bills are competing with another, weaker bill. Sen. Susan Collins (R-ME) introduced a [bipartisan bill](#) earlier in 2010 that would simply extend for five years the existing,

temporary chemical security program housed at the Department of Homeland Security (DHS). The Collins bill would continue to exempt from the program thousands of chemical and port facilities, including approximately 2,400 water treatment facilities and 400-600 port facilities. Moreover, critics point out that the current program, known as the [Chemical Facility Anti-Terrorism Standards](#) (CFATS), prohibits DHS from requiring any specific security measure, including the use of safer and more secure chemical processes that can eliminate catastrophic hazards posed by poison gas. CFATS also operates under such excessive secrecy that the public is unable to evaluate if the program is working and cannot hold the government or facilities accountable.

The new bills from Lautenberg would rectify many of the fatal flaws in the current CFATS program. The bills would also make some progress in wrenching crucial information from the government. However, key information would continue to be vulnerable to the excessive secrecy that now weakens CFATS.

Accountability and Chemical Security

The Senate bills allow the secretary of DHS and the administrator of the EPA (in the case of water facilities) to consider information created under the program as "protected information." Open government advocates readily agree that certain information, namely the security vulnerability assessments and site security plans, should not be disclosed to the general public. However, the bills allow the agencies to broadly apply the information protections, including to basic regulatory information such as the identities of covered facilities and their compliance status. Government inspection histories and information on violations and penalties at specific facilities could also be concealed. Should DHS and EPA withhold these records, the lack of compliance information would create an immense barrier to public accountability. Some degree of transparency is necessary to ensure the effectiveness of the government program and to assure communities that nearby plants are safe.

The legislation includes another troubling provision that would further restrict the public's access to vital information. Criminal penalties of up to one year in prison, fines, and, for federal employees, dismissal from their jobs await those who disclose sensitive information. The threat of such punishments has a chilling effect on the sharing of information that may or may not be considered sensitive, even with those who need the information the most, such as first responders. The risk of jail time also puts an even greater burden on life-saving whistleblowers who seek to expose negligence in the program's implementation.

Contrary to widespread assumptions, secrecy often interferes with security by reducing accountability, reducing the efficiency of security measures, and slowing or denying release of information to those who protect public safety. Excessive secrecy can delay needed actions by creating the false impression that an issue is being dealt with; the reality is that secrecy robs people of the tools to drive positive change and ensure needed fixes are implemented.

Good government groups have long held that basic regulatory data, technical information on safer and more secure chemicals and processes, and criteria for evaluating facilities should be

actively reported to the public. Such reporting would, among other benefits, generate solutions and improve people's ability to identify and remedy weaknesses in the program and at specific facilities.

Accountability Improvements

Transparency provisions are not completely missing in the Lautenberg bills. The package includes one tool crucial to government accountability: citizen suits against the government. Sensitive information would be protected from unauthorized disclosure in a judicial or administrative proceeding by the use of a protective order from the overseeing judge, background checks for legal counsel seeking access to the information, and guidance on the proper safeguarding of the information, among other restrictions.

Like the House bill, a provision to allow lawsuits against companies for alleged violations was omitted in favor of a "citizen petition" provision that lets individuals petition the government to respond to alleged violations at a facility. However, without basic information such as what facilities are covered by the program or what their compliance status is, the public is hamstrung in its application of the petition process – or any other effort toward accountability.

Other valuable features include a provision requiring an annual report to Congress providing a general overview of the level of compliance with the law, the number of facilities moving into higher or lower "tiers" of risk, and descriptions of the technologies being implemented to reduce the consequences of a terrorist attack. An emergency response capacity study is required to assess what emergency resources would be required to respond to a worst-case disaster scenario at a chemical facility.

The legislation provides for a notification system by which any member of the public may report to DHS a suspected violation or other security problem at a chemical facility. If the person submitting the report requests a response, the agency is required to respond with a description of the agency's findings and any compliance action taken. The Office of the Inspector General must report annually to Congress on the disposition of these reports.

The Road Forward

The current CFATS program expires on Oct. 4, but the prospects for any chemical security legislation moving out of the Senate are uncertain. Collins' bill has bipartisan support in the Senate Homeland Security and Governmental Affairs Committee, but the [chemical industry is fighting](#) the Lautenberg bills.

The Senate Energy and Public Works Committee will hold a [hearing](#) on the Secure Water Facilities Act on July 28 – right after the homeland security committee [marks up](#) and votes on chemical facility legislation. However, there is little time available on the legislative calendar before the midterm elections, making it unclear whether chemical security legislation in any form will see a floor vote in the Senate before November.

Alaska Court Stops All Oil and Gas Activities in Chukchi Sea

On July 21, a federal district court judge in Alaska issued an order halting all oil and gas activities in more than 29 million acres of the Chukchi Sea. The order said that the former Minerals Management Service (MMS) failed to adequately consider the environmental impacts of potential natural gas production in violation of the National Environmental Policy Act (NEPA).

The [order](#) was issued by Judge Ralph Beistline of the U.S. District Court for the District of Alaska and effectively blocks oil and gas exploration activity in Lease Sale 193, which brought in \$2.66 billion in February 2008. The bid was a record high for an Alaska lease sale, according to a July 23 [BNA article](#) (subscription required).

The January 2008 lawsuit to block the sale of the lease was brought by Earthjustice on behalf of the Native Village of Point Hope, City of Point Hope, Inupiat Community of the Arctic Slope, and 12 Alaska and national environmental groups, according to a July 21 [joint press release](#).

Earthjustice claimed that the decision to offer the lease violated NEPA, the Endangered Species Act, and the Administrative Procedure Act. The suit also alleged that the final environmental impact statement filed by MMS (now the Bureau of Ocean Energy Management, Regulation and Enforcement in the Department of Interior (DOI)) lacked essential information, inadequately assessed environmental and human impacts, understated the risks of oil spills, provided misleading information on the effects of seismic activity, and failed to completely assess the dangers to endangered eiders' habitat. (An eider is a type of large sea duck.)

DOI claimed that the environmental impact statement (EIS) contained the scientific results of years of study and analyses of cumulative effects on eiders, as well as incorporating information from the two EIS's conducted for the agencies five-year leasing plans.

The court found, first, that MMS did meet the necessary requirements regarding the analysis of the seismic surveying and its mitigating impacts in the final EIS. Second, the court said that the EIS did not include the necessary analysis of the impacts of natural gas exploration. In light of the incentives in the lease for natural gas production, the agency could not have taken "a 'hard look' at the impact of natural gas exploration if natural gas development is omitted entirely from the EIS." The government had argued that omitting the assessment of natural gas production was reasonable because there is not an infrastructure to bring natural gas to the marketplace.

Third, the court noted that NEPA places very specific obligations on agencies when there is incomplete or unavailable information. The EIS contains "dozens if not hundreds of entries indicating a lack of information" about the impacts on various species, according to the order. Earthjustice had argued that MMS had failed to meet the specific obligations under federal regulations to deal with the missing or incomplete information. The court agreed.

Earthjustice had urged the court to invalidate the lease sale or, barring that, sought "an injunction prohibiting further activity under the leases pending completion of the Agency's

NEPA obligations." The order does not set aside the lease sale; it orders the agency to complete its EIS obligations and halts all oil and gas activity until the agency meets those obligations.

In its July 21 [press release](#), Earthjustice attorney Eric Grafe was quoted saying, "This is an important decision directing the Secretary to consider the need for more information on the Chukchi Sea. We have long argued that more science, more data and more research is needed in the sensitive waters of the Arctic Ocean before oil and gas lease sales or drilling are allowed occur."

A July 22 [article](#) in the *Anchorage Daily News* reported that a spokesperson for Shell Alaska, one of the oil companies that was successful in obtaining leasing rights, said the company was reviewing the ruling and how it might affect the company's plans in 2010 and 2011. The newspaper also reported that native groups contend that "it would be impossible to clean up a spill in Arctic waters, far from deep-water ports and airports, especially during periods of broken ice. The nearest Coast Guard base is on Kodiak Island more than 1,000 miles away."

President Obama's initial May 28 six-month deepwater oil drilling [moratorium](#) halted much of the oil and gas activity in both the Gulf of Mexico and the Pacific region, including plans Shell had for drilling in Alaska waters. That moratorium was overturned, but Interior Secretary Ken Salazar issued a new drilling suspension on July 12 to address many of the concerns that prompted a district court to grant the injunction against the original moratorium. The new moratorium has also been challenged in court.

National Mining Association Sues EPA over Limits on Mountaintop Mining

The National Mining Association (NMA) filed a [lawsuit](#) on July 20 against the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) claiming that new [enforcement guidelines](#) issued by EPA in April unlawfully obstruct permitting of coal mining operations. NMA claims the new guidelines effectively prohibit certain types of surface mining and that EPA denied NMA the opportunity to review and comment on the guidelines before they became final.

The lawsuit arises out of the controversial practice of mountaintop removal mining, which involves blasting off the tops of mountains to access coal seams hidden below. After the coal has been mined, the leftover waste is discarded in the surrounding valleys. EPA issued [the new guidance](#) after extensive scientific research showed that this "valley fill" method causes pollution in downstream drinking water sources and endangers the health and safety of surrounding communities.

The guidelines are part of an effort to undo a Bush administration "[midnight regulation](#)" that allowed mining companies to dump waste from mountaintop mining into rivers and streams. EPA Administrator Lisa Jackson made reducing the harm caused by this rule a top priority, especially after the late Sen. Robert Byrd (D-WV) urged EPA to crack down on unsafe mining

practices. Byrd, an unlikely critic of mountaintop mining due to his coal country constituency, explained in a Dec. 3, 2009, [commentary](#) that mountaintop mining led to job loss and unknown effects on the health of surrounding communities. Byrd also defended EPA's regulatory actions and called for a safer alternative to mountaintop mining, stating that "the greatest threats to the future of coal do not come from possible constraints on mountaintop removal mining or other environmental regulations, but rather from rigid mindsets, depleting coal reserves, and the declining demand for coal as more power plants begin shifting to biomass and natural gas as a way to reduce emissions."

The new guidance requires greater scrutiny in evaluating Clean Water Act (CWA) permits for valley fill operations, which has led to many of the permits being denied or held up for review. Although EPA does not claim to be issuing a ban on all valley fills, the guidance states that "generally, it will be easier for projects with no or few valley fills to demonstrate that they comply with the requirements of the CWA and the 404(b)(1) Guidelines. Conversely, projects with multiple valley fills will generally raise serious questions about their compliance with CWA requirements and may require permit objection under 402 or elevation and possible veto under 404." Although EPA describes the guidelines as clarifying how CWA requirements apply to valley fills, and not as creating any new policy or rule, Jackson [explained](#) in the April 1 press conference announcing the guidelines that the standard was so strict that few, if any, valley fill permits would be issued.

NMA's lawsuit calls this heightened scrutiny a "de facto moratorium" on permitting for valley fill coal mining. NMA claims EPA and the Corps purposefully circumvented standard rulemaking procedures by issuing the new policy as a "guideline," thus avoiding the long notice and comment period required by federal law whenever an agency creates a rule. NMA also argues that the guidelines violate the CWA by allowing EPA to control the permit review process for valley fills. The authority to issue permits for the discharge of dredged and fill material under the CWA is traditionally delegated to the Corps.

However, EPA's [guidance summary](#) states that the CWA gives EPA authority to deny a permit for discharge of dredged or fill material if it would cause or contribute to significant degradation of state or federal water quality. EPA's scientific findings show that valley fills have a substantial impact on both aquatic life and surface waters that feed into public drinking water. The summary cites two federal studies that found that waters downstream of valley fills show elevated levels of highly toxic and bioaccumulative selenium, and that nine out of ten streams downstream of valley fills show significant impacts to aquatic life. Such degradation to water quality could lead to significant impacts on the health of surrounding communities, warranting EPA review under the CWA.

In June 2009, EPA and the Corps entered into a [Memorandum of Understanding](#) (MOU), which established enhanced coordination procedures between the two agencies. The MOU allows EPA to conduct additional review with veto power over all permitting actions made by the Corps in regard to valley fills. EPA has stated that it properly entered into the MOU under its authority to issue guidelines to ensure that permitting decisions made by the Corps are in compliance with CWA.

Jackson has repeatedly stated that the guidelines are one step in a long process toward reducing coal mining pollution. EPA's main goal in issuing the guidance is to make an immediate impact in the quality of streams used for drinking water, fishing, and swimming. "Coal communities should not have to sacrifice their environment, or their health, or their economic future to mountaintop mining," Jackson [said](#) in the April 1 press conference. "They deserve the full protection of our Clean Water laws."

The National Mining Association filed its lawsuit in the U.S. District Court for the District of Columbia. Neither EPA nor the Corps has issued comments or a response to the lawsuit at this time.

FEC Approves Advisory Opinions for Independent Expenditure Committees

The Federal Election Commission (FEC) recently voted 5-1 to approve advisory opinions allowing two political organizations to collect unlimited contributions for independent expenditures in federal campaigns. The groups, the conservative Club for Growth (the Club) and pro-Democratic Commonsense Ten, will disclose their donors and spending to the FEC. The opinions provide some guidance to entities that wish to raise and spend unlimited amounts of money to run ads supporting or opposing candidates for federal office.

In May, the Club filed an advisory opinion request asking the FEC to rule on the group's plans to establish a new political committee that will only make independent expenditures, without coordinating with campaigns, political parties, or other outside groups. The group [asked](#) the FEC whether the Club may solicit unlimited donations from the public to finance such expenditures. Specifically, the Club's request said, "There is a new, constitutionally-mandated entity that, although registering and reporting as a political committee, is protected by the First Amendment from contribution limits and other substantive campaign finance restrictions. This new entity is the independent expenditure-only political committee."

Commonsense Ten also [noted](#) that it will only make independent expenditures and seeks to raise unlimited money from unions, corporations, and individuals.

These new independent expenditure committees are the result of recent court decisions. The U.S. Supreme Court [ruling](#) in *Citizens United v. Federal Election Commission* lifted the ban on corporate and union campaign spending. In addition, decisions by the U.S. Court of Appeals for the DC Circuit in [SpeechNow.org v. FEC](#) and [EMILY'S List v. FEC](#) established that groups sponsoring independent campaign advocacy can collect unlimited contributions from their supporters. Despite providing greater freedom for campaign spending, the court decisions rejected challenges to FEC disclosure rules.

Taking advantage of the rulings, the groups wanted the FEC's permission to accept unlimited contributions, promising to only use the money for broadcast messages supporting or opposing federal candidates. Subsequently, the FEC [concluded](#) on July 22 that the independent

expenditure committees "may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations."

The approved advisory opinions directly extend the reasoning of the court decisions in *Citizens United*, *SpeechNow.org*, and *EMILY's List*. The Commonsense Ten advisory opinion [states](#), "Given the holdings in *Citizens United* and *SpeechNow*, that 'independent expenditures do not lead to, or create the appearance of, quid pro quo corruption,' the Commission concludes that there is no basis to limit the amount of contributions to the Committee from individuals, political committees, corporations and labor organizations."

The groups' requests also asked for guidance on reporting requirements. The court decisions upheld disclosure requirements but did not detail how reporting requirements would apply to activities that were previously illegal. The FEC rulings notify the organizations that they can use the current registration and reporting forms for political action committees to provide disclosure on their financial activity.

The FEC also provides a [template](#) for the suggested text of a letter committees may use to clarify plans to accept unlimited contributions for making independent expenditures. The applicant organization would state in the letter that it "intends to raise funds in unlimited amounts" but to use the money solely for independent expenditures.

Democratic commissioner Steven Walther voted against the advisory opinions and issued a [statement](#) that the FEC went beyond the legal issues settled by the courts. He wrote that "the landscape of federal campaign finance regulation has undergone a paradigmatic shift," and the commission should instead engage in a full rulemaking process to implement the court decisions rather than create individual, case-by-case opinions.

Walther also wrote a [separate draft opinion](#) in response to the Club's request, questioning whether the independence of the committee's spending will be compromised. The Club plans to have its president, who serves as treasurer of the Club for Growth PAC, also serve as treasurer of the new independent expenditure committee. However, the agreed-upon opinion accepted the Club's proposal that its new committee will not coordinate its activities with the PAC.

These advisory opinions provide some of the first guidance following the recent string of court decisions on campaign finance law. After announcing plans in April to issue a series of rulemakings, the FEC has failed to draft any new rules or adopt significant new policies. Former Democratic FEC Commissioner Robert Lenhard submitted [comments](#) during the advisory opinion process and said the opinion requests were "an opportunity to provide a clear workable system for the exercise of rights enunciated" by the court rulings.

However, the approved advisory opinions do not have the weight of formal regulations or of a law passed by Congress. Further, the opinions do not necessarily mean that it will be clear where all groups airing ads are getting their money. It seems to be up to the individual organization to follow the disclosure regime laid forth in the opinions. The FEC should clarify which groups need to register and report fundraising and spending information.

Legislation currently before Congress, known as the DISCLOSE Act, would address some of these disclosure concerns by setting up a new disclosure system for organizations spending money to influence federal campaigns. The measure passed the House in late June; it faces a procedural vote on July 27 in the Senate, though at press time, its fate remained unclear.

The two FEC advisory opinion rulings, any additional work by the FEC in the next couple of months, and Congress's action or lack thereof on the DISCLOSE Act are all expected to greatly impact the upcoming 2010 congressional elections. Independent groups will be raising and spending money without restraint, while the candidates and the national political parties must continue to operate within limits. As a result, outside groups could play a major role in this year's campaigns.

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Commentary: Federal Debt and Its Implications for Economic Stability

When the Congressional Budget Office (CBO) produced a [brief](#) in late July on the nation's debt levels and the risk they present to the economy, those pushing for immediate deficit reduction [jumped](#) on the report as evidence that the U.S. is about to go over a financial cliff. Upon closer inspection, though, the greatest threat facing the country is still the Great Recession and the lingering effects thereof.

The CBO [brief](#), "Federal Debt and the Risk of a Fiscal Crisis," did not reveal anything new. For quite some time, economists have known that "further increases in federal debt ... almost certainly lie ahead," and that unless policymakers change its trajectory, "growing budget deficits will cause debt to rise to unsupportable levels." These high levels of debt would predictably result in severe economic consequences.

Along with the "crowding out" of investment and legislators' limited ability to react to economic emergencies, high levels of debt "would also increase the probability of a sudden fiscal crisis." CBO characterizes the crisis as an event "during which investors would lose confidence in the government's ability to manage its budget, and the government would thereby lose its ability to borrow at affordable rates."

The problem is that there is no consensus on what level of debt might trigger a fiscal crisis. CBO projects that debt held by the public will stand at 62 percent of gross domestic product (GDP) by the end of FY 2010. Under its "alternative fiscal scenario," which takes into account likely future legislative and economic events, debt held by the public will increase to 90 percent by 2020, 110 percent by 2025, and 180 percent in 2035.

With implications of serious consequences, these numbers seem imminently threatening, especially when CBO notes, "In only one other period in U.S. history – during and shortly after World War II – has [federal debt held by the public as a percentage of GDP] exceeded 50 percent." Given the rarity of such a high debt ratio, one might be tempted to conclude that a fiscal crisis could be just around the corner.

A little context helps to mitigate the fear. During World War II, debt held by the public spiked at roughly 108 percent of GDP before falling relatively quickly, and then finally dipping back below 50 percent in the late 1950s. While it is difficult to make direct comparisons based simply on debt numbers of the past, with the return of a healthy economy, it would be hard to assume that projected debt levels over the next decade and a half necessarily foretell of doom.

Similarly, while it is true that fiscal crises can occur abruptly if investors quickly lose confidence in a country, as federal fiscal expert Stan Collender [observes](#), "[T]here is little or no concern on Wall Street about the government's borrowing, either short- or long-term." In fact, as Collender points out, the bond market, which lawmakers have traditionally looked to for insights on the federal budget, "is exhibiting no worries about the deficit or federal borrowing at all ... [and is] indicating that Washington should do more to stimulate the economy."

That is not to argue that Congress or the Obama administration does not need to do anything about projected debt levels; indeed, they do. Rather, it is to contend that fears about further spending in the near term based on future projected debt levels are unwarranted. As noted economist Nouriel Roubini recently [remarked](#), the "[r]isk of a double dip recession in advanced economies ... has now risen to 40 [percent]." Without further stimulus help from the federal government, including further deficit spending, the likelihood of such an event will almost certainly increase.

The economic consequences associated with high debt levels are serious. However, the long-term structural gap between certain entitlement program revenues and spending commitments, which is what makes up the high projections, will only be worse if the economy does not recover from the current downturn because the government put too much emphasis on erasing near-term deficits – those caused by falling tax revenues and increased spending as a result of the economic downturn and transitory congressional actions like the Recovery Act. Without a solid

recovery in the near term, lawmakers will have a more difficult time focusing on the longer-term implications of the structural debt without conflating the two.

Congress Sends Aid to States, Gaps Remain

With all of the attention placed on federal budget problems, it can be easy to forget that state budgets are facing similar troubles. Since almost every state has some form of a balanced budget requirement, states can be extremely susceptible to swings in the economy, and the recent recession is a perfect example. In an effort to help ameliorate the states' fiscal situation, [President Obama recently signed into law](#) a \$26 billion state aid bill passed by Congress in a rare August session. The bill, which includes \$10 billion in education funding and \$16 billion for state Medicaid programs, is expected to save some 300,000 jobs. Still, it pales in comparison to the actual size of the fiscal problem facing the states.

State budgets, which often rely on sales taxes and property taxes in addition to income taxes, took a strong hit when the housing bubble popped and unemployment started rising. Fewer home sales, lower property values, and fewer workers all mean less revenue flowing to the states. At the same time, more Americans are forced to use assistance programs, such as Medicaid, which is funded by states and the federal government. The more people who use these programs, the more they cost. Thus, while state revenues are falling, state budget costs are rising.

This is not an isolated problem. Between the 2011 and 2012 fiscal years, according to the Center on Budget and Policy Priorities, states are facing a collective \$260 billion shortfall, with [46 states facing budget shortfalls](#). Forty-three states have thus far had to cut services to fill in the gaps. These state budget shortfalls are far worse than those during the last recession in the early 2000s.

Meanwhile, the funding provided to the states by the Recovery Act is cresting. While Congress designed the act to last until 2019, most of the money will be spent in two fiscal years – FY 2010 and 2011. Indeed, this past quarter (April through June 2010) was the first to have more money [paid out than obligated](#) by federal agencies. This signifies that agencies are awarding fewer contracts and grants, which means the pace of Recovery Act funding has peaked and will slow in the near future.

Declining state revenues and the effective end of Recovery Act funding means states must scale back their budgets. As states run out of money, some services are cut sooner than others. Education, in particular, is an easy target, since it is [often seen](#) as less important, and easier to cut, than other social services. For instance, [43 states](#) have cut higher education funding, while only 29 have cut funding for the elderly or disabled. Recognizing trends in state cutbacks, Congress designed the state aid bill as a mix of funding to help states retain teachers and Medicaid to maintain health services for lower-income families.

The state aid bill, however, is far from perfect. The deficit-neutral bill has a variety of funding sources, including a closed tax loophole worth \$9 billion. Controversially, though, it takes money away from nutrition funding. The repurposing of the funding means that families could see as much as a [\\$60 reduction in their food stamp benefits](#) in 2014, when the cuts will take effect. While many families will benefit from Congress addressing current state funding shortfalls, many families will also feel the bite of shrinking household food budgets.

Additionally, the state aid bill is only a small fraction of what is needed. The bill's \$26.1 billion infusion is only ten percent of the gap states are facing this fiscal year and next, the rest of which will have to be made up through budget cuts or increased taxes. The final bill is less than half of what the president requested a few months ago and what the House originally passed, and it probably will not be able to completely prevent some states from laying off public workers.

Since August 2008, according to [the Economic Policy Institute](#), over 300,000 state and local government jobs have been lost. This state aid bill will do little to help these workers or significantly close state budget gaps, but by pushing [more money into the economy](#), Congress can help state budgets in both direct ways, such as filling budget gaps, and indirect ways, such as increasing state revenues by creating jobs.

EPA Seeks to Enhance Public Access to Chemical Data

The U.S. Environmental Protection Agency (EPA) has proposed several changes to its regulation of chemicals that should improve the public's access to crucial information. The improved data collected under the proposed rule will help the agency and the public identify potential chemical risks and take action to manage those risks.

The proposed rule is the latest of several actions by the EPA to use its existing authority under the nation's primary chemical law, the [Toxic Substances Control Act](#) (TSCA), to improve the public's access to chemical data and prevent manufacturers from inappropriately hiding health and safety information as alleged trade secrets.

The proposed changes would affect the [Inventory Update Reporting](#) (IUR) rule under TSCA. Under TSCA, EPA compiles an inventory of chemical substances in commerce in the U.S., known as the [TSCA Chemical Substance Inventory](#) (TSCA Inventory). The IUR rule updates the TSCA Inventory by collecting updated information on volumes of chemical production, manufacturing facility data, and how the chemicals are used. The IUR provides exposure-related data needed to understand chemical risks – information that is vital to identifying chemical risks to the public and environmental health and crafting regulations to protect them.

[According to EPA](#), "The IUR data are used to support risk screening, assessment, priority setting and management activities and constitute the most comprehensive source of basic screening-level, exposure-related information on chemicals available to EPA." The agency uses IUR data "to support many health, safety, and environmental protection activities."

Under President George W. Bush, the EPA weakened TSCA reporting by raising the reporting threshold, which was originally 10,000 pounds, and reducing the frequency of reporting from every four years to every five.

The proposed rule lowers or eliminates thresholds for reporting and increases reporting frequency, moves that should provide the public with more information on more chemicals. The amount of a chemical manufactured at a facility in any given year fluctuates widely. Currently, manufacturers must report if during the "principal reporting year," which actually occurs every five years, the production volume of a chemical exceeds 25,000 pounds. EPA's proposed rule would require a manufacturer to submit information on a chemical if the volume exceeds the 25,000-pound threshold for *any* year since the previous submission. The agency is also proposing to return the reporting frequency to every four years rather than every five. Additionally, EPA is proposing requiring all reporters to submit data on the processing and use of the chemicals. The current program requires such reporting only for chemicals manufactured or imported over 300,000 pounds.

Chemical manufacturers and importers will be required to report the information electronically. EPA will provide manufacturers with access to electronic reporting software and additional guidance on how to report electronically. Only one-third of reports were submitted electronically in the last reporting year, 2006, and EPA took over two years to validate the data submitted in paper or CD-ROM formats. A large number of errors were generated by entering data by hand into agency computers. By requiring electronic submissions over the Internet, EPA hopes to greatly reduce the reporting errors and get the data out to the public in a timelier manner.

Another proposed change would require reporting of a number of valuable pieces of information, such as yearly production volumes, more specific chemical names and numbers to ensure the correct chemical substances are identified, and the approximate number of workers exposed to the chemicals.

Important changes to the agency's treatment of trade secret claims have also been proposed in the rule. Currently, manufacturers are allowed to label data as confidential business information (CBI) with nearly no limitations, which usually compels the agency to withhold such information from the public. EPA has acknowledged that the inappropriate and excessive use of CBI claims has hidden important information from the public and even from EPA offices. [According to the agency](#), "The public would be better informed and better able to understand and provide meaningful comment on Agency actions if less information were unnecessarily or inappropriately claimed as CBI. The Agency would also be able to provide other public and private organizations and individuals with better information for making their own decisions."

The agency will place limits on what a manufacturer can label as CBI when submitting data under the IUR rule. EPA intends to prohibit use of CBI claims for the identity of a chemical listed in an IUR submission if the chemical identity is already publicly available on the public portion of the TSCA Inventory. EPA also proposes requiring upfront substantiation for CBI claims for processing and use information. Submitters would have to supply the agency with

written explanations defending their CBI claims. Manufacturers have previously claimed data to be CBI even though the same data were available publicly elsewhere – such as on the company's website.

The recent proposed rule follows several other actions by EPA to limit the abuse by chemical manufacturers of trade secrets protections. In May, EPA [issued](#) a "general practice" restricting CBI claims on chemical identities that are part of a health or safety study. In January, EPA [announced](#) chemical identities could not be considered CBI when manufacturers submit information indicating a chemical substance or mixture presents a substantial risk of injury to health or the environment if the chemical identity is already on the public portion of the TSCA Inventory.

[According to Steve Owens](#), the EPA's assistant administrator for the Office of Chemical Safety and Pollution Prevention, "Enhanced reporting on the production and use of chemicals will help give the American people greater access to information on the chemicals to which their children and families are exposed every day."

EPA is now accepting [public comments](#) on the proposed rule. EPA expects to finalize the modifications to the chemical information reporting rule in time for the next reporting period, scheduled for June 1-Sept. 30, 2011, for chemicals manufactured during calendar year 2010.

Wikileaks War Documents Raise Secrecy, Security Questions

Classified documents from the wars in Iraq and Afghanistan, released in recent months on the whistleblower website [Wikileaks](#), have garnered public attention and prompted widespread debate. For instance, the website's [Afghan War Diary](#), released in late July 2010, contains thousands of classified military documents relating to the war in Afghanistan. Such leaks have raised questions about whether the information should have been released, whether the leaker and Wikileaks should face prosecution, and the military's strategies to control information.

Wikileaks is a whistleblower website that accepts anonymous submissions of leaked documents. Controversy about its methods has dogged Wikileaks since its inception; nevertheless, the site has continued to gain access to sensitive materials, which have laid the foundation for investigations by major journalism organizations and provoked reactions by governments and civil society. Notable documents posted on the site include the [operating procedures at the Guantanamo Bay detention camp](#), [nearly 7,000 Congressional Research Service reports](#), and a [blacklist of websites proposed for censorship by the Australian government](#).

The recent leaks of military documents have proven particularly controversial. In April, Wikileaks posted a [classified military video of a 2007 airstrike in Baghdad](#) that killed two Reuters journalists. The military had previously denied a Reuters request for the video under the Freedom of Information Act.

The Afghan War Diary, released in July, contains more than 90,000 documents dating from 2004 to 2010 – a size and scope that has drawn comparison to the Pentagon Papers, the 1971 government documents about U.S. involvement in Vietnam released by whistleblower Daniel Ellsberg to *The New York Times*. While the sheer number of documents in the Afghan War Diary has prevented a comprehensive review, initial [reviews](#) have already found disturbing information, including accounts of Afghan police and army corruption, Afghan intelligence working against American interests and supporting the insurgents, and even that Osama bin Laden died in a hospital in 2007.

Debating the Leaks

The White House condemned the most recent leaks. National Security Advisor Jim Jones [in a statement](#) said that the Afghan leaks "could put the lives of Americans and our partners at risk, and threaten our national security." [In an interview](#), Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, called the leaks irresponsible and said that Wikileaks could have "blood on the hands" in the event of a reprisal against a soldier or collaborator whose identity might be compromised.

Some transparency advocates also criticized the leaks. [In an open letter](#), Reporters Without Borders said that while the release of the Iraqi video was "clearly in the public interest," "revealing the identity of hundreds of people who collaborated with the coalition in Afghanistan [in the Afghan documents] is highly dangerous." Steven Aftergood, [with the Federation of American Scientists](#), called Wikileaks' Afghan disclosures "clumsy" and said they had ironically bolstered public support for military secrecy.

Others supported Wikileaks and the disclosure of records. [At ThinkProgress](#), Matthew Yglesias wrote that the Afghan files are "a potent reminder that there's far too much classification and secrecy in the United States government." Tom Blanton, Director of the National Security Archive, which follows a strict legal approach to uncovering government secrets, also offered [some support](#), saying that the recent Wikileaks release of documents "falls under the journalist function of the First Amendment" and that the documents will hopefully "spark a new level of the debate about the Afghan War."

Examining Military Information Management

The leaks also focused attention on the military's ability to secure classified information. The Pentagon stated the incidents [may lead to changes](#) in the way sensitive material is distributed. Analysts suggested that [steps could be taken to protect classified information](#) without impairing information-sharing inside the military.

At the same time, some questioned whether the leaked information was properly classified. The overclassification of records has been a longstanding problem, with some officials estimating that as much half of what gets classified is not actually worthy of the protections. The Pentagon seems to want it both ways: on the one hand, it says that dangerous information has been leaked; on the other hand, it says that the leaked information does not compromise national

security. If the latter is true, the release of such a large number of classified documents that does not compromise national security raises renewed questions about whether the system strikes the right balance over what is being classified.

Citing a document about a reconstruction team visiting an Afghan orphanage, Yglesias commented, "That's not a military secret that puts people's lives at risk ... It's just a small data point that gives us some greater understanding of Afghan society." Similarly, Aftergood noted that "WikiLeaks has published a considerable number of valuable official records that had been kept unnecessarily secret and were otherwise unavailable, including some that I had attempted and failed to obtain myself."

Clearly, the leaks demonstrate challenges to federal information policy resulting from a changed information environment. At *Techdirt*, [Mike Masnick commented](#), "The real question is how does the government and the military learn to function in a society where information is a lot more open and free."

President Obama issued [Executive Order 13526](#) on December 29, 2009, prescribing a uniform system of classifying and declassifying government information. The order clarified the authority to label records top secret or classified and set clear goals to reduce the backlog of records.

Whistleblower Protections?

The leaks also raised questions about what protection – or prosecution – such whistleblowers deserve. [Danielle Brian, Executive Director of the Project on Government Oversight](#), said:

If there were safe channels for national security and military whistleblowers, leaks of classified information would be far less likely. Given that, POGO will continue to do everything we can to ensure passage of the Whistleblower Protection Enhancement Act and protections for all whistleblowers.

However, the incident seems to have lost Wikileaks some sympathy among members of Congress. [CongressDaily](#) reported that Sen. Charles Schumer (D-NY) is drafting changes to his shield law for journalists to ensure Wikileaks is excluded from protection.

Public Supports Consumer and Environmental Protections, Polls Show

Americans overwhelmingly support government protection of the environment and consumers, a series of new polls shows. The findings come as efforts to enforce and expand regulation face increasingly hostile rhetoric from conservatives and industry representatives in Washington.

A new Society for Human Resource Management/*National Journal* Congressional Connection Poll ([National Journal poll](#)) found wide public support for legislation intended to limit climate-

altering greenhouse gas emissions and to reform U.S. energy policy. Sixty-five percent of poll respondents said they would support a bill that would cap greenhouse gas emissions. The same poll, conducted from July 29 to Aug. 1, found that 78 percent favor requiring utilities to produce more energy from renewable sources.

The House passed a climate and energy bill in June 2009. Senators have introduced several climate bills, but prospects for passage in 2010 appear dim.

Polling also indicates that small business owners support climate and energy legislation, though not as strongly as the public at large. Three business groups, Small Business Majority, American Businesses for Clean Energy, and We Can Lead, commissioned a [poll](#) released in July that surveyed small business owners about their views on climate and energy legislation and its impact on the economy. Fifty percent of the respondents said they support legislation, while 42 percent said they oppose it. Many small businesses are optimistic about legislation's potential effects: "Forty-eight percent think an energy and climate bill would either not affect their business or would help it, while 45 percent think a bill would hurt their business," the groups said. Of the respondents, 79 percent own companies of five or fewer employees.

Like the climate and energy bill, a bill aimed at improving food safety by enhancing the powers of the Food and Drug Administration passed the House in 2009 but has stalled in the Senate. Americans support food safety legislation four to one, according to a [poll](#) released by Consumers Union on July 12. When asked, "How would you describe your support for Congress passing this legislation immediately?" 43 percent of respondents said they supported the legislation, and an additional 37 percent said they strongly supported it. Nine percent said they opposed the bill, and only seven percent said they strongly opposed the legislation.

Public opinion surrounding the BP oil spill disaster reveals a desire for government involvement, as well. Although 72 percent favor expanded oil and gas exploration, according to the *National Journal* poll, a majority of Americans – and 58 percent according to a June CNN [poll](#) – support the Obama administration's temporary ban on drilling in the Gulf of Mexico ordered in response to the spill. Generally, 69 percent favor stricter regulation of oil drilling, according to the *National Journal* poll.

In addition to the oil industry, Americans support greater regulation for a variety of sectors that figure prominently in national politics. According to a June NBC News/ *Wall Street Journal* [poll](#), a majority of Americans favors more regulation of Wall Street firms (57 percent), "big corporations" (53 percent), and the health insurance industry (52 percent). Only a small fraction favors less regulation – 27 percent for the health insurance industry, 21 percent for big corporations, and 16 percent for Wall Street, according to the poll.

A July CNN [poll](#) turned up similar results: 55 percent said they approved of government regulation of businesses generally, while 45 percent disapproved.

The polls' findings stand in sharp contrast to criticisms hurled by conservatives and industry representatives who have demonized regulation and characterized nearly any form of

government intervention as a threat to job creation or stability. Their complaints have grown louder in recent weeks as the critics attempt to prey on unrest over the struggling economy and ailing job market.

The critics have also turned "uncertainty" into the new watchword of the anti-regulatory campaign. Amid news from the St. Louis Federal Reserve that corporate profits hit \$1.37 trillion in the first quarter – an all-time high – and businesses are sitting on about \$2 trillion in cash reserves, business leaders [are saying](#) uncertainty over the stability of the economy is preventing them from using reserves to invest and add new hires. Regulation and pending legislation are contributing to the uncertainty, they claim.

Washington business groups have been leading the chorus of those linking regulation to economic instability and making the case for regulatory roll backs. Both the U.S. Chamber of Commerce and the Business Roundtable, a coalition of executives from major U.S. companies, [submitted](#) to the White House lists of regulations and other policies they want rescinded or weakened.

"Many regulations and legislation – both existing and proposed – exacerbate the uncertainty created by today's volatile economic environment," the Business Roundtable wrote in a [letter](#) to White House Office of Management and Budget (OMB) Director Peter Orszag. "Virtually every new regulation has an impact on recovery, competitiveness and job creation."

House Majority Leader John Boehner (R-OH) has been another vocal critic of regulation. On July 16, Boehner [endorsed](#) a one-year moratorium on most new regulation. A moratorium "sends a wonderful signal to the private sector that they'll have some breathing room," he said. No such moratorium is being seriously contemplated, either in Congress or the executive branch.

Boehner is also one of 69 co-sponsors of [H.R. 3765](#), the Regulations From the Executive in Need of Scrutiny Act of 2009 (REINS Act), a bill that would require Congress to vote on and approve every new agency rule estimated to have an economic impact (either costs or benefits) of \$100 million or more. The act would prohibit agencies from enforcing rules that do not garner congressional approval.

In a July 21 [opinion column](#) written for the *Huffington Post*, OMB Watch Executive Director Gary D. Bass called the attacks on regulation "shameful." The attacks are particularly insensitive so soon after national tragedies such as the BP oil spill disaster and the April explosion at the Upper Big Branch coal mine in West Virginia that killed 29 miners, Bass wrote.

In response to the campaign against regulation, including the industry hit lists submitted to the Obama administration, more than 600 people wrote to President Obama urging him to stand up for public protections. OMB Watch organized the letter-writing [campaign](#).

"I recognize that the federal government has significant responsibilities to ensure that the water I drink is free from harmful chemicals; that the food I eat is safe; that the air I breathe is clean;

that the products we buy for our children aren't contaminated by heavy metals; and that our workplaces are safe, healthy places to earn a living," many of the letters say.

BP Agrees to \$50.6 Million Penalty for Safety Violations that Killed 15

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced Aug. 12 that BP has agreed to pay a \$50.6 million penalty for safety violations related to the 2005 explosion at its Texas City, TX, refinery that killed 15 workers and injured 170 others. In addition to the fine, BP has also agreed to allocate about \$500 million to address unsafe conditions at the refinery.

In September 2005, OSHA cited BP for \$21 million in penalties for willful safety violations that led to the fatal Texas City explosion. Under the agreement, BP was required to conduct further investigations into other possible workplace safety concerns at the facility. But in a 2009 follow-up investigation, OSHA found that BP's efforts to protect the health and safety of its workers had been insufficient.

On Oct. 30, 2009, OSHA [issued](#) a proposed \$87.4 million fine against BP for failure to remedy workplace hazards at the Texas City refinery. The August [agreement](#) resolves only part of the ongoing litigation between BP and OSHA in connection to the explosion. According to OSHA's [announcement](#), BP is continuing to challenge an additional 439 willful violations, for which OSHA has assessed more than \$30 million in penalties. OSHA has the authority to issue a maximum fine of \$70,000 for each willful violation "where an employer has knowledge of a violation and demonstrates either an intentional disregard for the requirements of the Occupational Safety and Health (OSH) Act of 1970, or shows plain indifference to employee safety and health." The announced agreement will have no impact on the ongoing litigation and the possibility that BP will eventually agree to pay the entire \$87.4 million penalty.

The current \$50.6 million penalty is the largest ever issued by OSHA. "The size of the penalty rightly reflects BP's disregard for workplace safety and shows that we will enforce the law so workers can return home safe at the end of their day," said Secretary of Labor Hilda L. Solis in the announcement. Representatives of BP did not admit to any wrongdoing but [stated](#) that they will "focus on moving forward collaboratively in order to continue to improve plant safety."

While the \$50.6 million penalty is massive compared to OSHA's past citations, members of the Texas City community are [far from satisfied](#). Lawyers representing several victims of the explosion are renewing their efforts to prosecute BP on criminal charges, arguing that BP's agreement to pay the fine without invoking the company's right to appeal is akin to an admission of guilt. The Texas Attorney General's Office is also currently suing the company for allowing a fire to release 500,000 pounds of noxious emissions into the air over 40 days. The attorney general blames the fire on poor maintenance and operating practices and claims BP allowed the fire to burn longer to avoid profit loss from shutting down the machinery.

In its statement, BP classified the disaster that killed 15 workers as an “accident,” but a comprehensive [report](#) by the U.S. Chemical Safety Board (CSB) paints a different picture. CSB’s report concluded that the explosion was caused by “organizational and safety deficiencies at all levels of the BP Corporation.” The report blamed the tragedy on lack of communication, false instrument readings, and alarms that never went off. CSB cited the recent downsizing at the refinery that forced many of the remaining workers to pick up extra shifts as a contributing factor to worker fatigue. CSB also outlined a history of willful safety violations at the refinery, including a failure to adequately address the safety impacts of budget cuts and a 2004 internal report that warned of “an exceptional degree of fear of catastrophic incidents” and the possibility that “Texas City kills someone in the next 12-18 months.”

The story of BP workers losing their lives to willful safety violations and alarms that fail to go off is sadly familiar. [According to a worker](#) on BP’s Deepwater Horizon oil rig, the safety alarms that might have warned workers that the rig was in danger of exploding had been disabled because rig managers “did not want people woken up at 3 a.m. with false alarms.” The April explosion that killed 11 workers and continues to choke the Gulf of Mexico with oil has put a spotlight on BP’s record of environmental, health, and safety violations and launched numerous federal investigations.

An [analysis](#) by the Center for Public Integrity found that two refineries owned by BP account for 97 percent of all willful OSHA safety citations in the refining industry over the past three years. Citing the analysis, Sens. Patty Murray (D-WA) and Al Franken (D-MN) sent a [letter](#) to OSHA urging the agency to hold BP accountable. The senators criticized the current OSHA policy that does not require employers to report the injury or death of a contractor’s employee. All 15 of the workers killed in Texas City were contractors. “Excluding contractors from reporting requirements allows employers to claim their workplaces are safer than they actually are,” the senators said in the letter.

Although the \$50.6 million BP will pay for its continued failure to address the problems that caused the Texas City explosion is a small victory for workplace safety advocates, the question remains as to whether it will be enough to deter BP and other companies from future violations.

CREW Sues the Federal Election Commission over Case Dismissals

Citizens for Responsibility and Ethics in Washington (CREW) and Melanie Sloan, its executive director, recently filed a lawsuit against the Federal Election Commission (FEC) for continually dismissing cases without providing information about the decisions. Those who file complaints with the FEC are often unable to legally challenge the commission’s dismissal actions or obtain the reasons for the dismissals.

[*CREW v. Federal Election Commission*](#) seeks to end the dismissal of cases without explanation, requesting a declaratory judgment under the Administrative Procedure Act that the FEC’s actions are “arbitrary, capricious, and contrary to law.” CREW also seeks an injunction to force

the FEC to provide explanations for closed cases within the 60-day statute of limitations set forth by the Federal Election Campaign Act (FECA).

The FEC must legally provide statements of reasons after a case is dismissed so parties can meet the FECA-required deadline to file an appeal in federal court. FEC rules also require documents be placed in the public record within 30 days after an enforcement case is closed. However, when the FEC either delays or fails to release such information, the commission successfully avoids legal action. The lawsuit calls on the FEC to file statements of reasons in a timely fashion.

The [lawsuit](#) states, "CREW and [its Executive Director] Ms. Sloan are harmed when the FEC arbitrarily and capriciously dismisses their complaints without providing the reasons for the dismissal prior to the 60-day period in which complainants must file a petition as such dismissals effectively deprive CREW and Ms. Sloan of their statutory rights to judicial review."

The suit documents specific cases and highlights the FEC's poor response to plaintiffs and failure to issue any statement of explanation within 60 days. Three of the cases were filed by CREW, including a prominent case stemming from the 2004 presidential election involving November Fund, a 527 organization. CREW filed the complaint in September 2004, only to find out four years later that the case was dismissed on a 3-3 deadlocked vote. This was well past the deadline for a court challenge.

Another complaint was filed by CREW in March 2007 against a political action committee of former Rep. Duncan Hunter (R-CA). CREW was informed more than three years later that the FEC found reason to believe that provisions of FECA had been violated, yet the agency took no action and closed the file. No documents were ever placed in the public record.

Larger complaints about the FEC, particularly regarding the issue of declining enforcement, have resurfaced with CREW's lawsuit. This is not a new topic of concern, as similar cases have occurred over the past few years where commissioners decided against pursuing possible campaign finance violations. These decisions have often resulted from deadlocked, party-line stalemates between the three Democratic and three Republican commissioners. Because of the 3-3 votes, the commissioners regularly defy its counsel's recommendations to pursue enforcement. CREW's [press release](#) about its current lawsuit asserts there is "a pattern and practice of dismissing complaints because the Republican and Democratic commissioners are deadlocked 3 to 3, particularly in controversial cases."

The Center for Competitive Politics [disparaged](#) CREW's actions "as part of its advocacy campaign to increase political speech regulation. Many [complaints], if not most, go nowhere—unsupported by law or evidence. Like some of these complaints, the current lawsuit looks less like a serious attempt to address a legal issue and more like a P.R. gambit."

CREW's Sloan [noted the substantive nature](#) of the group's lawsuit, saying the commission "is deliberately manipulating the law to conceal its decisions in the hopes of running out the clock on any potential appeals of its decisions. This is wrong, and it must stop."

CREW's concerns about the commission mirror those of some in Congress, including two lawmakers who have suggested changes to the FEC's makeup as a solution to many of the commission's problems. Sens. Russ Feingold (D-WI) and John McCain (R-AZ) introduced the [Federal Election Administration Act](#) (S. 1648) in August 2009 to replace the FEC with a three-member administrative body called the Federal Election Administration. The odd number of members is intended to prevent deadlocked votes, and no more than one individual would be from the same political party. There has been no action on this bill.

Congress Fails to Address Corporate Political Spending before August Recess

Recent congressional actions highlight concerns over corporate involvement in elections. Before the August recess, Congress made several attempts to regulate corporate electoral involvement, including the Senate's failed attempt to pass the DISCLOSE Act and the House Financial Services Committee's approval of the Shareholder Protection Act. Though some lawmakers worked around the clock, Congress ultimately failed to follow through on reform before the recess.

Senate Votes Against Debating the DISCLOSE Act

On July 27, the Senate fell one vote short to debate the DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act), legislation designed to mitigate the effects of the January U.S. Supreme Court decision in [Citizens United v. Federal Election Commission](#). The DISCLOSE Act is meant to increase disclosure requirements for election-related spending and restrict such activity by government contractors and foreign-controlled companies.

The Senate vote was not unexpected, but there was still hope among those who favor campaign finance reform that the Senate would move forward in debating the DISCLOSE Act. Various provisions were added to the bill that caused some groups that would normally favor increased disclosure, such as the American Civil Liberties Union, to lobby against the bill. However, other groups, such as Public Citizen, saw the legislation as necessary to limit corporate influence in elections, despite the fact that they had some concerns with the bill.

One such contentious provision allowed a disclosure exemption for large, membership-based organizations (the criteria in this exemption were so specific that only a few groups, such as the National Rifle Association and the Humane Society of the United States, would have qualified). On the flip side, the bill also included a requirement that all Senate candidates file campaign finance disclosures electronically, as House and presidential candidates are already required to do.

Rick Hasen, professor at Loyola Law School and moderator of the *Election Law Blog*, [notes](#) that "[e]nhanced disclosure is especially needed now that the FEC has voted to allow corporations, labor unions and other entities to make unlimited contributions to independent expenditure

committees. We have never had the situation before on the federal level where people, and now presumably corporations and labor unions, could make large – indeed unlimited – contributions to fund independent expenditures."

The Senate vote fell largely along party lines. According to [The Washington Post](#), Democrats "portrayed the legislation as an attempt to force transparency on political advertising by outside groups and corporations, activity that is often cloaked in anonymity and is now largely unrestrained by campaign finance restrictions." Republicans, however, portrayed it as "a partisan effort" to protect "incumbent Democrats from criticism ahead of the November election," according to a statement by Senate Minority Leader Mitch McConnell (R-KY).

The Senate's failure to pass the DISCLOSE Act has the potential to result in massive amounts of corporate money being used in political ads, and the public will not have the ability to know who funded the ads.

Sen. Chuck Schumer (D-NY), who introduced the DISCLOSE Act along with Rep. Chris Van Hollen (D-MD), said he plans to try to push the legislation again after the August recess. According to the *Post*, Schumer is open to changes to attract Republican support.

The [House passed the DISCLOSE Act](#) months ago, approving the bill on a 219-206 vote on June 24. The House debate on the bill erupted in controversy when exemptions similar to those found in the Senate version of the DISCLOSE Act were introduced. Concerns about nonprofit donor disclosure also weighed heavily on the debate in the House. For more details on the controversy surrounding the House bill, see [the June 29 edition of The Watcher](#).

House Committee Approves Shareholder Protection Act

On July 29, the House Financial Services Committee approved the [Shareholder Protection Act](#), another attempt by House Democrats to mitigate the effects of the *Citizens United* decision. The bill, which was introduced by Rep. Michael Capuano (D-MA), requires shareholder approval of a corporation's political spending for federal races. The Securities and Exchange Commission (SEC) would be mandated to issue rules requiring corporations to disclose any materials for political activities created with or purchased using company money.

According to [Congressional Quarterly](#), the "bill would allow shareholders to vote on the total amount of proposed political expenditures for that fiscal year. It would require corporations to include in its bylaws a requirement for a shareholder vote on political expenditures in excess of \$50,000 or any expenditure that would make the total amount spent by the corporation more than \$50,000. A majority vote would be required for approval."

In an editorial in [Roll Call](#), Craig Holman, government affairs lobbyist for Public Citizen, wrote that the "Shareholder Protection Act will not solve all the problems of unlimited corporate political spending, but it will help bring openness and accountability into corporate finances – and reduce corporate managers' ability to use shareholders' money for their own political purposes."

The Shareholder Protection Act now moves to the full House and may be considered in September. The Senate did not act on the legislation before the August recess.

Corporate Involvement in 2010 Elections

The impact of corporations' newfound ability to donate to political candidates became apparent when Target and Best Buy recently came under fire for donating \$150,000 and \$100,000, respectively, to MN Forward, a Minnesota political group supporting a conservative gubernatorial candidate, Minnesota state Rep. Tom Emmer.

"After the group disclosed the contribution in a state filing, gay rights groups and other left-leaning organizations had expressed outrage at the donation – made possible by the Supreme Court ruling – since the candidate has been a vocal opponent of gay-rights initiatives," according to [CNN](#). Many groups also threatened to boycott Target and Best Buy.

The firestorm that occurred after the donations became public caused Target's chief executive, Gregg Steinhafel, to write a letter to employees apologizing for the donation. Steinhafel says Target made the donation due to Emmer's economic stances, not his positions on social issues, according to the [Associated Press](#). The Associated Press further noted that "Target is known in Minnesota for helping sponsor the annual Twin Cities Gay Pride Festival."

Another example of corporate political spending comes from the [Americans for Prosperity Foundation](#), a conservative advocacy group that on Aug. 16 announced a \$4.1 million ad campaign in 11 states and two dozen of the most competitive congressional races, slamming "wasteful federal spending." The ads do not mention individual candidates in the November election. President Obama described the AFP campaign as another reason why Congress should pass the DISCLOSE Act.

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GAO: Lack of Competition in Some Contracting Difficult to Overcome

In a recent [report](#) to the House Committee on Oversight and Government Reform, the Government Accountability Office (GAO) found systemic hurdles to reducing the dollars spent on contracts not competed or those that are competed but only receive one bid. The reasons provided to GAO for the use of these contract vehicles reveal the difficulties that the Obama administration and Congress will face in instituting further reforms; they range from technical hegemony or general expertise by contractors to institutional indolence.

Noncompetitive contracts represent 31 percent of obligations, while competed contracts that receive only one bid make up 13 percent. The Office of Management and Budget (OMB) recently cited the latter as high risk because the lack of responses deprives "agencies of the ability to consider alternative solutions in a reasoned and structured manner."

While GAO identified few "contracts or orders that did not reflect sound procurement or management practices," they found that agencies often could not compete a contract because of the expertise or monopoly on proprietary data of one contractor. This was especially true of Department of Defense (DOD) contracts for services supporting a weapons program. Over half

of the noncompetitive DOD contracts that GAO reviewed used "lack of access to proprietary technical data" as a justification.

In almost all of those contracts, the government forwent purchase of the rights to the technical data based on short-term budgetary considerations. As the contractor tasked with creating the weapons system gains expertise over the course of development, the government essentially becomes "stuck" with the contractor, which can end up costing the government much more down the road in noncompetitive contract costs compared to the price of purchasing the technical data at the beginning of program development.

Congress has begun to address the issue of access to technical data. Most recently, Congress near-unanimously [passed](#) in 2009 the Weapon Systems Acquisition Reform Act that, along with other competition-enhancing elements, "requires acquisition strategies for major defense acquisition programs to include measures to ensure competition throughout the life cycle of the program," which "includes considering the acquisition of complete technical data packages." There is no evidence yet that the legislation will produce the desired results.

Purchase of proprietary data at the start of a weapons program, however, is not a panacea to DOD noncompetitive contracts. GAO also found that, because of the ever-shrinking pool of defense contractors (which [ironically](#) is partly the result of the peace dividend Washington urged contractors to take part in at the end of the Cold War), the government often has "little choice other than to rely on the contractors that were the original equipment manufacturers."

GAO also found that a federal agency could become too comfortable with a contractor and thus limit the use of competition to favor a certain company. Contracting officials told GAO that it is not unusual for a federal agency's program office, which dictates the requirements of a contract, to lean on a contracting office, which carries through with the award of the contract, to award a contract to a favored incumbent contractor. Sometimes the program office will go further and produce overly restrictive requirements that could only lead to an offer from the incumbent contractor.

The Obama administration has attempted to correct these deficiencies in competition. In its FY 2010 [budget guidance](#), "OMB instructed agencies to reduce dollars obligated to high-risk contracts – including noncompetitively awarded contracts and contracts competed with only one offer received – by 10 percent." The required reductions, according to OMB, have already produced [results](#) with a reduction in contracts awarded without competition in the first six months of FY 2010. The Office of Federal Procurement Policy (OFPP), following up in October 2009, released "[guidelines](#) for agencies to evaluate, in part, the effectiveness of their ... competition practices."

GAO recognizes these advancements but concludes that the federal government could do more. One of the most often heard complaints during the GAO study was the lack of well-trained staff, and thus GAO recommends "establishing an effective, adequately trained team of contracting and program staff working together, starting early in the acquisition process." GAO appreciates

that this may "challenge conventional thinking," but it stresses that it is "key" to taking full advantage of targets of opportunity.

GAO also recommends that OFPP investigate amending the Federal Acquisition Regulation (FAR), the government's contracting code, to require federal agencies to "regularly review and critically evaluate the circumstances leading to only one" contractor offering a bid on a contract. GAO adopted this solution straight from several agencies that have attempted to boost competition on their own by instituting in-house reforms. GAO acknowledges, "Some degree of noncompetitive contracting is unavoidable," but, "Given the nation's fiscal constraints," lack of competition within contracting just because a contractor "is doing a good job," or the agency is comfortable with the company, is unacceptable.

USAspending.gov to Increase Transparency through Subrecipient Reporting

Since it was unveiled in 2007, USAspending.gov has been a crucial portal through which the federal government makes spending data available to the public. With [new guidance](#) on subaward reporting released in August, the Office of Management and Budget (OMB) has taken additional steps to ensure USAspending.gov will comply with the law that created the site and will make it possible to track more of the federal spending chain.

Many of the requirements in the guidance are mandated by a landmark transparency law from 2006, [the Federal Funding Accountability and Transparency Act \(FFATA\)](#). FFATA created USAspending.gov and called for federal award and subaward reporting, which would be reported to USAspending.gov. While the Bush administration launched USAspending.gov ahead of the required Jan. 1, 2008, deadline, it did not put in place the required subaward reporting by the law's deadline, Jan. 1, 2009. The executive branch has thus not been in compliance with federal law for almost two years.

At present, USAspending.gov only includes information on so-called "prime recipients," those entities which directly receive federal funds. Since many federal projects involve myriad subawards, a complete picture of where federal funds flow remains incomplete. However, according to the new guidance, all prime recipients must begin collecting and reporting information on the next link in the federal spending chain to a central website, FSRS.gov (short for FFATA Subaward Reporting System), which will then send the information to USAspending.gov. By Oct. 1, prime recipients will begin reporting information on their subrecipients, including:

- Subawardee DUNS (a unique code identifying each recipient; the DUNS numbering system is a proprietary system run by Dun & Bradstreet)
- Subaward amount
- Subaward date
- Subawardee principal place of performance
- Subaward number

- Subaward Project Description

If the subawardee is registered with the Central Contractor Registry (CCR), the following fields will be prepopulated on the prime recipient's report. If the subawardee is not registered in CCR, the prime recipient is required to fill in these fields:

- Subawardee name
- Subawardee address
- Subawardee parent DUNS (if applicable)
- Catalog of Federal Domestic Assistance (CFDA) number
- Federal agency name
- Subawardee executive compensation (if applicable)

With this data, USAspending.gov will contain another layer of spending information. However, the new guidance only pertains to "first tier-subrecipients," or the first level of entities which receive subgrants or subcontracts from prime recipients. Subsequent recipients are not required to report under this guidance. This means that if a federal agency makes an award to a state, and the state makes a subaward to a city, all of that information will be recorded and made public. However, if the city makes subawards to various entities to implement the work, that information will not be disclosed. Thus, the OMB guidance does not trace federal funding to the ultimate recipient(s).

Additionally, all prime and first-tier recipients must report on the compensation of their five highest-paid executives, so long as the entity brings in at least \$25 million a year, at least 80 percent of which is from federal sources.

While the new guidance focuses on federal grants, the Federal Acquisition Regulation (FAR) Council released companion guidance for federal contractors a few weeks earlier in the form of [an interim final rule](#). That rule should be made final in the coming weeks and is similar to the OMB guidance. (OMB Watch submitted [comments](#) on the proposed rule Sept. 7.)

The Obama administration has made compliance with FFATA, authored by then-Sen. Barack Obama (D-IL) and Sen. Tom Coburn (R-OK), a priority. The Bush administration had licensed software from [FedSpending.org](#), a website developed in 2006 by OMB Watch to approximate requirements in FFATA, as its vehicle for implementing the law. The Bush administration put an emphasis on improving the speed of reporting data from federal agencies, and USAspending.gov did not change much until the Obama administration. Toward the end of May, OMB launched a redesign of the website, adding many new features and breaking from the look and feel of FedSpending.org.

Obama also placed early attention on spending disclosure under the American Recovery and Reinvestment Act (Recovery Act). As Obama said in his first primetime news conference on Feb. 9, 2009, "...every American will be able to go online and see where and how we're spending every dime."

In many ways, Recovery Act reporting has become a trial run for the new subaward reporting guidance. OMB worked with the Recovery Accountability and Transparency Board to develop guidance during 2009 on recipient and subrecipient reporting for the Recovery Act. The model was nearly identical to OMB's current guidance: OMB required reporting by the prime recipient and one tier below the prime, and the Recovery Board created a centralized website called FedReporting.gov, where the entities could report online.

In some ways, however, the reporting requirements for the Recovery Act are more detailed than the current OMB guidance. For instance, prime recipients of Recovery Act funding must report how many jobs were created by their projects, a data point not required under FFATA. One big difference from Recovery Act reporting is that the current OMB guidance applies to nearly all federal spending, not just Recovery Act funds, so the scope is much larger and potentially more complex.

With this new guidance, OMB is moving federal spending transparency to a central, recipient reporting-based model, but it has made only preliminary steps toward an ideal reporting system. For a truly transparent system, OMB will still need to capture reports from the ultimate recipient of federal funds. Additionally, OMB will need to pay even more attention to data quality issues, as more entities will now be reporting. Finally, OMB has yet to announce how the new data will be presented on USAspending.gov.

Posting Federal Contracts Online: The Next Step in Contracting Transparency?

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued an [advance notice of proposed rulemaking](#) on May 13 that could establish standards for posting federal contracts online. Providing the public online access to electronic copies of federal contracts could create a new level of accountability in federal procurement, but some contractors have opposed the idea, claiming it would cost too much and could reveal confidential business information.

Developing a means to quickly post federal contracts and related documents online could shed new light on how the government spends hundreds of billions of taxpayer dollars each year.

As a senator, President Obama co-sponsored the Federal Funding Accountability and Transparency Act (FFATA), which was signed into law by President George W. Bush and resulted in the creation of USAspending.gov. While USAspending.gov answered questions about who receives government money, as well as how much and what the money was for, it failed to answer the more fundamental questions of why the agencies made the contracting choices they made and whether contractor performance was adequate. Why did some contractors repeatedly receive large contracts with almost no competition? Why were some products and services so expensive? Why did some agencies have to outsource so many activities? Did the contractor actually do the work it was being paid to do and was the work completed on time? Posting

contract documents online certainly won't answer all of these questions, but it would likely be the first significant step into understanding the government's choices.

Posting the records related to all, or even nearly all, contracts would be no small feat. In FY 2009, the federal government spent almost \$540 billion on contracts with more than 250,000 recipients. The number of records associated with such activity, including individual task orders, is substantial. However, many public access advocates assert that technological advances make the handling of such large collections of records more feasible than ever.

What the Notice Said

The advance notice of proposed rulemaking, entitled "[Enhancing Contract Transparency](#)," asked "how best to amend the Federal Acquisition Regulation (FAR) to enable public posting [online] of contract actions, should such posting become a requirement in the future, without compromising contractors' proprietary and confidential commercial or financial information." In particular, the councils were looking for efficient and equitable methods to exclude protected information from disclosure in processing the incredible number of government contracts. The councils also asked for information on the benefits of contract transparency, impacts on contractors and the government, and whether to institute a threshold amount (i.e., to exclude contracts under a certain dollar amount).

The notice received [14 comments](#), but the councils have not yet released their analysis of the comments.

Pros and Cons of Posting Contracts Online

One of the most significant potential advantages of posting contracts online is the increase in comprehensiveness and accountability. Currently, the government discloses some information about federal contracts at the bidding stage through summary data on [USAspending.gov](#) and through responses to Freedom of Information Act (FOIA) requests. Although some agencies and contractors claim these processes provide adequate transparency, the reality is that these systems are not linked and fail to provide comprehensive information about federal procurement.

For instance, [USAspending.gov](#) only offers coded summaries – often with [significant data quality problems](#) – such as the total contract amount, but lacking the contract details. Such details may be available through FOIA requests for contracts; however, only such contracts as are requested are even considered for disclosure, rather than comprehensive disclosure of all contracts government-wide. Moreover, even when requested contracts are disclosed, only the requester receives them, not the general public, and often with significant sections redacted.

A comprehensive public posting of contracts could address many of these deficiencies. In fact, some agencies have started voluntarily posting certain contracts online, including the Department of the Treasury [posting](#) many contracts related to the Troubled Asset Relief Program (TARP). However, this practice is still small-scale. Many public access and

procurement reform advocates would like to see this type of posting made mandatory government-wide.

Another major potential advantage of online disclosure is improved ease of use. Rather than requiring citizens to search for the complete details of a contract through separate systems, contract details could instead be provided on USAspending.gov, linked to the summary data already present on that site. Navigating a website is a much easier task for most Americans than pursuing a lengthy and bureaucratic FOIA request.

Studies indicate that the current disclosure process performs poorly on timeliness. [FFATA](#) requires that spending be reported on USAspending.gov within 30 days of its obligation, yet a [recent report](#) found the average delay government-wide to be 55 days, nearly double the limit. Meanwhile, while the backlog of FOIA requests [decreased nearly 40 percent in FY 2009](#), [almost 80,000 requests were still pending at the end of that fiscal year](#).

Another factor that could vary widely depending on specifics is the cost. Several contractor and agency representatives expressed concern in their comments about the workload and resource requirements of online disclosure, including training and oversight. But a well designed system could manage these costs.

Perhaps the greatest variance in cost could depend on the method chosen for processing protected information in contracts. Currently, the process for disclosing contracts under FOIA or voluntary proactive disclosure involves the agency reviewing the issued contract for any protected information to be redacted, as well as contacting the contractor to afford the contractor an opportunity to object to the disclosure of particular information. This time-consuming process would be inappropriate to apply to the routine disclosure of hundreds of thousands of contracts issued each year. A variety of changes have been proposed to better manage this process, including:

- Notifying prospective offerors that successful offers will be made public
- Instructing contractors to provide a version of the offer with protected information redacted, to serve as the basis for the version to be posted online
- Instructing contractors to include all protected information in an appendix, to be excluded from the version posted online
- Designating particular data fields as containing protected information, to be automatically excluded from the version posted online
- Requiring contractors to submit justifications for their proposed redactions simultaneous with the proposed redactions, limiting the need for agencies to contact contractors for clarification during processing

Several contractors and their representatives, such as the [Coalition for Government Procurement](#), raised the specter of protected information being accidentally disclosed through the online posting of a contract containing it. This possibility also can be reduced through proper procedures. Some comments, such as those from the [Associated General Contractors of America](#), went so far as to suggest that government employees could be held personally liable for

revealing trade secrets contained in contracts posted online. However, such liability should not apply to accidental disclosure in the good-faith execution of governmental duties.

Another interesting aspect of posting contracts online would be its effect on competition. Several comments postulated a decrease in competition for government contracts as potential offerors fear exposure of their confidential business information. For instance, the Department of Health and Human Services (HHS) in its [comments](#) asserted, "The posting of contracts will discourage potential offerors from submitting proposals." Likewise, industry group TechAmerica [stated](#) (pp. 32-35) that contract disclosure would produce a "reduction in competition for government requirements, particularly for small businesses." Others said, however, that increased access to market information could lower barriers to entry and thus support a flourish of competition. As the Project on Government Oversight (POGO) stated in its [comments](#), "When contract information is publicly accessible, genuine competition will increase."

Perhaps the most shocking claim came in the HHS comments, which seemed to suggest that increased transparency is undesirable because it could enhance public support for accountability and broader participation:

The real burden and cost to the Government will come following the posting by virtue of a significant surge in public inquiries and how that will detract from the Contracting Officer's primary responsibility to award and manage contracts.

History of Online Posting Idea

Lawmakers and organizations have previously proposed posting contracts online. A requirement to do just that was included in the [Strengthening Transparency and Accountability in Federal Spending Act of 2008](#), introduced by then-Sen. Barack Obama (D-IL) and Sens. Tom Coburn (R-OK), John McCain (R-AZ), and Tom Carper (D-DE). The bill was a follow-up to FFATA. The bill would have [required](#) that the government provide copies of the request for proposal, announcement of award, actual contract, and scope of work documents, linked to the spending information on [USAspending.gov](#). The bill did not pass in the 110th Congress.

A similar requirement nearly became law under the [American Recovery and Reinvestment Act of 2009](#), (the Recovery Act). As OMB Watch [noted at the time](#), the provision passed in the House but was not included in the Senate bill and was eventually dropped in conference.

Next Steps

The councils' analysis of the comments should be forthcoming, which may address the questions that have been raised about the proposed rulemaking. Additionally, the councils may hold a public hearing on the topic.

Food Safety Bill Pushed after Salmonella Outbreak

A salmonella outbreak that has sickened more than 1,500 people and led to the recall of 550 million eggs highlights the need for Congress to pass legislation that would empower the Food and Drug Administration (FDA) to better protect the food supply, advocates say.

Leading food safety advocacy groups in Washington are calling on the Senate to take up the FDA Food Safety Modernization Act ([S. 510](#)) as soon as possible, citing the need for a preventative approach to food safety in the wake of the massive salmonella outbreak and egg recall. The Senate returned to Washington Sept. 13 after its five-week summer recess.

The Center for Science in the Public Interest, Consumer Federation of America, and U.S. Public Interest Research Group (U.S. PIRG) published a [study](#) Sept. 8 finding that 85 food recalls have sickened at least 1,850 people since July 30, 2009, the day the House passed [H.R. 2749](#), its version of food safety reform legislation. The vast majority of the illnesses have been linked to the salmonella outbreak. Eight other recalls have been linked to between one and 272 illnesses each, according to the study. The remaining recalls have not been linked to any illnesses.

The groups say that the continued occurrence of foodborne illness outbreaks proves the need for a food safety reform bill that would give FDA more regulatory tools to prevent future outbreaks. "We need this food safety reform legislation so that the FDA can focus on preventing contamination in the first place—before the food ends up in Americans' cupboards and refrigerators," [said](#) Elizabeth Hitchcock of U.S. PIRG in a release from the Center for Science in the Public Interest.

The study looked only at FDA-regulated products. FDA regulates 80 percent of the food Americans eat, including produce, nuts, spices, cheese, and fish. The U.S. Department of Agriculture (USDA) regulates meat and poultry products. The two agencies share responsibility for egg safety.

Both the House and Senate food safety bills aim to prevent food contamination by requiring facilities to maintain food safety plans, with an emphasis on prevention, and enabling FDA to inspect food facilities more frequently. In the event of contamination or suspected contamination, both bills would give FDA the power to order mandatory recalls, an authority the agency does not currently possess. Both bills would also require the FDA to improve the traceability of foods to help investigators link contaminated food to processors, farms, and other facilities.

A July 2009 regulation meant to prevent salmonella contamination in eggs did not take effect until July 2010, after the eggs subject to the current recall had been laid. FDA has [acknowledged](#) that the rule, proposed in 2004 but delayed for years by the George W. Bush administration, could have helped the agency prevent the outbreak and the subsequent recall.

As the groups point out, food safety regulation, like many other forms of federal regulation, is too often reactive and does not adequately focus on preventing problems or mitigating risk. A

reactive philosophy makes the public too susceptible to tragedies like the salmonella outbreak, the BP oil spill disaster, the Upper Big Branch mine explosion that killed 29 in April, and other regulatory failures.

A common thread among those tragedies has been the inability of regulators to police firms with well-known health and safety problems, such as BP and Massey Energy, the owner of the Upper Big Branch mine. A *Washington Post* [investigation](#) uncovered a comparably negligent record at DeCoster Farms, the owner of Wright County Egg in Iowa, which is responsible for the majority of the eggs in the recall. DeCoster has been cited for occupational safety, fair labor, and environmental violations by both federal and state regulators.

Another food safety problem is industry influence that permeates the food safety regulatory system, according to a [new report](#). The Union of Concerned Scientists surveyed more than 1,700 scientists at the FDA and USDA. According to UCS, 38 percent of respondents said that "public health has been harmed by agency practices that defer to business interests," and 25 percent said they had experienced an incident in which corporate influence weakened a consumer protection.

UCS is also calling for passage of food safety reform in the Senate. The survey shows that federal food safety scientists overwhelmingly support some of the bill's provisions. Seventy-three percent of respondents said they support an electronic trace back system, and 75 percent said they support increased inspections.

Critics also say that better coordination is needed among food safety officials. Two former Wright County Egg employees [told the Associated Press](#) that they reported unsanitary conditions, including mishandled manure and dead chickens, to USDA inspectors but were ignored. It does not appear as though the complaints made their way to FDA.

In the past, food safety experts have called on the government to fold the responsibilities of the USDA, and other agencies operating on the periphery of food safety, into the FDA, or a new agency entirely, creating a master food safety regulator. Neither the House nor the Senate bill would make such a change.

According to the UCS survey, many federal scientists would support consolidating the agencies' responsibilities. Forty-one percent of survey respondents said consolidation would improve food safety, while 25 percent said it would worsen food safety. "Fifteen percent predicted no significant change in food safety from such a reform and 18 percent said they didn't know," according to UCS.

S. 510 is one of several pressing matters on the Senate's agenda, but Senate leaders have yet to indicate a timeline for the bill. If the Senate passes the bill before adjourning ahead of November's midterm elections, it would have to be reconciled with the House version, and each chamber would have to schedule another vote before the president could sign it. The House may adjourn for midterm elections as early as Oct. 1. Lawmakers could also work on the bill in the

lame-duck period following the elections.

Reports Start Flowing on BP's Gulf Oil Disaster

New reports on BP's April 20 *Deepwater Horizon* oil spill disaster detail problems with oil drilling operations and regulation, including environmental reviews, agency approvals, and industry oversight.

On Aug. 16, the White House Council on Environmental Quality (CEQ) released [a report](#) on the former Minerals Management Service's (MMS) National Environmental Policy Act (NEPA) policies and practices related to outer continental shelf oil and gas production. The CEQ review and report were prompted by the April 20 BP *Deepwater Horizon* oil rig explosion and subsequent underwater oil and gas spill.

MMS, renamed and restructured as the Bureau of Ocean Energy and Management, Regulation and Enforcement (BOEMRE), had procedures that allowed policymakers to incorporate broad environmental reviews into subsequent, narrower reviews. The result was that the agency did not evaluate the environmental impacts of specific projects like BP's drilling project.

The report detailed MMS's process and makes recommendations for reform. The NEPA process requires agencies to produce detailed environmental impact statements for broad programmatic planning and then use "tiering" to incorporate information from the general impact statements to progressively narrower projects, adding new information if necessary. The goal of tiering, according to [CEQ's regulations](#), is "to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." The process MMS used to approve the *Deepwater Horizon* exploration plan and the various permits to drill the well used this tiering process to address environmental impacts of outer continental shelf activities. According to the report:

This process was not transparent, however, and has led to confusion and concern about whether environmental impacts were sufficiently evaluated and disclosed. It is essential to ensure that information from one level of review is effectively carried forward to—and reflected in—subsequent reviews, that the agencies independently tests assumptions, and that there is appropriate evaluation of site-specific environmental impacts.

As a result, MMS issued categorical exclusions – environmental waivers – for plans and permits that allowed MMS to ignore the environmental impacts of BP's oil drilling project.

The CEQ report made several recommendations to the agency dealing with the use of tiering, ensuring greater transparency and accountability, revising the agency's categorical exclusions, and reconsidering its NEPA policies and practices in light of the BP oil spill disaster. The report stated that the agency will be using these recommendations as "guideposts" as the agency continues its reforms.

Also on Aug. 16, the Department of Interior and BOEMRE [announced](#) that BOEMRE "will restrict its use of categorical exclusions for offshore oil and gas development to activities involving limited environmental risk." The announcement did not identify specific limited-risk activities but noted that shallow water permits could be issued. The announcement also said that Interior will conduct a new environmental analysis for the Gulf of Mexico. BOEMRE will publish details about the agency's supplemental environmental impact statement in the *Federal Register* "in the coming days," according to the announcement.

On Sept. 9, BP released the results of an internal investigation it conducted on the *Deepwater Horizon* disaster. [The report](#) is mostly an evaluation of the technical and engineering problems that occurred around the date of the April explosion.

The report identified eight key findings that allow BP to spread the blame for the incident to many companies and attribute the disaster to multiple causes. For example, the report stated that the investigators "did not identify any single action or inaction that caused this accident" but that it was a combination of failures that escalated. "Multiple companies, work teams and circumstances were involved over time," the report concluded.

However, a one-page disclaimer undermined the report by minimizing the reader's ability to draw firm conclusions from the information in the report. For example, the report noted that additional information may have led others to different conclusions, that the information gathered was not evaluated according to legal standards of evidence, and that the investigating team did not attempt to establish the credibility of the evidence when it was "contradictory, unclear or uncorroborated."

The disclaimer may be an important component of BP's legal strategy. There are many other investigations of the disaster ongoing, including those of the U.S. Justice Department and the U.S. Coast Guard, and BP faces potentially significant liability for the explosion, spill, and cleanup. On Sept. 9, a [New York Times article](#) on the BP report called it "part mea culpa, part public relations exercise, but mostly a preview of BP's legal argument as it prepares to defend itself against possible criminal or civil charges, federal penalties and hundreds of pending lawsuits." The report's technical analysis laying out multiple engineering and design failures appears designed to spread the blame for the disaster to multiple parties involved in the project.

Also on Sept. 9, Interior [announced](#) the release of a report to Interior Secretary Ken Salazar on the agency's oversight and regulation of offshore energy production programs. The [report](#) was undertaken by a team of senior Interior officials, the Safety Oversight Board, including the acting inspector general of the department. The report recommended "a framework for improvement that would create more accountability, efficiency, and effectiveness in a bureau with significant responsibilities." The major themes in the report are the need to create a culture of safety and for more personnel who are well-trained and capable of meeting the challenges presented by the increased complexity of deepwater drilling.

The announcement also stated that BOEMRE Director Michael R. Bromwich issued an [implementation plan](#) based on the 59 recommendations in the report. The plan addressed

interagency cooperation, resources, ethics reforms, permitting procedures and training, inspections, enforcement, environmental management, and post-accident investigations.

In conjunction with the release of these reports, Salazar asked for an additional \$100 million for the agency to hire hundreds of additional inspectors, according to a Sept. 8 [Washington Post article](#). BOEMRE has about 60 inspectors for the more than 3,500 oil rigs in the Gulf of Mexico, according to the *Post*.

The need for additional inspectors is made clear in the Safety Oversight Board's report. It quoted a 2007 management consulting report given to MMS that, despite a 200 percent increase in leasing and a 185 percent increase in oil production, staffing at MMS had decreased by 36 percent since 1983. As a result of these and other inspection-related issues, the Board's report recommended that BOEMRE "undertake a comprehensive workforce and workload analysis of the inspection program."

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Biennial Budgeting on the Horizon?

If the Senate confirms [Jack Lew](#), President Obama's nominee to lead the Office of Management and Budget (OMB), Lew is likely to revisit the idea of biennial budgeting. The allure of biennial budgeting at the federal level is that it theoretically frees up more time for both Congress and federal agencies to work on issues outside of the budget. But would a move to biennial budgeting actually change the budget process for the better?

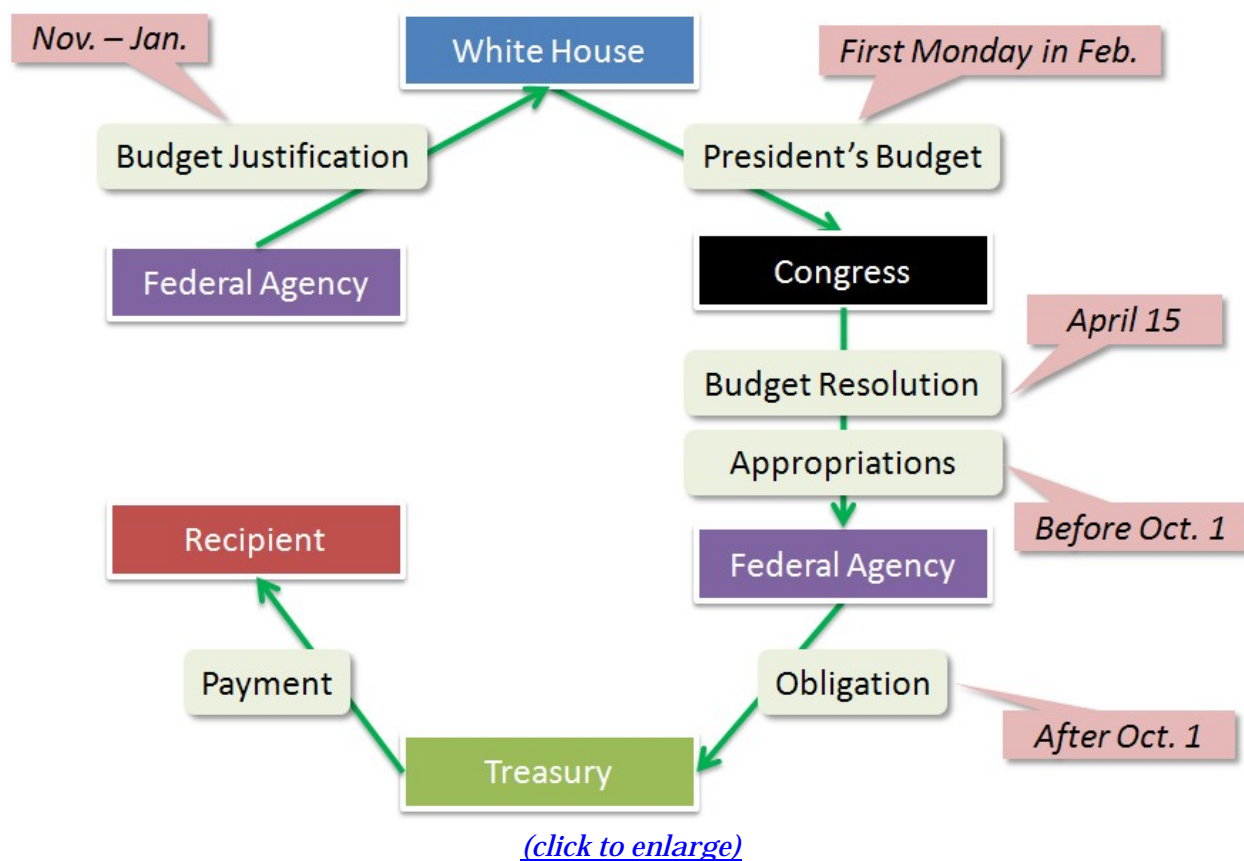
Under the current budget cycle, federal agencies start creating budgets two years before they're enacted. The Fiscal Year 2011 budget was formulated by agencies starting in mid-2009 and presented by the president in early 2010. If the system was working properly, Congress would approve all agency budgets by Oct. 1, the beginning of the new fiscal year.

At any given time, Congress and the executive branch are wrestling with three budget cycles: oversight of the current fiscal year, including consideration of supplemental appropriations and rescissions; preparing for the upcoming fiscal year, which starts Oct. 1 of the current year; and planning for the following fiscal year, which starts Oct. 1 of the next year.

In the recent past, Congress has been unable to complete its budget-making responsibilities, mostly by being late on enacting its appropriations bills. In 2010, however, Congress did not even pass a budget resolution. Many have commented that the complexities of the budget process, combined with congressional partisanship, have caused the annual budgeting process to break down.

Under a biennial budgeting regime, instead of completing the entire budget process every year, Congress would only work on spending bills every two years. In the off year, Congress could focus on the oversight of programs and address tweaks to the spending process through supplemental appropriations or rescissions. By not worrying about yearly budgets, Congress could spend more time improving how the federal government works.

The Budget Lifecycle



Historically, biennial budgeting was the norm in the states. [According to the National Conference of State Legislatures](#), 44 states employed biennial budgeting in 1940, but only 20 will by the end of 2010. One of the reasons states are moving away from biennial budgets is the difficulty of forecasting revenues as far in advance as biennial budgeting requires. Another is that in the 1940s, many state legislatures were part-time; some only had long sessions every two

years. With the growth in power of state legislatures also came increased interest in controlling budgets.

Despite the trend away from biennial budgeting at the state level, there is increased interest at the federal level. While biennial budgeting has frequently received presidential support – Presidents Reagan, both Bushes, and Clinton all endorsed biennial budgeting – it has never been implemented at the federal level. Given that Lew oversaw the Clinton budgets that included recommendations to move to biennial budgeting, it was [not surprising to hear](#) Lew recommend it again at his recent Senate confirmation hearing. Sen. Kent Conrad (D-ND), the chair of the Budget Committee, echoed Lew in supporting biennial budgeting. In the past, key Republicans have also voiced support for the practice.

With Republicans expected to make gains in Congress in the November election, biennial budgeting is likely to pick up steam in 2011.

However, it isn't certain that the federal government would see any benefit from a biennial budget cycle. In a two-year budget cycle, federal agencies could use every second year to focus on implementing their programs, instead of working on the next year's budget. Agencies might also benefit from the added stability of biennial budgets, as program planners could set their sights on longer-term goals. But these advantages come at a cost. One of the hardest parts of preparing the federal budget is the technical aspect – preparing estimates of inflation, economic growth, revenue estimates, and more. Most elements of cost are based on assumptions. Out-year estimates have an increasing level of uncertainty associated with them, which are inherent in biennial budgeting. Many assumptions about difficult-to-control cost elements, such as payroll or travel costs, would have to be built into the estimates. The costs incurred are difficult to change, yet estimating the costs of a workforce almost three years ahead of time is not an easy task. The problem becomes even more pronounced when it comes to revenue estimates.

If Congress moved to a biennial budget system, it would need to rely on supplemental appropriations bills to make major corrections along the way. Overuse of the supplemental appropriations process would lead to a de facto annual appropriations bill, erasing any certainty agencies might gain from biennial budgets, while at the same time pushing more spending into extra-budgetary supplemental appropriations, undermining budget accountability.

The "budget certainty" argument also ignores the fact that the budget process already supports multi-year appropriations. Congress can, and routinely does, appropriate funding for a program over the course of several years, say for a new fighter plane that would require many years of sustained funding. Indeed, [according to the Government Accountability Office \(GAO\)](#), in 2000, about two-thirds of annual appropriations accounts had multi-year funding. Thus, agencies already receive the benefits of biennial appropriations but with the added ability to change funding levels if circumstances require it.

Moving to a biennial budget could exacerbate, not reduce, the greatest problem currently facing the budget process: gridlock. Congress has not passed its annual budget resolution, nor has it passed a single appropriations bill, despite the fact that the current fiscal year ends on Sept. 30.

Between now and then, Congress [must pass a continuing resolution](#) to fund government or face a crippling government shutdown. This current crisis has come about not because Congress is spending too much time on the budget process or does not have enough time; the problem is that the different factions of the Democratic Party cannot agree on spending levels, and they worry about Republicans tying them in knots politically.

As a result, the normal budget process is now far, far behind schedule and will most likely require multiple continuing resolutions before Congress passes one giant omnibus appropriations bill sometime after the election. Under biennial appropriations, the current political environment might mean Congress could chew through that second legislative year with more budget debates, since there isn't another budget cycle they're bumping up against. With today's political gridlock, biennial budgeting could lead to seemingly unending budget battles and two years worth of agency budgets held in limbo.

While biennial budgeting may bring some positive attributes to a budget process in need of reform, it is not a panacea or a full solution to the problems Congress currently faces. As budget expert Stan Collender asserts in a [commentary](#) in *Roll Call*, "The only thing biennial budgeting would absolutely cut is the number of politically difficult votes that Members of Congress have to take on the deficit."

Congressional Oversight Panel Examines TARP Contracting

On Sept. 22, the Congressional Oversight Panel (COP), the body tasked by Congress to oversee implementation of the Troubled Asset Relief Program (TARP), [examined](#) the Department of the Treasury's use of private contractors under the program. Witnesses from government, the private sector, and the nonprofit world critiqued Treasury's use of financial services contractors and highlighted lessons about improved competition and openness that the government should take from the soon-to-be-ended program.

Shortly after passage of the Emergency Economic Stabilization Act of 2008 (EESA), which created TARP, Treasury began turning to private entities, including investment management firms, law firms, accounting firms, and consulting firms, to assist with implementation of the \$700 billion bank bailout. As of the end of August, Treasury had entered into 108 transactions to procure nearly [\\$450 million worth of services](#).

Under TARP, Treasury entered into two forms of agreements, one with contractors and one with financial agents. Treasury utilizes contractors for basic services like document management, legal support, and information technology, while financial agents act for and on behalf of the government and may hold and manage money. While financial agents have a fiduciary obligation to the government, as deputy chair of the panel Damon Silvers [pointed out](#), they "do not take an oath of office ... stand for election ... nor are they subject to civil service rules." Rather, "Their goal is to turn a profit – not to advance the public good."

Under EESA, Congress granted Treasury emergency contracting authority, which allowed the agency to bypass normal contracting rules under the Federal Acquisition Regulation (FAR), including those concerning competition and conflict of interest. Despite Treasury's steps to mitigate these issues – including issuing separate [guidance](#) on increasing competition in TARP contracts and conflict of interest regulations – questions remain.

Despite contractors and financial agents instituting required conflict of interest controls, including internal information firewalls, non-disclosure agreements, and restrictions on gifts and entertainment from outside groups, good government organizations worry that the rules rely too heavily on self reporting. Codes of conduct, incident reporting, and quarterly certifications on ethical issues such as conflicts of interest will likely not capture those employees or organizations that seek to skirt the rules.

According to Scott Amey, general counsel for the Project on Government Oversight (POGO), TARP's conflict of interest rule, instituted in January 2009, is in dire need of additional reforms. POGO and others have [criticized](#) the rule "for being cumbersome, ambiguous, inconsistent with the FAR, and requiring clarification." Clarification and improvements would end the "overreliance on retained entities to report organizational and personal conflicts" and "require constant agency monitoring and review."

Amey also pointed out the deficiency of Treasury's general contracting practices and the lessons the government should learn from it. In procuring nearly \$4.8 billion in goods and services in Fiscal Year 2009, Treasury opened only 22 percent of those funds to full and open competition. All forms of restricted competition, including competitions within a selected pool of contractors and offers on which the government only received a single bid, account for only roughly 60 percent of Treasury's contract dollars. This means, as Amey aptly points out, that competition for a contract, even in a limited form, is really the exception to the rule at Treasury.

Amey and other witnesses, however, were impressed with the trend within Treasury to convert risky, potentially more costly contract types into more accountable contracts. Indeed, even though the agency entered into a number of time and materials contracts, Amey recognized that Treasury "has made progress in converting them to fixed price contracts when requirements were established and fixed prices could be determined."

Because many of the contracts the government entered into under TARP already exist, there is little the government can do fix these current problems. As Professor Steven Schooner, a George Washington University Law School professor, [stated](#):

Ultimately, Treasury – with its eyes open, and for good reason – entered into a large number of risky transactions, under severe time pressure. At this point, the moment had passed for the government to best employ the lion's share of the best practices to minimize and avoid risk. Many of those transactions will turn out fine. Some will not.

This is to say that the government should take the lessons from TARP contracting and apply them in the future should a similar crisis arise.

Look for the [Congressional Oversight Panel](#) to release a report soon on the Treasury Department's use of private contractors and financial agents in TARP programs utilizing the testimony from this recent hearing.

At UN, Obama Calls for Global Transparency but Offers Few Details

On Sept. 23, President Barack Obama addressed the United Nations (UN), calling on countries to strengthen government openness. He emphasized the importance of transparency in fighting corruption and increasing civic engagement. At a world summit the day before, Obama trumpeted his administration's new global development policy, which pledges more transparency related to U.S. aid activities. However, the administration refused to release the text of the policy, and details remain sparse.

In his speech to the UN General Assembly, Obama [praised](#) the benefits of transparency. He noted that the foundation of liberty and human progress “lies in open economies, open societies, and open governments.” He went on to say that “America is working to shape a world that fosters this openness,” and added, “The common thread of progress is the principle that government is accountable to its citizens.”

Obama argued that one key element in creating accountability is “to make government more open and accountable.” He challenged the United Nations members to return in 2011 with “specific commitments to promote transparency; to fight corruption; to energize civic engagement; to leverage new technologies so that we strengthen the foundations of freedom in our own countries, while living up to the ideals that can light the world.”

Echoing the speech, the White House released a [fact sheet](#) on recent developments in transparency in the U.S. and abroad, which reiterated Obama's call for countries to return to the UN in 2011 with specific transparency commitments.

The day before the UN speech, Obama addressed a world summit to review progress toward the Millennium Development Goals (MDGs). Adopted by UN members in 2000, the MDGs set global development targets for the year 2015 on topics such as poverty, health, and environmental sustainability.

In his [remarks](#), the president made clear that transparency would be a prominent element of U.S. development policy, saying the U.S. would focus its development efforts on countries with good governance and transparent institutions. The president also urged other donor countries to “commit to the same transparency that we expect from others.”

Before the summit, OMB Watch sent a [letter](#) to the president asking him to publicly address transparency at the summit. The letter also detailed several needed reforms to improve U.S. aid transparency.

New Global Development Policy

The White House also used the summit as an opportunity to announce its new Presidential Policy Directive on Global Development. A [fact sheet](#) on the policy outlined the three areas of focus for development. First, the administration will seek to maximize the return on development investments by focusing on projects with the most sustainable outcomes. Second, the government will pursue a new model of engagement that will enable the U.S. to be a better partner in development projects. Third, development will be elevated within the government to the equal of diplomacy and defense. The fact sheet stated that the U.S. would expect transparency from recipients of U.S. aid and pledged "greater transparency" for U.S. aid activities.

In separate fact sheets, the [Millennium Challenge Corporation](#) emphasized transparency in its activities and the [Treasury Department](#) emphasized transparency in multilateral development banks to which the U.S. contributes, while the [Global Climate Change Initiative](#) mentions improving transparency in recipient countries.

The White House heralded the Presidential Policy Directive on Global Development as the first such policy by a U.S. administration but [refused to release](#) the text of the actual policy directive. Apparently, the policy is a classified document of the National Security Council. The fact sheet does repeatedly discuss the importance of development within the national security strategy.

The classification process requires documents to meet strict standards of including information that would be damaging to national security if released before the record can be classified. The administration has not articulated publicly how its development policy meets these requirements. (At the end of the Bush administration, a Senate hearing examined the [problems of secret policies](#).)

Gregory Adams of development charity Oxfam America criticized the decision, noting, "The Administration should make sure that enough [information] gets out to not only provide the American people with a clear rationale for the new approach, but also make sure that our partners around the world understand how we plan to change the way we work with them."

Results of the MDGs Summit

The summit's [outcome document](#) noted the benefits of transparency and accountability in both donor and developing countries, as well as in UN agencies, to achieving the MDGs. The document emphasized that providing more data on aid spending and its results can mobilize greater support for donors to fulfill their commitments. The document also emphasized the role of transparency in ensuring that aid spending reaches its intended beneficiaries:

To build on progress achieved in ensuring that [development aid] is used effectively, we stress the importance of democratic governance, improved transparency and accountability, and managing for results.

However, the document was criticized by the international human rights group Article 19, which called the transparency language "[strong on rhetoric but weak on commitment](#)" and said the transparency elements were "only minimal pledges."

Concerns over Industry Influence Mount in Cell Phone Right-to-Know Fight

In an effort to ensure mobile phone buyers can make informed choices, the city of San Francisco recently passed an [ordinance](#) requiring retailers to label cell phones with the amount of radiation the devices emit. In retaliation, a wireless industry trade group [announced](#) it will no longer hold its trade shows in San Francisco and [filed a lawsuit](#) to block enforcement of the ordinance. The fight has caused right-to-know advocates to raise concerns over the extent of the wireless industry's influence over regulators.

The San Francisco Board of Supervisors, citing "the potential harm of long-term exposure to radiation emitted from cell phones," voted 10-1 in favor of the "Cell Phone Right-to-Know Ordinance," which requires cell phone retailers to display the radiation levels for each phone model. Cell phone radiation is measured using a specific absorption rate (SAR), calculated by the amount of the phone's radiation energy (in watts, W) absorbed per kilogram of body tissue (W/kg). SAR levels for cell phones are already publicly available through the [Federal Communications Commission's](#) (FCC) website. The FCC sets acceptable radiation standards for cell phones.

Members of the public may search for the SAR of a particular cell phone model on the FCC's [site](#). However, the site's searchability has been criticized, as searching is too difficult and time-consuming. The website requires users to enter the product's FCC ID number, usually found inside a phone beneath the battery.

Despite providing cell phone SAR values to the public, the FCC recently deleted information on how consumers can protect themselves from exposure to radiation from cell phones. The commission's website currently [states](#):

Some measures to reduce your RF [radiofrequency energy] exposure include:

- Use a speakerphone, earpiece or headset to reduce proximity to the head (and thus exposure). While wired earpieces may conduct some energy to the head and wireless earpieces also emit a small amount of RF energy, both wired and wireless earpieces remove the greatest source of RF energy (the cell phone) from proximity to the head and thus can greatly reduce total exposure to the head.

- Increase the distance between wireless devices and your body.
- Consider texting rather than talking - but don't text while you are driving.

However, as recently as Sept. 17, [the FCC website](#) had included the following text as an additional precaution, information that has since been deleted:

Buy a wireless device with lower SAR. The FCC does not require manufacturers to disclose the RF exposure from their devices. Many manufacturers, however, voluntarily provide SAR values. You can find links to manufacturer Web sites providing these SAR values on the FCC's Web site at www.fcc.gov/cgb/sar.

Advocates of the San Francisco right-to-know ordinance suspect industry influence may have pressured the FCC into removing information from its website.

The Environmental Working Group (EWG), a nonprofit public interest group, recently submitted a [FOIA request](#) to the FCC requesting all agency communications with the [Cellular Telecommunications Industry Association](#) (CTIA), the wireless industry's trade association, regarding the San Francisco ordinance. EWG is seeking disclosure of calendars, meeting documents, and e-mails between CTIA and the FCC. The consumer watchdog group is [concerned](#) that "CTIA wants the FCC to intervene in its lawsuit with San Francisco. And, in fact, the FCC has a history of siding with industry in legal disputes concerning cell phones."

CTIA is headed by [Steve Largent](#), a former Republican congressman from Oklahoma who served on the telecommunications subcommittee of the House Energy and Commerce Committee.

[According to CTIA](#), "The ordinance misleads consumers by creating the false impression that the FCC's standards are insufficient and that some phones are 'safer' than others based on their radiofrequency (RF) emissions." The industry group criticizes the city of San Francisco for requiring disclosure of information that will confuse consumers and condemns the ordinance for intruding on FCC's "exclusive and comprehensive regulation of the safety of wireless handsets." The ordinance is also unconstitutional, violating the Supremacy Clause in Article VI of the U.S. Constitution, according to CTIA.

A spokesman for San Francisco mayor Gavin Newsom, a supporter of the ordinance, countered industry complaints, [stating](#), "This is a modest and commonsense measure to provide greater transparency and information to consumers." The ordinance does not make any judgment on the relative safety of various SAR ratings or phones, and only requires retailers to post information that is already available publicly – although not easily – through the FCC.

There currently is no conclusive evidence showing that mobile phones are dangerous. However, a number of scientific studies have identified links between cell phone use and human health problems.

In September 2009, EWG released a [report](#) reviewing the scientific literature regarding cell phone radiation and human health effects. The report raised concerns about the safety of cell

phone use over many years. EWG observes that a Food and Drug Administration (FDA) assertion on the safety of cell phone use failed to consider the long-term impact of the devices. (FDA has authority to take regulatory action if cell phones are shown to emit RF levels hazardous to the user.) The report goes on to identify studies linking cell phone radiation to increased risk for brain cancer, salivary gland tumors, behavioral problems, and migraines and vertigo. The report also cites a 2008 National Research Council [study](#) that raised concerns about the impact on children's health of cell phone radiation. Children are more susceptible to the effects of radiation than adults.

Despite the health concerns identified by EWG's analysis of scientific studies, the federal government continues to defend the existing [SAR standard](#), 1.6 watts per kilogram, as safe. [According to the FDA](#), "The weight of scientific evidence has not linked cell phones with any health problems." The FCC [maintains](#) that "currently no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses."

The mayor and Board of Supervisors of San Francisco recognize that product labels are one of the most effective ways to provide crucial information to the public. The city has taken publicly available information that had been difficult to access and is making the data more easily available. It is in the best interest of the public to have relevant data easily accessible so consumers may make their own decisions, especially considering the incomplete and sometimes contradictory scientific data on the safety of long-term cell phone use.

EWG also maintains a [searchable database](#) listing SAR levels for cell phones, including smart phones, available on its website. The database allows users to compare the radiation levels of different models and includes lists of "best" and "worst" phones ranked by radiation levels.

OSHA's Whistleblower Protection Problems Continue, GAO Says

In a new report, the Government Accountability Office (GAO) has again strongly criticized the Occupational Safety and Health Administration (OSHA) for a range of problems and inconsistencies in the agency's handling of whistleblower protections.

The participation of workers is an important accountability and effectiveness mechanism needed to keep workplaces safe and legal. OSHA is responsible for protecting the substantive and procedural rights of employees who disclose prohibited or illegal practices and then experience retaliation for blowing the whistle on these practices. OSHA administers the whistleblower protection provisions of 19 different federal statutes covering industries and subjects as diverse as transportation, consumer products, environmental quality, and finance.

In [a report](#) released Sept. 17, GAO criticized OSHA for several failures to adequately protect workers and to develop agency practices that can lead to better implementation of its responsibilities. The report was requested by Sens. Tom Harkin (D-IA) and Patty Murray (D-WA) and by Reps. George Miller (D-CA) and Lynn Woolsey (D-CA). They requested GAO to

follow up on its [January 2009 report](#) that was critical of OSHA's whistleblower program to see if there were improvements at the agency.

For more than 20 years, GAO has criticized OSHA management for its neglect of the whistleblower program. OSHA's internal procedures, lack of resources and training for investigators, and inconsistent outcomes across the agency's regional offices are persistent problems. The most recent report highlights these same issues.

Specifically, the report concludes that:

- A large portion of agency investigators has not completed the two mandatory training programs for investigators established in 2007 and 2008. The report notes that "just over 60 percent has taken or registered for the second mandatory course. Additional training on specific, complex statutes has not been developed because of resource constraints."
- OSHA still has not implemented earlier GAO recommendations to provide investigators with a standard set of equipment (such as portable printers) and resources (such as standard software).
- "OSHA lacks sufficient internal controls to ensure that the whistleblower program operates as intended due to several factors, including inconsistent program operations, inadequate tracking of program expenses, and insufficient performance monitoring."
- Regions vary in the way they screen whistleblower complaints and assign personnel and by the level of manager who makes decisions about cases. The national office does not have access to data and case files to adequately monitor the regional offices for compliance with agency procedures.

GAO points out that the problems at OSHA are exacerbated by the increased numbers of whistleblower complaint statutes recently passed while OSHA's program resources have remained relatively flat. For example, since 2000, six new statutes addressing such broad issues as financial accountability, pipeline safety, and consumer product safety, as well as the new health care bill, all create new enforcement responsibilities for OSHA. The number of investigators has remained in the range of 63-80 (the current high in 2010). OSHA received resources for 25 additional full-time investigators in Fiscal Year 2010, but GAO raises concerns about the distribution of those new investigators among regional offices and whether they will be used strictly for whistleblower activities.

Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, [released a statement](#) Sept. 16 addressing GAO's report, saying

With our available resources, OSHA is working hard to ensure that whistleblowers are protected from retaliation. We are in the process of a top-to-bottom review of OSHA's whistleblower protection program. This comprehensive review will cover policy, resources, equipment and work processes. The objective is to identify any weaknesses and inefficiencies in the program and improve the

way we conduct this very important activity. In addition, we have hired additional personnel in the past year in an effort to more efficiently process cases.

Michaels, who was only confirmed by the Senate on Dec. 3, 2009, noted that OSHA has set a goal that all investigators and their supervisors complete within 18 months the mandatory training programs as an example of actions the agency has begun.

The GAO report criticized the agency's responses to its recommendations, saying that the agency knows enough to begin implementing internal controls before a thorough review of weaknesses is completed.

[A press release](#) from the members who requested the GAO follow-up study noted that in congressional hearings on incidents like the Upper Big Branch mine explosion and the BP *Deepwater Horizon* oil spill disaster, Congress heard from many employees who feared being fired or who experienced some retaliation when disclosing significant workplace problems. Miller was quoted as saying, "As we have seen all too often, workers pay the tragic price when companies retaliate against workers who raise legitimate safety concerns. Strong and effective whistleblower protections are essential to ensuring a safe workplace since safety regulators can't be on every site."

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Modernization at IRS Could Help Reduce Tax Gap and Shrink Deficit

The estimated \$345 billion in revenue that goes uncollected every year is a tempting target for deficit crusaders. However, closing the so-called tax gap is not a cure-all, and attempting to address the problem could create other tax compliance issues. Despite such potential complications, a new [report](#) by the Government Accountability Office (GAO) has found that recent modernizations to the Internal Revenue Service's (IRS) computer systems show promise in helping to close the tax gap while avoiding some of the problems that may arise from aggressive tax collection.

Reducing the tax gap, which is the difference between what individuals and businesses owe the government and what they actually pay on a timely basis, is important to improving the integrity of the tax system, ensuring fairness, and fulfilling the funding demands of the government. The last [estimate](#) of the average gross tax gap was \$345 billion. IRS released the updated estimate in 2007, which was based on data compiled in 2001, the last time the agency tried to determine the amount of revenue the government loses each year through noncompliance with tax laws.

In a 2007 [paper](#) for the Tax Policy Center, Eric Toder noted that stepped-up IRS enforcement imposes not just increased costs on the IRS, but on filers as well:

Measures to improve compliance also impose compliance costs on taxpayers (in addition to the tax and penalties they must pay) in the form of additional time spent gathering records, meeting with and corresponding with IRS agents, and possibly seeking assistance from outside counsel or tax preparers...

But additional enforcement and reporting requirements also impose time and sometimes money burdens on compliant taxpayers who must undergo an audit, respond to IRS correspondence, or supply additional data with their tax returns and on third parties such as brokers or credit card companies who must prepare additional reports for the IRS and taxpayers.

According to the GAO report, improvements to IRS's business nonfiler program, which aids the agency in tracking down businesses that do not pay their taxes, could play a significant role in shrinking the tax gap. The system has the added benefit of not placing a higher compliance burden on businesses.

Most businesses within the United States, including corporations, partnerships, and any business that has employees, are required to register with IRS. Once a business registers, the agency uses the account to track whether the business has filed the necessary tax returns for any given year. If a business does not file a return by the due date, the agency considers the organization to be a potential nonfiler.

There are, of course, many legitimate reasons why a business might not file a tax return, including not owing any tax that year, or, if the business is a subsidiary, a parent company filing the return. Additionally, a business may have closed, merged with another business, no longer have employees, or restructured and registered a new account with IRS.

For more than two decades, government watchdogs, including GAO and the Treasury Department's inspector general for tax administration (TIGTA), have documented IRS's shortcomings at attempting to correctly identify and pursue businesses that illegitimately fail to file a tax return. GAO noted:

Each year IRS identifies a large number of potential business nonfiler cases, more than IRS has the capacity to work. Many cases go unresolved, and many that IRS does pursue are closed with a determination that the business does not owe IRS a return – a generally unproductive use of IRS's enforcement resources.

To address these issues, IRS instituted the Business Master File Case Creation Nonfiler Identification Process (BMF CCNIP) in 2009. The long-winded acronym is simply a program that uses third-party information and IRS account data "to select potential business nonfiler cases for pursuit based on the likelihood of securing returns and revenue." Despite lacking

formal data on its performance – because the program is so new – BMF CCNIP, according to IRS officials, is showing a positive impact on prioritizing nonfiling cases.

The success of BMF CCNIP is not only important to IRS's accurate identification and pursuit of business nonfilers, which reduces the tax gap through recovered revenue, but it is also important to IRS's efforts to better understand the tax gap. Unlike the tax gap estimate for individuals, there currently is no comprehensive tax gap estimate for business nonfiling. Accurate identification of more illegitimate nonfilings by business would provide IRS with at least a partial estimate of business nonfilers, thereby increasing the accuracy of the tax gap estimate.

It is important for IRS to accurately identify and pursue businesses that owe taxes to the government because each instance of nonpayment reduces the confidence of those individuals and businesses that actually pay their taxes on time and in full. Moreover, \$345 billion is more than a sliver of the \$1.3 trillion projected deficit, and while it will be impossible to close the tax gap completely, BMF CCNIP could significantly improve the fairness of tax administration without imposing new burdens on business, alleviate the burden that individuals have to shoulder because of noncompliance, and chip away at the federal budget deficit.

Commentary: The Case of the Misunderstood Bailout

Currently, it's hard to find a federal program more unpopular than the Troubled Asset Relief Program (TARP), the bank "bailout" passed in the waning days of the Bush administration. [Poll after poll](#) shows that the public does not support the bailout, and politicians, especially ones up for reelection, have picked up on this trend and frequently denounce the program. And yet, by many objective measures, the bailout could be considered a success: it helped avert financial calamity, it will cost a fraction of its original estimates, and TARP's bank provisions will likely end up earning a profit for the government. While TARP could have done better, the public perception that TARP failed is not consistent with most data.

The law creating TARP, the Emergency Economic Stabilization Act of 2008 (EESA), is an incredibly vague piece of legislation, mainly because Treasury officials, led by then-Secretary Hank Paulson, [were worried](#) that the nation's economy was collapsing. Lehman Brothers had already imploded, others seemed likely to follow, and AIG, an insurance group with myriad financial ties throughout the economy, was teetering. Congress needed to do something and do it immediately to stabilize the financial sector. Thus, TARP gives the Treasury remarkable leeway in how to use bailout money. This can be seen in the fact that TARP actually involved very little purchasing of "toxic assets," despite the moniker of the program created by EESA: "Troubled Asset Relief Program."

While some argue that the Federal Reserve's monetary efforts did more to prop up the economy in the long run, TARP unquestionably succeeded in the short run. No more large banks or investment houses collapsed, nor did AIG fail. Because of TARP, the nation did not descend into financial oblivion, saving the assets and retirement savings of millions of people.

At the same time, the bailout will not cost the widely publicized \$700 billion figure. TARP had essentially three kinds of programs. The first was the support for banks, the Capital Purchase Program (CPP), which is one of the more well known provisions. The federal government basically loaned banks money in exchange for various forms of collateral, enabling banks to stay afloat in a time when few were willing to lend. Since federal support was in the form of loans, which had to be paid back, CPP cannot be considered a "handout." And because banks had to pay interest on the loans, the support could even be profitable for the American people. [Thus far](#), 78 percent of bank recipients have paid back their TARP funds plus interest, which has provided the government with \$27 billion in profit on those loans.

However, the other two parts of TARP will likely end up costing the taxpayers money. The second part of the money was spent propping up AIG, the international insurance giant, while the third part was spent on several other programs, including support for American car manufacturers and home mortgages. Estimates for the cost of both parts are uncertain. The Treasury Department has recently [been hinting](#) that AIG may earn a profit for taxpayers, but that is far from clear. The home mortgage modification program, however, was never intended to recoup its investment and will end up costing almost \$50 billion, although it has only spent \$500 million so far. Depending on how the stock market fares in the coming months, the government's investment in automakers could end up costing somewhere less than \$20 billion.

All in all, it looks like TARP will have cost taxpayers some \$30 billion, far less than the \$700 billion figure frequently cited (the \$30 billion figure is a [government estimate](#); the independent Congressional Budget Office, on the other hand, estimates TARP will cost about [\\$66 billion](#)).

The United States has long had a strong anti-Wall Street populist streak, so it is unsurprising that the bailout is disliked. Indeed, animosity over TARP is so bad that sitting members of Congress have already lost their jobs over their votes for the bill. The most prominent example of this is [Sen. Robert Bennett \(R-UT\)](#), who resoundingly lost a primary battle for his seat in May. However successful TARP may have been at averting economic calamity, popular enmity toward the program is not without reason.

TARP was riddled with shortcomings. Reuters financial blogger Felix Salmon [wrote in a recent article](#) that not only did the Fed's monetary policy play a larger role in saving the nation's economy, TARP failed to improve small business lending or improve the nation's foreclosure crisis, despite the program's stated goal of removing "toxic assets."

Another vocal critic of TARP, Dean Baker, a director at the Center for Economic and Policy Research, has frequently noted that, through TARP, the government was providing Wall Street firms with [very low loan rates](#), losing a great deal of potential revenue while at the same time giving great benefits to the firms. [Many other critics](#) have decried TARP's implied moral hazard, in that bailing out failing banks only encourages them to continue risky behaviors in the future.

EPA Plans for Greater Openness in Coming Years

The U.S. Environmental Protection Agency (EPA) will incorporate greater transparency, accountability, and community engagement throughout its operations over the next five years, according to the agency's recently released [Fiscal Year \(FY\) 2011-2015 Strategic Plan](#). The new strategic plan is the agency's first developed under the Obama administration, which has made increasing government openness a high priority.

Throughout the 68-page strategic plan, the agency repeatedly comments on the need to work with a diverse stakeholder community and to provide information in a transparent and useful manner. The document establishes three "core values" upon which the rest of the plan is founded: science, transparency, and the rule of law.

In addition to setting transparency as one of its three core values, EPA's plan incorporates open government concepts throughout its cross-cutting fundamental strategies. These strategies address a number of concerns raised by environmental and open government advocates over how the agency conducts its operations.

EPA's plan identifies five strategic goals and five cross-cutting fundamental strategies that the agency expects "will be used routinely by the Agency's senior leadership as a management tool." The plan's five strategic goals are:

- Goal 1: Taking Action on Climate Change and Improving Air Quality
- Goal 2: Protecting America's Waters
- Goal 3: Cleaning Up Communities and Advancing Sustainable Development
- Goal 4: Ensuring the Safety of Chemicals and Preventing Pollution
- Goal 5: Enforcing Environmental Laws

EPA also establishes five "cross-cutting fundamental strategies" that it plans to adopt agency-wide. These strategies are:

- Expanding the Conversation on Environmentalism
- Working for Environmental Justice and Children's Health
- Advancing Science, Research, and Technological Innovation
- Strengthening State, Tribal, and International Partnerships
- Strengthening EPA's Workforce and Capabilities

While transparency is a recurring theme throughout much of the plan, access to and management of information were most prominent in two goals and one strategy. The strategy of "Advancing Science, Research and Technological Innovation" seems to respond to repeated complaints by public interest groups that science had taken a backseat to politics at EPA under the Bush administration. The "Expanding the Conversation on Environmentalism" strategy ties directly into the Obama administration's open government efforts to improve participation and collaboration at agencies. The "Ensuring the Safety of Chemicals and Preventing Pollution" goal builds on a long history of disclosure of chemical risks.

Science

A significant concern raised by environmental and open government groups has been the need for scientific and technical information to be presented to the public in ways that can be easily and readily understood. Among the new cross-cutting fundamental strategies, EPA calls for advancing science, research, and technological innovation. The agency states, "To maximize the impact and utility of our research, EPA will communicate the design, definition, conduct, transfer, and implementation of the work we do. We will translate our science so that it is accessible, understandable, relevant to, and used by stakeholders and the general public."

Many environmental advocates would agree with EPA's strategy to advance scientific and technical research. Environmental advocates have identified a [long list of data gaps](#) they believe must be filled in order to provide the strongest protections for the public. These research and data gaps include understanding the wide-ranging impacts of climate change, many of which climate experts claim we are already beginning to experience. According to the strategic plan, EPA will address this climate change research gap and incorporate its findings into its rulemakings and other decisions.

One of the agency's priority goals is implementation of the new [mandatory greenhouse gas \(GHG\) reporting rule](#). EPA promises that by June 15, 2011, all GHG emissions data will be available to the public. The agency is still developing a final rule on how it will evaluate company claims about confidential business information (CBI).

Additionally, advocates for stronger scientific integrity at EPA have long been [waiting for guidance](#) from the Obama administration on protecting agency research from political manipulation and distortion. Open government advocates also seek an agency [communications policy](#) that clearly sets forth procedures for public and media access to scientific and technical experts at the agency. The new strategic plan does not address either issue.

Transparency and Community Engagement

EPA's plan includes establishing a fundamental strategy for expanding the conversation on environmentalism, by which EPA intends to improve communication and collaboration with stakeholder groups, especially citizens in low-income, tribal, and minority communities. In a [message](#) accompanying the strategic plan, EPA Administrator Lisa Jackson stated that EPA "will take broad steps to expand the conversation on environmentalism to communities across America, building capacity, increasing transparency and listening to the public."

It is through this strategy that the agency's strategic plan seems to offer the most opportunity for progress on open government issues. To achieve greater community engagement, the agency plans to incorporate a list of transparency principles into its regular functions. To aid the efforts, EPA is asking all employees to "bring their creativity and talents to their everyday work to enhance outreach and transparency in all our programs."

EPA reiterated its plan to make environmental information accessible to diverse public stakeholders. EPA will work to ensure that "science is explained clearly and accessible to all communities, communicating and educating in plain language the complexities of environmental, health, policy, and regulatory issues." Moreover, the agency will seek to "educate and empower individuals, communities, and Agency partners in decision making through public access to environmental information and data."

Addressing another concern identified by environmental advocates, EPA's plan seeks to help citizens build the skills needed to engage policymakers by encouraging "citizens to understand the complexities and impacts of environmental issues and environmental stewardship, and provide avenues and tools that enhance their ability to participate in processes that could affect them."

EPA succinctly summed up the basic reforms sought by many open government advocates when it stated in its strategic plan that it intends to "ensure that the Agency's regulations, policies, budget, and decision-making processes are transparent and accessible through increased access to environmental data sources, community right-to-know tools, and direct stakeholder engagement."

Chemical Information

EPA has made ensuring the safety of chemicals one of its strategic goals. However, the agency [acknowledges](#) that the nation's primary chemicals statute, the [Toxic Substances Control Act](#) (TSCA) is flawed and in need of reform. EPA is seeking greater authority to collect data on the health and safety of chemicals. Under current law, the EPA's [authority to collect information](#) is so restricted that the agency has only been able to require testing on around 200 of the 84,000 chemicals on the TSCA Inventory. To date, only five existing chemicals have been regulated under TSCA's ban authority.

The EPA already has implemented several initiatives to increase transparency regarding information on the health risks of chemicals. EPA has [made changes](#) to the way it handles CBI claims from chemical manufacturers. EPA has repeatedly admitted that this privilege is overused and abused and denies the public important information on chemical risks. With the new policies, manufacturers will find it harder to conceal the health risks of certain products. The agency has even set a specific performance measurement for reducing the impact of CBI claims, seeking "to make all health and safety studies available to the public for chemicals in commerce, to the extent allowed by law" by 2015.

Rather than codify improved transparency as a separate goal or strategy, EPA has incorporated key aspects of open government throughout its strategic plan. By weaving transparency, participation, and collaboration into the fabric of the agency's guiding plan, EPA takes a major step toward creating a culture of openness. Of course, the true test will be in how successfully EPA's daily operations comport with this plan, and whether staff, from top to bottom, sincerely adopt these concepts. The plan gives open government advocates another tool to compel

meaningful changes from the agency and another opportunity to strengthen accountability.

No Taxation without Information

The idea of providing taxpayers with an itemized receipt for their income taxes was recently proposed by Third Way, a center-left think tank. The proposal, which is not entirely new, has attracted considerable commentary. However, there are significant challenges to creating a simple and engaging taxpayer receipt that would provide meaningful transparency for federal spending.

Third Way proposed the receipt idea in a recent [issue brief](#) as a tool to inform debate about the federal budget and deficit. To demonstrate taxpayers' ignorance about the federal budget, the paper notes a [survey](#) that shows that Americans overwhelmingly – and mistakenly – believed that the U.S. government spends more on foreign aid than on Social Security or Medicare. (In fact, Social Security accounts for [around 20 percent of all federal spending](#), while non-security international spending only makes up one percent.) That misperception persisted through three different surveys from 1997 to 2005.

To provide taxpayers with more information about what they're paying for, the brief proposes providing each taxpayer with an itemized receipt detailing, in dollar figures, their personal contribution to various budget items. The receipt would be delivered online for taxpayers who file electronically and mailed to everyone else. To calculate the individual's contribution to each item, the group proposes multiplying a program's share of the federal budget by the individual's tax payment. The receipt would thus list the individual's contribution toward "twenty to thirty budget items of interest," although how the items would be chosen is not specified in the brief.

Precedents for a Taxpayer Receipt

An early precedent for a taxpayer receipt was a website created by New York City's Independent Budget Office (IBO) in April 1997. The site allowed users to enter their tax totals and receive an itemized receipt for their contributions to federal, New York state, or New York City income taxes. The service for federal taxes was not limited to New York taxpayers. During its lifetime, the service received publicity from [The New York Times](#), [CNN](#), the [Federal Reserve Bank of New York](#), and the National League of Cities.

The IBO service [inspired](#) then-Rep. Charles Schumer (D-NY) to introduce the [Taxpayer Right-to-Know Act \(H.R. 2827\)](#) in November 1997, which subsequently received bipartisan support. The bill would have allowed taxpayers to request an itemized receipt when they filed their taxes and required the IRS to establish a website similar to IBO's service. The legislation failed to pass in the 105th Congress, but it was reintroduced in the 106th Congress by Schumer and Rep. Merrill Cook (R-UT) in 1999 (as [S. 942](#) and [H.R. 1153](#), respectively). The Senate bill refined the language, eliminating the provision for a receipt on request but retaining the idea of an interactive website. That year, the Senate attached Schumer's language to the [Treasury and General Government Appropriations Act](#), which was signed into law (P.L. 106-58).

IRS established the website in 2000 (see an [archived copy from July 2000](#)). In 2000 or 2001, IBO discontinued its service, referring taxpayers to the IRS site instead (see an [archived copy from August 2001](#)). The IRS site was updated in 2001 (see [archived copy from August 2001](#)) but was moved or deleted at some point after that. Requests for information from the IRS were not returned.

The IBO calculator was not the only taxpayer receipt for state or local taxes. In 1998, California's Franchise Tax Board created a [taxpayer receipt for California income taxes](#). The site was created in response to a legislative proposal that was never enacted. The site is still in service; however, it received only 2,700 visits between Jan. 1, 2008 and Oct. 5, 2010, according to the board's statistics – a small usage compared to millions of California taxpayers. Even the California Taxpayers' Association was not aware of the service.

Challenges in Establishing a Taxpayer Receipt

While a taxpayer receipt may have some potential to serve as an engaging and easily understood vehicle to convey information to citizens, several challenges would have to be resolved for it to be effective and meaningful. The first and most basic challenge would be to get taxpayers to read such a receipt or use a website containing the information. The low usage in California suggests that changes would be necessary for a federal receipt to be effective. Given the major misconceptions about the use of taxes, the government may not require a very high percentage of use to see a receipt process as a useful tool to educate the public over the long term.

Another challenge would be trying to summarize the complex federal budget in an accessible yet comprehensive way. Although the Third Way brief asserts that preparing a taxpayer receipt would be "really very easy," many subjective decisions would be involved. Deciding how to describe and categorize federal spending could be challenging. For example, the Taxpayer Right-to-Know Act mandates nine broad categories and 19 sub-categories, while independent calculators by [What We Pay For](#) and [Kareem Shaya](#) use entirely different categories.

Should the receipt list agencies (e.g. Department of Defense) or particular activities (e.g. war in Afghanistan)? Listing the budget per agency would be simple but not necessarily informative. For instance, besides knowing the overall budget for the Department of Education, many taxpayers might wish to know how much spending goes to K-12 education, early childhood education, or postsecondary education. Government activities as seen by the taxpayer do not necessarily correlate to budget lines, and many activities cross agencies (such as educational programs conducted by the National Science Foundation). Because the way that spending activities are described can influence taxpayers' opinions, if a receipt were widely viewed, the descriptions [could be manipulated for political purposes](#).

Another difficulty is how to provide appropriate context to spending information while keeping that information accessible. For instance, rather than merely learning the dollar figure for last year's spending, taxpayers might wish to know how the number compares to recent years or historical trends. In addition, spending does not exist in a vacuum but is meant to address needs or produce outcomes; however, information on merit or performance of the activities is [outside](#)

[the scope](#) of Third Way's proposal. The administration's launch of the [IT Dashboard](#) is a good example of connecting the amount being spent on information technology by agencies with performance to identify over-budget and delayed projects. If a goal of the receipt is to root out wasteful spending, simply listing the amount of spending, but not the achievements it makes possible, will be of limited value.

Finally, although the Third Way brief describes the formula as "very simple," calculating the values of each budget item is complicated by several factors. The Third Way proposal neglects that income taxes and payroll taxes are separate revenue streams. Payroll taxes under the Federal Insurance Contributions Act (FICA) are capped for Social Security, applying only to incomes of \$106,800 or less, and go into dedicated trust funds for Social Security and Medicare, thus limiting an individual's maximum contributions to those programs. The proposal also fails to account for revenue sources besides personal income taxes and payroll taxes, which together only account for [around 80 percent of federal revenue](#). Of the remainder of revenue sources, some are earmarked for specific programs, such as the federal fuel tax. Thus, income taxes are not proportional to spending on these programs. In addition, actual spending does not match exactly the amount budgeted, as in the case of programs completed under-budget (in fact, accurate reporting of federal spending suffers [chronic difficulties](#)); it is unclear how a taxpayer receipt would reflect this.

Whatever its merits, a taxpayer receipt cannot be considered a substitute for improving detailed spending transparency. The government websites [USAspending.gov](#) and [Recovery.gov](#) are good examples of government providing detailed spending information to the public. These sites work and should be enhanced to give the public information not only about who is getting how much money, but also whether taxpayer dollars are being wisely spent.

A Long Road for Mine Safety Enforcement Reform

Even though a five-month inspection blitz uncovered widespread disregard for miner safety, the Mine Safety and Health Administration (MSHA) is unlikely in the near term to be able to force behavioral or cultural reform among the nation's most recalcitrant mine operators.

From April through August, MSHA inspectors caught 108 mines breaking mine safety laws and regulations and cited the mines' owners and operators with 2,660 violations, 45 percent of which were determined to be "significant and substantial," the most serious category of violations.

The agency is conducting what it calls "impact inspections" that target mines with historically poor safety records. On Sept. 20, MSHA [released the results](#) of the impact inspections from April through August, which included 111 mines, but is continuing the initiative.

The impact inspections were conducted in part as a response to an April 5 explosion at the Upper Big Branch mine in West Virginia that killed 29 miners. The tragedy was the worst mining disaster in the U.S. since 1984.

Despite having been thrown into the national spotlight since the disaster, and despite MSHA's renewed focus on dangerous mining conditions, Massey Energy, the Upper Big Branch mine's owner, continues to violate mine safety laws. Most recently, during a Sept. 28 inspection of another Massey-owned mine in West Virginia, [MSHA found](#) that miners were making dangerous, unapproved cuts into the coal seam and that the mine foreman was not monitoring the mine's air supply or ensuring adequate ventilation. The violations led MSHA to close parts of the mine.

"This situation was very frustrating and totally unacceptable," Massey spokesman Jeff Gillenwater [told the *Huffington Post*](#). "We appreciate MSHA's blitz for uncovering conduct that we did not uncover ourselves."

Gillenwater's comments stand in contrast to the attitude previously expressed by Massey. Massey CEO Don Blankenship has blamed regulation for mine accidents, and he [proclaimed in July](#) that, had Massey further resisted MSHA regulation, the explosion at Upper Big Branch may have been prevented.

The difficulty MSHA faces cracking down on dangerous mines stems in part from its struggling Pattern of Violations (POV) program. MSHA can add mines to its POV list, triggering additional monitoring and enforcement actions, but MSHA has never added a mine to the POV list in the program's 32-year history.

Mine owners and operators are often able to keep themselves off the POV list by contesting MSHA citations before the Federal Mine Safety and Health Review Commission (FMSHRC). As the industry strategy has grown in popularity, FMSHRC has accumulated a backlog of more than 16,000 cases.

The POV program drew increased scrutiny after Upper Big Branch when MSHA acknowledged that a computer glitch had kept the mine off a list of POV candidates. In a [Sept. 29 report](#), the Department of Labor Inspector General found other problems with the POV program's computer systems and determined that MSHA was not pursuing POV listings aggressively enough.

MSHA began following through on pledges to reform the POV program when it [announced](#) on Sept. 28 that the agency will use new criteria to place mines on the POV list. However, MSHA chief Joe Main called the new criteria a "stop-gap measure" and acknowledged that legislative changes or new regulations are required to truly reform the program.

Congress took action in July when it [approved](#) \$22 million in additional funding for FMSHRC, to reduce the backlog of contested citations, and MSHA, to spend on mine safety enforcement.

MSHA's impact inspections may actually be undermining efforts to improve the POV program and reduce the FMSHRC backlog. [The Washington Post](#) reported Oct. 11 that an uptick in contested citations has mirrored the surge in MSHA violations. The backlog has grown to 18,100 cases, the *Post* reported.

With the help of the funds approved by Congress, FMSHRC hopes to eliminate the backlog in three years, according to the *Post*. "The commission is very determined to take whatever steps it can to attack the backlog," General Counsel Michael McCord told the *Post*.

EPA and Transportation Lay Out Long-term Fuel Efficiency Plans

The U.S. Environmental Protection Agency (EPA) and the Department of Transportation (DOT) have begun the process for setting fuel efficiency standards for light-duty vehicles (cars and light-duty trucks) for model years 2017 through 2025. The regulatory initiative comes at a time in which the EPA is under bipartisan attack for addressing climate change issues in the absence of congressional action.

In April, EPA and DOT issued a joint rule that set fuel efficiency standards for model years 2012 through 2016. The rule marked the first time in U.S. history that the federal government had written regulations aimed specifically at reducing greenhouse gas emissions and stemming the impact of global climate change.

On Sept. 30, the agencies published a [notice of intent](#) asking for comment on four different miles-per-gallon (mpg) requirements of increasing stringency. (The notice of intent is not an official notice of proposed rulemaking, which will come after the agencies publish at least one more preliminary notice.) The proposals would require average mpg levels in 2025 of 47, 51, 56, and 62, leading to carbon dioxide outputs of 190, 173, 158, and 143 grams per mile, respectively. The agencies did not state a preference among the four options. The new standards would prevent hundreds of millions of metric tons of climate-altering CO₂ emissions and save hundreds of millions of barrels of oil.

The latest effort is in response to President Obama's May 21 [Presidential Memorandum Regarding Fuel Efficiency Standards](#) instructing EPA and DOT to propose the new rule by Sept. 30, 2011. The memo directs the agencies to develop a process that includes public participation and technical assessments leading to the standards. The joint rulemaking is one part of a coordinated national program described in the memo intended "to produce a new generation of clean vehicles."

The notice of intent comes [amidst attacks](#) on EPA's authority to regulate greenhouse gases under the Clean Air Act. According to a *Wall Street Journal* [article](#), EPA is a favorite target of politicians in this election season. Opponents of EPA's regulatory activity on a range of environmental issues claim new regulations will be overly burdensome on businesses at a time when they are struggling. The *Journal* article notes that these criticisms come from both sides of the political aisle.

These claims by opponents are nearly identical to the claims business groups and anti-regulatory politicians have been making for years – that the burden and cost of regulations hurt small business and are job killers. Yet evidence of increased burden and costly regulations is

scant. Instead, studies show regulations to have extensive economic benefits. In one such study, released in October, the Small Business Majority and the Main Street Alliance, two small business advocacy organizations, presented more evidence of the benefits of regulations under the Clean Air Act.

The [report](#), *The Clean Air Act's Economic Benefits Past, Present and Future*, noted that as the country marks the 40th anniversary of the Clean Air Act (CAA) this year:

EPA's authority under the CAA is coming under threat from members of Congress that would delay or limit the Agency's ability to regulate greenhouse gas emissions and other pollution. This has negative implications for many businesses, large and small, that have enacted new practices to reduce their carbon footprint as part of their new business models. It could also hamper the growth of the clean energy sector of the economy—a sector that a majority of small business owners view as essential to their ability to compete.

The report cited studies done by EPA, the Office of Management and Budget (OMB), and others that showed 1) substantial economic benefits of regulations that far exceeded the costs by more than 40 to one in the first 20 years of the act, for example; 2) that emissions of air pollutants have declined substantially while U.S. Gross Domestic Product (GDP) has increased (a 41 percent decline in emissions and a 64 percent GDP increase); and 3) that technological innovations – such as catalytic converters and direct fuel injection – resulting from environmental regulations, and especially the CAA, created about 1.3 million jobs between 1977 and 1991.

In addition, the report concluded that both "[i]ndustry and government economists alike have overestimated the costs of the Clean Air Act, anywhere from 500% to more than 1,000%." One cause of this miscalculation, according to the report, is that regulatory compliance spawns new technologies that ultimately lower the compliance costs to businesses as they adjust to new regulations and adopt new technologies. "Such innovations also allowed the U.S. to become a world leader in environmental control technologies—exports of environmental technologies grew by 130 percent between 1993 and 2003, and were valued at \$30 billion in 2004," the report noted.

The Senate failed in 2010 to pass legislation to establish a cap-and-trade regime to regulate greenhouse gases after the House passed a bill in June. Given the fractious nature of Congress, it seems less likely that significant legislation to address climate and energy issues will pass in a new Congress, leaving EPA to address a wide range of issues under its statutory mandates.

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Will Code of Conduct Clean Up Security Contracting Field?

In November, more than 20 private security contractors (PSCs), along with representatives from various governmental and non-governmental organizations (NGOs) from around the world, will come together in Geneva, Switzerland, to sign the International Code of Conduct for Private Security Service Providers. The code aims to "set forth a commonly-agreed set of principles for PSCs and ... establish a foundation to translate those principles into related standards as well as governance and oversight mechanisms." Because the code's "oversight mechanisms" remain undetermined, questions linger about the effectiveness of another self-policing policy for the private security industry.

The [code of conduct](#) is a 17-page document crafted, according to the Geneva Centre for the Democratic Control of Armed Forces (DCAF) – a partner in the process – through "an inclusive, transparent multi stakeholder initiative launched in June 2009." The Swiss government, which created the DCAF in 2000 as a think tank on private security matters, along with the governments of the U.K. and the U.S., consulted on the creation of the code as well. "Companies that sign on to the industry-led effort," the *Wall Street Journal* recently [wrote](#), "will promise to

respect human rights, properly screen security personnel and work to reduce civilian harm when working in conflict zones."

Critics of the effort, such as José Luis Gómez del Prado, head of the United Nations (UN) Working Group on the Use of Mercenaries, acknowledge that the code of conduct is a "good document" but claim the self-regulatory approach is just "window dressing" and that a "legally binding instrument" is needed as a real enforcement tool against PSCs. P.W. Singer, a senior fellow and director of the 21st Century Defense Initiative, recently [told](#) *Government Executive*, "It's a lot like the code of conduct at your neighborhood country club, but with even less bite," recognizing that the document lays out "good practices to aspire toward" but lacks "legal or economic" sanctions.

Human rights proponents and other groups have long advocated the need to regulate PSCs better, but the issue has only gained traction over the last few years. In 2005, the UN Commission on Human Rights, the predecessor of the UN Human Rights Council, set up Gómez del Prado's group to study the impact of PSCs throughout the world. The working group arrived at several [startling conclusions](#):

In the cluster of human rights violations allegedly perpetrated by employees of [private military and security companies] which the Working Group has examined one can find summary executions; acts of torture; cases of arbitrary detention; of trafficking of persons; serious health damages caused by their activities; as well as attempts against the right of self-determination. It also appears that [private military and security companies], in their search for profit, neglect security and do not provide their employees with their basic rights, and often put their staff in situations of danger and vulnerability.

The high-profile scandals that have erupted over the last few years in the U.S. wars in Iraq and Afghanistan only reinforce the working group's conclusions. The UN working group, along with the Parliamentary Assembly of the Council of Europe, has called for a legally binding instrument to hold PSCs accountable, which would resemble the "Stop Outsourcing Security Act," [introduced](#) earlier in 2010 by Sen. Bernie Sanders (I-VT) and Rep. Jan Schakowsky (D-IL).

Any arrangement to hold PSCs accountable modeled after the "SOS" Act, however, would circumscribe the private security industry's opportunities of employment, limiting them to roles that do not approach the delicate, gray area of tasks only government employees should perform. Not surprisingly, industry officials disagree with this approach and do not acknowledge that the kinds of tasks they perform have anything to do with the pernicious effects they can have on an environment in which they are engaged.

The private security industry insists that a self-policing effort, like the new international code of conduct, will be enough, as it will weed out the bad actors that many within the PSC community blame for their poor reputation. Speaking to *Government Executive*, Tara Lee, a partner with DLA Piper, a law firm associated with the security contracting community, claims the minimum standards will help because, "Right now, three guys with guns, a truck and a website have a

security company." However, most of the major scandals associated with the private security industry were perpetrated by large, professional organizations in good standing with the PSC community, such as Blackwater/Xe, ArmorGroup, and DynCorp.

Some good government advocates optimistically see the new International Code of Conduct for Private Security Service Providers as a first step. Professor Deborah Avant of the University of California, Irvine told the *Journal* that the code helps establish private security contractors as "a feature of the landscape in conflict zones," which will lead to better oversight. The key, though, will be enforcement of penalties against companies that violate the code and how the group will find violations. The DCAF and other advocates of the code of conduct point out that there will be independent auditing of member companies, but it will still be up to members to self-report serious incidents in the field, and it will be up to the group of organizations signed on to the code to decide consequences for noncompliance.

Contractors have a very poor record when it comes to self-reporting serious incidents that may show incompetence or neglect. At a [hearing](#) convened by the Commission on Wartime Contracting (CWC) this summer on the use of private security contractors in Iraq, self-reporting by companies was a main issue. Commission member Charles Tiefer, a law professor at the University of Baltimore, pointed out to several government officials testifying that no less than three different studies conducted by governmental and non-governmental entities found that private security contractors cannot be counted on to reliably report incidents involving grave issues such as civilian casualties and weapons discharges.

The studies included a [report](#) by Human Rights First, which reviewed 610 serious incident reports provided by private security contractors used by the U.S. government and found that just one report even suggests unwarranted weapons discharge. The second [report](#), conducted by the inspector general of the U.S. Agency for International Development (USAID), examined 207 incident reports filed between 2006 and 2009 and found that contractors reported no persons other than employees of the company were killed or injured, and no property other than the companies' were destroyed. The report found "that subcontractors can censor or omit incident reports that might reflect on them poorly." The final [study](#), done by the Special Inspector General for Iraq Reconstruction (SIGIR), reviewed 109 incidents that reported, as Professor Tiefer exclaimed, "no Iraqi civilians ... injured, let alone killed." A pattern of underreporting of civilian incidents is clearly reflected in these studies.

Even if private security companies do begin to self-report serious incidents on a consistent basis, there is no guarantee that the organization of members signed on to the proposed code of conduct will penalize them appropriately. Indeed, the private security industry has a self-policing code of conduct similar to the new international one. The [IPOA](#), formerly known as the International Peace Operations Association, an industry trade group that boasts over fifty member companies, "seeks to ensure the ethical standards of IPOA member companies operating in conflict and post-conflict environments so that they may contribute their valuable services for the benefit of international peace and human security."

Last summer, though, when pictures of employees of IPOA member ArmorGroup [surfaced](#) that showed drunken orgy-like parties at a personnel compound near the Kabul embassy in Afghanistan, not one other member of the group stepped forward to complain about the incident. At a CWC [hearing](#) held to address the ArmorGroup scandal, Doug Brooks, head of the IPOA, admitted that over the course of 13 days, between the time the pictures and allegations emerged and the time of the hearing, no one – much less a member company – filed any sort of complaint. Brooks even conceded, "[M]ost of the complaints come from outside the association."

If governments are going to hold the private security industry accountable, a binding, international instrument will likely need to be adopted. As Gómez del Prado, the UN working group head, has remarked, "Voluntary codes of conducts for [private military and security companies] may be a useful mechanism. However ... they remain insufficient and should be combined with the elaboration and adoption of legally binding instruments at the national, regional and international level."

Commentary: In Case of Bailout, Break Glass for Transparency

With the [unpopular bank bailout](#), the Troubled Asset Relief Program (TARP), coming to a close, policymakers should begin looking back at the program to glean lessons from its creation and execution. When TARP was created by an act of Congress in 2008, the imperative was speed, not transparency. Unfortunately, that lack of transparency and other problems plague the program nearly two years later.

Lesson 1: Create an explicitly independent inspector general.

Probably the easiest problem to fix, as far as future bailout legislation is concerned, is that TARP did not specifically state that its oversight body, the Special Inspector General for TARP (SIGTARP), would be independent from the Department of the Treasury (Treasury). While it is unclear if Treasury ever acted to control SIGTARP or curtail its independence, SIGTARP's relationship with Treasury was [a contentious issue](#) for several months in the summer of 2009, as SIGTARP was beginning its investigations. At best, TARP's silence on the issue distracted from both TARP's and SIGTARP's missions and hampered transparency. This problem would be easily fixed with a short section acknowledging any future oversight body's independence.

Lesson 2: Establish a recipient/participant reporting mechanism and clear disclosure requirements.

A second, more difficult problem that should be addressed in any future bailouts is a hot-button issue in the transparency community in general: recipient reporting. [TARP specifies very little](#) in the way of disclosure, instead leaving it up to the Treasury Secretary to decide how, what, and when to disclose. For instance, while the Secretary chose to identify TARP recipients by name, the TARP legislation merely requires that the Secretary publish a "description" of what is purchased. When compared to landmark federal transparency laws such as the [Federal Funding](#)

[Accountability and Transparency Act](#) (FFATA) and [the Recovery Act](#), both of which outline specific data points to be collected, TARP falls tragically short.

Treasury should disclose the identities of anyone who receives federal support, whether in the form of loans, direct stock purchases, guarantees, or anything else of value, placing bailout transparency in line with other federal spending transparency measures. Additionally, bailout recipients should report on how they used their federal support. With both the Recovery Act and FFATA, we have learned that while it is important to know who received government support, it is equally important to know what they did with that support. Currently, Treasury surveys TARP recipients to see how they are using their funds, but the results are infrequent, aggregated, and anonymous. Short summaries of how each financial institution used their federal bailout funding would greatly increase transparency and increase public trust in deeply unpopular institutions.

Lesson 3: Carefully consider conflict of interest guidelines.

TARP [similarly delegates](#) the creation of conflict of interest guidelines to the Treasury Secretary. Most TARP programs did not create significant conflict of interest problems, but one, the [Public-Private Investment Program](#) (PPIP), did. PPIP basically invested in mortgage-backed securities using a mixture of TARP and private funds and were managed by private management firms. Clearly, with private firms managing public money, [conflict of interest problems abound](#), especially when, thanks to the interconnected nature of Wall Street, any PPIP investment could easily benefit the private firms managing the funds. Treasury, after a lengthy delay, eventually released conflict of interest guidelines for PPIP, including so-called "firewalls" blocking off the PPIP managers from the rest of their companies. However, TARP itself still does not have adequate conflict of interest guidelines. Adding such guidelines to bailout legislation itself would ensure that adequate federal regulations are written by the implementing agency and could accelerate the process of rulemaking by federal workers trying desperately to save a faltering economy.

These are certainly not the only lessons that Congress should take from its actions in 2008. Indeed, other lessons learned from the financial crisis were incorporated into the financial reform bill, passed earlier in 2010. And although that bill reforms the structure of Wall Street in an effort to prevent future bailouts, it is just as important to prepare for future crises now, when cooler heads may prevail. Many of the transparency elements discussed here were eventually instituted by Treasury, but the key is to have them standardized and in place before any future bailout. These provisions are what are necessary for a baseline of bailout transparency, but this list is by no means an exhaustive accounting.

Transparency Survey Offers Mixed Results for Federal Government

A recent transparency survey of more than 5,000 Americans found that more than three-fourths gave the government low scores (59 or lower out of 100), and only seven percent rated the

government as highly transparent (a score of 80 or higher). The White House received the highest transparency score in the study, and Congress received the worst score among government entities. However, limitations of the study make any final judgment on the success or failure of the government's transparency efforts difficult.

The [Government Transparency Study](#) was conducted by ForeSee, a customer satisfaction survey company, and NextGov, a federal technology news website, to establish a baseline of public perceptions of transparency. The research was done in the context of the Obama administration's promise to be the most transparent in history and the launch of several high-profile policies such as the [Open Government Directive](#) and transparency websites such as [Data.gov](#). The random online survey of 5,107 U.S. citizens from Aug. 25 to Sept. 4 inquired about participants' perception of transparency, satisfaction, and trust, of the White House, federal agencies, Congress, and four regulated industries (airlines, banking, health care, and oil and gas).

All entities scored relatively low on the hundred-point scale for transparency, with the White House leading the group with a score of 46 and the oil and gas industry scoring the lowest with a score of 30. Congress had the lowest government transparency score, 37, which placed it one point behind the airline industry.

As to the White House's leading score, the study acknowledged that "if these entities were graded on a curve, the White House would get an A." However, the study quickly dismisses this conclusion, stating that "given the fact that federal websites regularly achieve online transparency scores in the 60s, 70s, and 80s ... it's hard to give the White House too much credit for being the best of a sub-par group."

This study represents an inaugural effort; thus, there are no previous scores against which to compare these scores. It may be that the government scores, though low on the total scale, represent a significant recent increase in public perceptions from previous years. The survey did ask if people's trust in government had increased or decreased from a year ago. However, no similar question on the trend in transparency was asked. Such a question, though not enough to create a retroactive baseline, might have provided more context for the current scores.

Additionally, the authors note that the low scores may also relate to the purpose of the study, which was to obtain general perceptions of transparency in government, not assess web user satisfaction with particular agency transparency efforts. "Had we surveyed people who had specific interactions with these government entities, their transparency and other scores could very well be higher," the report notes. In fact, ForeSee also provides a quarterly Transparency Index, doing just that – tracking reactions to transparency in 30 federal agencies from those who interact with agency websites. The average transparency score of the measured websites during the third quarter of 2010 was 75.8, much higher than the public's general perception of government transparency shown in the ForeSee/NextGov report.

It should also be noted that the ForeSee/NextGov survey did not target those well informed about the government's transparency efforts. The only qualifying question asked of participants

was if they followed the news about the White House, government, etc. The study notes that “when people are asked about a broad experience or awareness rather than a specific one, transparency and satisfaction scores are typically lower.” This calls into some question the study’s comparison of high customer satisfaction scores for government websites with the lower general perception scores. If lower scores are typical on a general awareness survey, then it may be reasonable to view the scores on a curve.

Given the lack of particular awareness of transparency efforts in government, the results are also more vulnerable to measuring the wrong things. The study notes in the key findings that “Americans may be blaming the government for tough times.” One-third of participants had lost a job or had a spouse lose a job in the last two years, a quarter had experienced large drops in investments, and almost 40 percent reported family or friends losing a home. These issues have nothing to do with government transparency, but they could influence people’s perception of government overall. As a result, the unrelated issues could influence responses to any questions about satisfaction with government regardless of issue area.

Similarly, the study notes that the strongest correlation with transparency ratings comes with political affiliation, with conservative and Republican participants providing transparency scores in the low 30s and liberal and Democratic participants giving scores in the 50s. This correlation may indicate that respondents’ answers are more a reflection of overall approval of government than genuinely held perceptions of transparency.

Based on ForeSee’s customer satisfaction research, the study also notes a strong link between people’s perception of government transparency and both satisfaction and trust with government. The study suggests that transparency drives citizen satisfaction, which in turn drives their trust in government. The study results appear to confirm a connection between the three concepts, as scores for each government entity (White House, agencies, Congress, and government overall) followed similar patterns. For each entity, the citizen satisfaction and trust scores were identical and lower (between 6 and 11 points) than the entity’s transparency score.

Given the emphasis the Obama administration has given transparency and the fact that we are approaching the midpoint of the president’s four-year term, it is likely that other evaluations of the progress made on transparency will be forthcoming. It will be interesting to see what approach those evaluations take and how the outcomes resemble and differ from this perception survey.

Commentary: Did OMB Block Worst-Case Estimates of Oil Spill?

A [working paper](#) by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling has ignited a controversy about the role of the White House Office of Management and Budget (OMB) in controlling information about the spill. The working paper alleges that, soon after the April 20 explosion of BP’s Deepwater Horizon rig, OMB blocked plans to disclose the government’s worst-case models of the spill. The administration’s response

to the allegations leaves several key questions without clear answers, which can only be resolved by disclosing the drafts and feedback through which these critical documents were developed.

To aid in the spill response, the National Oceanic and Atmospheric Administration (NOAA) prepared worst-case models of where the spilling oil might go. Unnamed government officials informed the commission that NOAA wanted to release the models to the public in late April or early May, but that OMB denied permission to release the models. The allegations have prompted charges of censorship by OMB.

OMB and NOAA [acknowledged reviewing the models](#) and providing feedback to ensure they "reflected the best known information at the time." According to OMB and NOAA, the feedback was incorporated, and the models were eventually released in July, representing an "improved analysis."

However, the commission [contended](#) that the models released in July were different from those prepared in late April or early May and were based on information that was not available until June.

In its responses to the controversy, the administration has left some ambiguities; to rebuild the public's trust, these should be clarified.

First and perhaps foremost, the administration vigorously denied claims that OMB blocked release of the estimates. At the same time, it acknowledged that OMB provided comments that influenced the report. White House press secretary Robert Gibbs [declared](#) that "no information was altered. No information was withheld." But he stated that "OMB sent the report back to NOAA to include" additional information in the modeling because NOAA's draft "wasn't an accurate representation." At the same time, he claimed that "none of the science in any of the report was changed."

This distinction is echoed throughout the administration's carefully worded statements and replies on this issue, prompting the questions: What was the precise nature of OMB's "feedback"? If OMB did not deny NOAA's request to release the estimates, did it require that they be amended before being released? Was this "feedback" from OMB, or was it passed along by OMB from scientists in other agencies?

In addition, the administration has not disputed the working paper's timeline, which states that NOAA submitted the estimates for release in late April or early May. However, the administration has not publicly confirmed the timeline, either. In a letter to the commission, NOAA did [acknowledge a delay](#) in clearing the models for release, which it attributed to the models' complexity, the desire to be current in reflecting changes in the spill and response, and the challenges of clearly and accurately communicating to the public. The question remains: What was the exact timeline, from submission to feedback to public release?

Finally, the administration has stated that OMB's feedback was intended to improve the modeling and that there was nothing improper about this process. In a [letter to the commission](#),

NOAA director Jane Lubchenco states, "I believe the end product was consistent with the highest professional standards and best available scientific data." However, the administration has provided only its assertions to evidence this claim. Particularly, the administration has not released the draft that NOAA submitted for OMB approval, which would permit independent analysis of its claim that the draft's models were flawed. Neither has the administration released intermediate drafts or correspondence relating to changes in the document, which would allow the public to judge whether the edits were scientific or political in nature.

These are not idle questions given criticisms of OMB interfering in agencies' scientific decisions during the previous administration. "If OMB censored NOAA by refusing to let the agency release its worst-case estimate – well, that would be extremely troubling," said Gary Bass, OMB Watch executive director, in a [Washington Post article](#). "It would be reminiscent of the Bush II administration which often put politics above science. We have not seen that pattern during the Obama administration."

Additionally, these are not the first questions raised about the Obama administration's handling of information and access about the BP oil spill. For example, the commission's working paper also examined NOAA's Aug. 4 "oil budget" estimating what happened to the spilled oil and how much remains in the Gulf. The oil budget was [criticized by several scientists](#) as well as Reps. [Ed Markey \(D-MA\)](#) and [Raul Grijalva \(D-AZ\)](#) for painting too rosy a picture and for not disclosing its methodology. (As of this writing, the oil budget's methodology still has not been released.) Transparency failures unfortunately have been a recurring theme in the spill response, including [a lack of transparency from BP](#) and [obstructions to media access to the spill site](#).

The administration's claims that it did not act improperly may well be truthful. However, the administration has not provided enough information about the process to allow the public to evaluate the claims. Instead, the opacity of agency interactions with OMB leaves little more than a "he said, she said" situation. This creates public uncertainty – and that uncertainty leads to distrust of our government.

Government insiders will argue against any peek into the interagency process, claiming that disclosure could chill dialogue in internal deliberations. However, this claim must be weighed against other criteria, such as the imperative of accountability. In some situations, the case for transparency is clear and striking: this is such a case. Given that President Obama [called](#) the BP spill "the worst environmental disaster America has ever faced," the public should demand a greater level of transparency than usual. Accordingly, OMB and NOAA should release all revisions to the long-term, worst-case scenario, as well as relevant communications and a timeline of changes.

When President Obama established the oil spill commission, [he said](#), "[E]ven as we continue to hold BP accountable, we also need to hold Washington accountable.... I want to know what worked and what didn't work in our response to the disaster[.]" In that spirit, let's open the books and see what really happened between OMB and NOAA.

White House Sued over Delayed Scientific Integrity Policy

The nonprofit organization Public Employees for Environmental Responsibility (PEER) is suing the Obama administration over a long-delayed policy to limit interference in federal scientific research and to protect government scientists from censorship and harassment.

On Oct. 19, PEER filed a [complaint](#) in federal district court in the District of Columbia against the White House Office of Science and Technology Policy (OSTP), which alleges that the office is illegally withholding documents related to the development of a pending scientific integrity policy, including internal White House and interagency communications and draft recommendations for the policy.

PEER criticized the administration for failing to transparently develop a policy that itself rests upon the foundations of transparency, accountability, and integrity. "Why is the development of transparency policy cloaked in secrecy?" PEER Executive Director Jeff Ruch asked in a [statement](#).

PEER's complaint was filed under the Freedom of Information Act (FOIA). The group filed a FOIA request on Aug. 11, but the White House did not provide the requested documents. PEER submitted its request in its role as an advocacy, research, and education organization "to learn how the scientific integrity policy is being developed and why it has been delayed," according to the complaint.

More specifically, PEER requested records related to communications OSTP received from other agencies regarding the draft policies, copies of draft recommendations, and documents providing reasons for the delay in publishing the new policies. According to the complaint, OSTP did not respond to PEER within 20 days as required by FOIA. PEER appealed to OSTP on Sept. 10 and OSTP responded on Sept. 20 that it acknowledged receipt of the request and the appeal. Through its letter and a subsequent phone call with PEER on Oct. 13, OSTP could not identify a date when it would fulfill the request because of the "extensive nature" of the request. PEER had not received any documents related to its request by the time it filed the complaint with the district court.

The development of new scientific integrity policy dates back to March 9, 2009, when President Obama issued a [memo](#) instructing OSTP to present him with recommendations for ensuring adequate independence for federal scientists and integrity of scientific information and its use. Obama said he will use the recommendations to take "Presidential action" as appropriate and set a deadline of 120 days for their submission. On April 23, 2009, OSTP [invited](#) public comments on development of the recommendations. However, OSTP has still not released the recommendations to the public.

The scientific community and good government groups had applauded Obama's March 2009 memo, hoping the effort would restore scientific integrity in government decision making. The Union of Concerned Scientists (UCS), another nonprofit organization advocating for the protection of scientists and their research, [catalogued a litany of abuses](#) during the Bush

administration, including the censorship of scientists researching public health and environmental issues such as climate change and the direct manipulation by non-scientists of scientific recommendations on contraception.

In its [comments](#) to OSTP, OMB Watch recognized the important role science plays in public policy and recommended 1) limitations on the White House's role in reviewing agency science; 2) additional disclosure of scientific research and draft conclusions with the goal of warding off scientific interference early in the policy development process; and 3) presidential instructions against the use of scientific uncertainty as an excuse to delay or avoid regulation.

In July, around the one-year anniversary of the recommendations' due date, groups renewed their support for strong recommendations from OSTP. PEER [pointed](#) to a continued need for better protections, citing the Obama administration's handling of the BP oil spill, specifically [the lack of disclosure related to oil spill estimates](#) and information on dispersants. UCS [continues](#) to collect instances of scientific abuse under the Obama administration.

In June, OSTP Director John Holdren acknowledged the hold-up of the recommendations but pledged their eventual release. In a [blog post](#), Holdren wrote, "I am pleased to report here that the process, though slower than many (including myself) had hoped, has resulted in what I believe is a high-quality product that I anticipate finalizing and forwarding to the President in the next few weeks," implying that OSTP has completed the recommendations.

Scientific integrity advocates fear that the White House Office of Management and Budget (OMB) has contributed to the delay. NPR [reported](#) Oct. 7 that the draft recommendations "appear hung up" at OMB. OMB review of the recommendations before they are made public is a standard step in the development of many government-wide policies.

At least one federal agency, the Department of the Interior, has taken its own steps to protect the work of its scientific staff. On Sept. 29, Interior Secretary Ken Salazar issued a [Secretarial Order](#) that requires greater disclosure of scientific information, expands protection for whistleblowers, and "forbids the alteration of scientific findings in policy-making activities," among other things. The order applies to both career staff and political appointees.

The announcement of the order came less than a month after Interior released a draft policy that was criticized in [comments](#) by OMB Watch, UCS, and other public interest groups for its timidity in applying new protections to scientists and for failing to cover political appointees. The final order was praised by many of those groups.

In a [statement](#), Interior said that the order is consistent with Obama's March 2009 memo and said "guidance and recommendations" from OSTP are "expected" in 2010.

On Nov. 4, Holdren will co-chair a [meeting](#) of the President's Council on Science and Technology. During the public hearing portion of the meeting, advocates are expected to reinforce support for enhanced scientific integrity protections and call on the office to release

recommendations as quickly as possible.

Chinese Drywall Manufacturer Agrees to Help Rebuild Homes

One of the Chinese companies that manufactured drywall used to rebuild homes around the Gulf Coast after Hurricane Katrina has agreed to help pay for the repair of 300 homes. The legal agreement, which establishes a pilot program in four states, results from claims that the drywall emitted substances that corroded and destroyed pipes, wiring, and alarm systems.

Hurricane Katrina struck several Gulf Coast states on Aug. 29, 2005. According to the [National Hurricane Center](#), Katrina was the most economically devastating hurricane to hit the U.S., costing more than \$81 billion. There was a massive rebuilding effort in the states most directly impacted by Katrina – Louisiana, Mississippi, Alabama, and Florida.

Many homeowners who rebuilt during this time have reported problems with extensive corrosion of heating and cooling, electrical, and plumbing systems. In some cases, the corrosion problems were so severe that residents experienced health problems, and rebuilt homes had to be extensively renovated or abandoned. Investigations into the causes of the corrosion have highlighted problems with Chinese-made drywall imported to meet the demands of rebuilding after Katrina.

According to the Consumer Product Safety Commission's (CPSC) [monthly report for August](#), as of Aug. 20, 2010, there had been approximately 6,300 complaints about drywall problems; 3,526 of those complaints from 38 states were filed with CPSC. About 90 percent of those complaints have come from five states, four of which are those states most directly impacted by Katrina. CPSC's investigation into the drywall problems has been the largest investigation in the agency's history, costing more than \$5 million.

In May, CPSC [released the results](#) of tests it had commissioned on drywall samples emitting high levels of hydrogen sulfide. (Sulfur compounds can corrode metal.) Of the ten most highly emitting samples, all were made in China. "Some of the Chinese drywall had emission rates of hydrogen sulfide 100 times greater than non-Chinese drywall samples," according to the report.

The manufacturing company that topped CPSC's most-emitting list was Knauf Plasterboard, the company that has agreed to pay for repairing the homes in the newly created pilot program. According to an Oct. 14 Associated Press (AP) [article](#), Knauf, building suppliers, builders, and insurance companies have agreed to fix 300 homes in Louisiana, Mississippi, Alabama, and Florida that had been damaged by the corrosion. An attorney for a Louisiana building materials supplier said that his client and multiple insurance companies and builders will pay for the repairs. Knauf will help select which homes are repaired, according to the AP article.

Although there are thousands of drywall claims against Chinese manufacturers, this is the first settlement reached. The pilot program could start the process of helping to resolve almost 3,000 claims against Knauf if the program is extended.

The Chinese manufacturers of the defective drywall are not subject to U.S. courts. U.S. and Chinese officials have held high-level diplomatic meetings to help involve Chinese manufacturers in the process of repairing damaged homes, according to CPSC's [press release](#) announcing the May drywall test results. Knauf is the only manufacturer to submit to the court's proceedings.

The judge overseeing the consolidated claims, U.S. District Judge Eldon Fallon, has already made awards to families with homes ruined by defective drywall. The AP reports that these claims deal only with property damage. Medical claims will be taken up by the court in separate cases.

Related bad news for homeowners has hit as insurance companies have refused to pay claims and have canceled insurance policies, according an Oct.17 [Washington Post](#) article. As homeowners have learned that their homes contain defective drywall, they have filed claims with their insurance companies, only to have those claims denied and their policies either not renewed or canceled. Lawyers have begun to tell their clients not to make claims with insurance companies for fear that the homeowners will lose their insurance and possibly their homes.

According to the *Post*, "Robert Hartwig, president of the Insurance Information Institute, said that homeowners policies were never meant to cover 'faulty, inadequate or defective' workmanship, construction or materials." Not telling insurance companies of problems, however, may not protect the homeowner in future claims if the insurer learns the home was built with Chinese drywall, according to a lawyer quoted in the *Post* article. In other words, the insurance companies are not bound to cover problems resulting from the defective materials, but they can use the defective materials as an excuse to deny coverage for claims.

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In Lane-Duck Session, Emboldened Republicans Face Tough Fiscal Choices

While the 2010 midterm elections swept in a significant Republican majority in the House and a larger Republican minority in the Senate, Congress will face a great deal of important fiscal legislation that it must address before the newly elected members begin their terms in 2011. With annual appropriations bills and the expiration of the Bush tax cuts pending in the upcoming lame-duck session, the focus will be on the Republican minority in the Senate and whether it decides to block key legislation or work with Democrats to address unfinished business.

One of the most pressing fiscal issues before Congress is the set of Fiscal Year (FY) 2011 appropriations bills. Congress has yet to pass [any of the 12 spending bills](#), a poor showing considering the Democrats have controlled both houses of Congress and the presidency for the past two years. FY 2011 began Oct. 1, meaning Congress is now more than a month late in passing spending bills. Operations of the federal government are currently funded by a continuing resolution (CR), a stop-gap funding measure that will expire Dec. 3. At this point, an omnibus appropriations bill, which will wrap all twelve spending bills into a single, large bill, seems to be the only feasible way of approving all the provisions necessary to fund the federal

government for the current fiscal year. This means members will be forced to vote for one giant bill with an enormous price tag, probably about \$1.2 trillion – a cut in discretionary spending from FY 2010's \$1.4 trillion.

The question is whether Republicans, especially in the Senate, will decide to support the likely package of spending bills. The FY 2011 budget will be the Democrats' last chance to fully shape a budget, since the next two years will involve a lot of compromising between the Democratic Senate and the Republican House if any spending bills are to be completed. At the same time, Republicans in the Senate may choose to stall by passing another CR to fund the government until January, when Republicans take control of the House and there are more Republicans in the Senate. Democrats will have little reason to agree to a CR, knowing that doing so will allow Republicans to significantly reshape FY 2011 spending levels, setting the stage for a potential budget stalemate in the coming weeks. On the other hand, if a stalemate develops, Democrats will have no reason not to accept a CR, given that the Republicans, once they take over in the House, plan on offering bills to rescind current spending anyway.

If both sides cannot agree on a course of action before Dec. 3, when the current CR runs out, the federal government will be forced to shut down. The last time this happened was in the mid-1990s, when Republicans also found themselves in a strengthened position, and the resulting government shutdown rebounded against the party badly. This time, Republicans must decide if gaining more influence over the FY 2011 appropriations bills is worth a possible shutdown. The current sentiment, at least [among Senate Republican leadership](#), seems to be leaning toward letting the FY 2011 bills go through and instead focusing their budget-cutting efforts on the FY 2012 budget process. It remains to be seen how the incoming class of fiscal conservatives feels about postponing a fiscal reckoning, but it is likely [they will not be happy](#).

A less politically risky option for Republicans looking to take a fiscal stand is the Bush tax cuts, although they are possibly more politically charged. Originally passed in 2001 and 2003, the Bush tax cuts lowered taxes for large swaths of the population but predominately helped higher-income taxpayers. The cuts are set to expire at the end of 2010, and Congress is locked in a struggle over which aspects to extend. Many, but certainly far from all, Democrats [are pushing to extend](#) the cuts for families earning less than \$250,000, and Republicans are pushing to keep all of the cuts, leaving the two parties fighting over the tax rates for the [wealthiest two percent](#) of the nation. The difference is important, since fully extending all the Bush tax cuts could cost [more than \\$5 trillion over ten years](#), once associated costs such as debt servicing are factored in.

Similarly, thanks to the Bush tax cuts, the estate tax has been slowly cut, from a rate of 55 percent on bequeathed assets above what would have been \$1 million if past law had continued, to 45 percent with a \$3.5 million exemption, culminating in full repeal for the 2010 tax year. In 2011, however, the tax returns to 2001 levels with a \$1 million exemption. With the potential for billions of dollars in revenue to be collected from the wealthiest 1.76 percent of decedents, many Republicans and Democrats are fervently calling for some sort of resolution.

Although some congressional Republicans are calling for permanent repeal of the estate tax, the [almost \\$600 billion cost over the next ten years](#) has made that proposition untenable. Instead,

members of Congress from [both sides](#) of the aisle have been trying to find a compromise. Support is strong for simply setting the estate tax at its 2009 levels – a \$3.5 million (\$7 million for couples) exemption at a 45 percent rate, but soon-to-be-departing Democratic Sen. Blanche Lincoln (D-AR) and Republican Jon Kyl (R-AZ) have aggressively pushed a far more generous estate tax with a \$5 million (\$10 million per couple) exemption at a 35 percent rate. Inaction will cause the estate tax to affect less than the wealthiest two percent of estates, up from its current impact on no estates (and one quarter of one percent of estates in 2009), yet attention from members of both parties is inexplicably and intensely focused on this issue, likely resulting in some action during the lame-duck session.

Fighting to extend the Bush tax cuts and repeal the estate tax are far less risky battles for congressional Republicans, since the worst-case scenario is a tax hike, not a government shutdown. While a tax hike would likely [rankle](#) the Republicans' voting base, a government shutdown would anger a large swatch of independent voters, potentially giving them pause in 2012. Therefore, Republicans may choose to wage a high-profile fight for the tax cuts while quietly passing the FY 2011 budget bills, gaining the limelight and placating their supporters but avoiding a potentially harmful political debacle.

Another possibility being discussed is simply extending all the Bush tax cuts for one or two years, letting the new Congress deal with the issue. President Barack Obama has indirectly suggested this approach as a possible compromise during the lame-duck session. Sen. Orrin Hatch (R-UT), likely the new ranking Republican on the tax writing committee, has said he could support an extension as long as all the tax cuts – for wealthy and middle-income individuals and families – are treated the same. This, of course, raises a question for the estate tax: Would an extension be based on 2010 when there was no tax, or would it be based on 2009 when there was?

These three issues – the budget, the Bush tax cuts, and the estate tax – are only part of the fiscal challenges facing the lame-duck session. Congress [must also pass](#) a patch for the Alternative Minimum Tax (AMT), a package of miscellaneous tax provisions often referred to as “extenders,” and a “doc fix,” which would postpone a planned payment cut for Medicare physicians, all of which are annual occurrences. Congress has yet to address any of these measures because, yet again, Congress dragged its feet and failed to pass any of them in a timely fashion. The result could be a hectic lame-duck session, with trillions of dollars in spending on the table, which will produce legislation motivated more by political expediency than sound fiscal policy. Alternatively, lawmakers could take a “kick-the-can” approach and leave many of these issues for the next Congress to tackle.

Commentary: Contracting Oversight in the 112th Congress

With the GOP winning control of the House on Nov. 2, Republican members of House oversight committees are poised to determine how the lower chamber of Congress uses its investigatory powers for the next two years. Rep. Darrell Issa (R-CA), the likely chairman-to-be of the House Oversight and Government Reform Committee, has [released](#) what his website calls “a blueprint”

for oversight of the executive branch, and Rep. Eric Cantor (R-VA) released [a document](#) shortly after the elections calling for greater congressional oversight overall. With plenty of contracting issues that remain unexamined or in need of further investigation, what will this shift mean for congressional oversight of government contracting in the next Congress?

During the Bush administration, as dollars spent on contracting doubled between 2001 and 2008 and became more concentrated in a relative handful of companies, Democrats began scrutinizing the federal contracting process. In 2005, while still in the minority, Democrats began using the Senate Democratic Policy Committee (DPC) to begin investigating [whistleblower allegations](#) of waste, fraud, and abuse in contracting in Iraq. After Democrats took control of Congress in the 2006 midterm elections, they began showering oversight attention on contracting by creating new oversight panels in both chambers and creating the Commission on Wartime Contracting in Iraq and Afghanistan (CWC).

While Republicans will have no control over the CWC, which will wrap up its work and provide final recommendations within the next six months, or the contracting panel in the House, which submitted its final recommendations in March, questions remain as to the House's commitment to continue the work on contracting reform that has occurred over the past four years. Indeed, several contracting issues have come up just within the past few months that warrant continued congressional scrutiny.

In early November, the Department of Defense (DOD) announced that Lockheed Martin's F-35 fighter jet – the only fifth-generation fighter platform the Pentagon will have since Congress terminated funding for continued F-22 acquisitions – would experience additional delays and cost increases. Writing in his influential military reporting blog *War is Boring*, David Axe [notes](#) that just this spring, DOD reorganized the F-35 program, delayed the start of full production, and added \$3 billion to development costs. Now the Pentagon is pushing full production back another year and adding another \$5 billion for research and development. Proper oversight would require that Congress call Lockheed Martin executives, along with top Pentagon brass, up to Capitol Hill to testify about the company's continued failures to meet cost and schedule demands and DOD's failures to keep the project on course.

Additionally, continued problems with contractors in Iraq and Afghanistan demand further congressional attention. In June, Rep. John Tierney (D-MA), the current chair of the Subcommittee on National Security and Foreign Affairs of the House Oversight Committee, released a [report](#) titled *Warlord, Inc.* The report, which incorporates a six-month investigation spurred by an [expose](#) conducted by *The Nation* magazine, exposes the extortion and corruption surrounding DOD's "outsourcing of security on the supply chain in Afghanistan to questionable providers, including warlords." In short, the report found that DOD "designed a contract that put responsibility for the security of vital U.S. supplies on contractors and their unaccountable security providers." This arrangement, which "has fueled a vast protection racket run by a shadowy network of warlords, strongmen, commanders, corrupt Afghan officials, and perhaps others" – read: the Taliban – not only conflicts with DOD and congressional rules and regulations, but likely undermines "the U.S. strategy for achieving its goals in Afghanistan."

Without pressure from Congress resulting from investigations like these, DOD risks unwittingly funding the very groups our country has sent our armed forces to fight.

In Iraq, the State Department is about to [assume](#) all responsibility for overseeing contractors, as the military continues its withdrawal of most combat troops. State estimates that it will have to watch over some 25,000 to 26,000 private security contractors (PSCs). These PSCs will continue to provide standing and moving security, and the training of Iraqi police and soldiers, but they will also have to supply quick-reaction combat teams, route clearance, recovery of wounded personnel, removal of damaged vehicles, and the detection and disposal of explosive devices. This may create a nightmare scenario where the State Department, due to [lack of experience and too few oversight personnel](#), can't adequately oversee contractors tasked with new and difficult duties to perform. Congress needs to pick up the CWC's vigorous oversight of the State Department and ensure that the agency is adequately overseeing contractors in Iraq.

In his September report criticizing Democratic oversight of the executive branch and other issues, Issa ostensibly lays out his plan of action for the next Congress. While scrutiny of the executive branch is surely the duty and prerogative of Congress, Issa's [report](#) fails to mention oversight of federal contracting, nor does it address any of the issues discussed here.

Of course, even if the House fails to confront contracting issues, the Senate will likely continue to do so. Indeed, Sen. Claire McCaskill (D-MO), chair of the Subcommittee on Contracting Oversight of the Senate Homeland Security and Governmental Affairs Committee, recently released an "aggressive" [agenda](#) for the next Congress. According to Robert Brodsky of *Government Executive*, McCaskill plans to hold hearings on "Afghanistan reconstruction projects and is conducting investigations of Energy Department procurements, public relations contracts, and acquisitions connected to congressional earmarks." McCaskill, one of the driving forces behind the creation of the CWC, is determined to "cause squeamish moments for both industry leaders and federal agencies." Without similar support from the House, the oversight of contracting issues may be detrimentally affected in the next Congress.

New Executive Order Reforms Controlled Unclassified Information

On Nov. 4, President Obama signed a new [executive order](#) on controlled unclassified information (CUI), reforming the system of safeguarding information that is not classified but is still considered "sensitive." Previous practices for handling CUI stymied public access and inhibited information sharing inside government. The new order has been praised by numerous government openness advocates.

Over the years, agencies have created CUI categories on an ad hoc basis: sometimes as required by legislation or regulation, but also simply out of perceived need. A 2009 report identified more than 100 such categories across the government, including many without a clear public definition. The new executive order will create a public registry of all CUI categories and their definitions, along with their justification in statute, regulation, or government-wide policy. The

order also makes clear that CUI documents are subject to standard disclosure processes under the Freedom of Information Act (FOIA); labeling a document as CUI does not exempt it from FOIA.

History of CUI

Since at least the 1970s, agencies have sought ways to protect information that was "sensitive but unclassified." The growth of such practices was facilitated by a post-9/11 Bush White House [memo](#) that instructed agencies to control such information.

However, the problems caused by the confusion resulting from the proliferation of "pseudo-secrecy" practices became apparent even to the Bush administration. In 2005, President Bush issued a [memorandum](#) directing agencies to standardize procedures for safeguarding sensitive terrorism, homeland security, and law enforcement information in order to better facilitate the sharing of this information between different agencies. This was followed by a [2008 memo](#) adopting CUI as the common designation for systems to protect terrorism-related information.

The Obama administration continued the reform efforts. In May 2009, President Obama established an interagency task force to examine CUI and issue recommendations for reform. OMB Watch, along with other public interest groups, contributed [perspectives](#) to this process. In August 2009, the task force issued [a set of recommendations](#), including a call for a new executive order.

What the Executive Order Does

The new executive order establishes CUI as the sole system for controlling unclassified information. It makes clear that a CUI designation is not an exemption from FOIA review and requires an assumption of openness in designating information as CUI. Throughout the process, the National Archives and Records Administration (NARA) can consult with government officials, state and local authorities, private stakeholders, and the public.

NARA is responsible for administration and oversight of the order. NARA is assigned to develop government-wide procedures for implementing the order within six months. At the same time, agencies must review the categories they currently use and submit them to NARA for review, including definitions citing a basis in law, regulation, or government-wide policy. Agencies no longer have the authority to create new information categories on their own; only those categories approved by NARA may be used.

NARA then has six months to review and approve the categories proposed by the various agencies. As the executive agent overseeing the order, NARA has the authority to reorganize categories submitted to eliminate duplication, overlap, and other conflicts. Conflicts over categories or implementation procedures that cannot be settled by NARA and agencies will be resolved by the White House Office of Management and Budget (OMB). Within one year of the order, NARA must publish a public registry of authorized categories, including their definitions and associated procedures. Future proposed categories will also have to be approved by NARA.

While NARA is reviewing the submitted categories and creating the public registry, agencies must establish their CUI programs and policies based on NARA's implementing guidance. The agencies must submit their plans to NARA for review to ensure they comply with the original guidance. NARA will review the proposals and establish deadlines for agency implementation. The procedures will likely consider questions such as systems for safeguarding CUI, markings, control processes (e.g., who is authorized to control a document), decontrol timelines and processes, staff training, and selective control (controlling parts of documents rather than entire documents).

For the first five years, NARA must produce an annual report on implementation of the order. After five years, NARA will issue a report every other year. The order does not specify any particular metrics or framework for the reports. It may be that the implementation guidance to the agencies will provide some indication by requiring the agencies to collect and report to NARA on certain aspects of implementation.

Analysis

The order steps back from the direction of an earlier [draft](#), which would have directly established a small, tiered set of broad, government-wide categories, rather than having NARA process the existing categories. This earlier approach would have been similar to Bush's 2008 memorandum. [According to OpenTheGovernment.org](#), "The Bush policy and earlier drafts could have created a fourth level of classification." Likewise, the Federation of American Scientists [commented](#) that under the earlier draft order, "CUI would have constituted another level of classification, by another name."

The draft order also spelled out government-wide procedures rather than having NARA develop them. Among the policies were sanctions for unauthorized disclosure of CUI, which created concerns about retaliation against whistleblowers. Openness advocates will be closely watching the development of the procedures for such issues.

Even after the procedures are released, implementation of the order will remain a topic of vigilance for openness advocates. One indicator many will no doubt like to see built into the procedures is the reporting of statistics on the use of CUI designations, which will allow assessment of whether the order actually is reining in the volume of information marked as CUI.

Reactions to the E.O.

Initial reactions from open government groups were positive. OMB Watch [said](#) that the order "deserves genuine praise as a simple but strong path forward." Gary D. Bass, OMB Watch's executive director, went on to stress that "implementation will determine if this policy succeeds or fails."

The American Civil Liberties Union (ACLU) [said](#) the order would "improve government transparency" and added, "This Executive Order is a welcome step toward ensuring that our government agencies can no longer withhold information without oversight."

The Federation of American Scientists [commented](#) that the order "seems well-crafted to streamline information handling in the executive branch without creating any new obstacles to public access."

OpenTheGovernment.org [commented](#) that the order will "significantly limit the number and end the spiraling proliferation" of CUI categories.

Lack of Plan for EPA Libraries Threatens Access to Environmental Information

After more than three years of development, the U.S. Environmental Protection Agency (EPA) has yet to complete a strategic plan for its library network or to inventory the network's holdings, according to the [Government Accountability Office](#) (GAO). The Bush administration controversially moved to close several agency libraries, but opposition from Congress and the public pushed EPA to reverse course and [reopen the libraries](#). However, the GAO report makes clear that additional steps are needed to ensure the library network's valuable holdings are genuinely accessible to the public.

EPA issued a draft outline for a strategic plan in July 2007, and the plan was scheduled to be completed in 2008. However, the outline is missing several important pieces and is composed primarily of placeholders for future activities with no specific goals, timeframes, or methods listed.

In addition to the lack of a plan to guide the library network, GAO found that EPA does not yet have an inventory of its holdings. The agency also has no plan for prioritizing the digitization of its materials, a key component to improving public access to the agency's library holdings. Without an inventory of holdings, EPA cannot prioritize what documents need to be digitized or know how much it will cost or how long it will take. Additionally, the agency has no criteria for scheduling funding for digitization or a timeline for the process. Without a completed strategic plan or a plan for funding the reorganization of the library network, the EPA's ability to meet the network's users' needs is threatened, according to the GAO.

The EPA's library network has for several years been the focus of controversy resulting from the Bush administration's moves to close several libraries and the potential [loss or destruction](#) of library holdings. EPA reopened the libraries in 2008 following numerous protests by public interest groups, including OMB Watch, and the employees' union, a critical government report, and congressional intervention.

An earlier [GAO report](#) found that the EPA's process for closing the libraries was seriously flawed. The agency failed to follow its own plan for closing and reorganizing the libraries. The public was cut out of the process, with poor communications with library users and no plan for dispersal or disposal of holdings. EPA had also failed to fund the library closings and reorganizations.

In its response to the recent GAO report, the EPA agreed to complete its strategic plan in Fiscal Year 2011, although no detailed timeline was provided. EPA also agreed to create a schedule for cataloguing the inventory of library network holdings and to complete the cataloguing by Sept. 30, 2011.

The GAO report went on to highlight another significant flaw in the EPA's information access policies. EPA often contracts with private entities to do many types of work, such as research and development. In addition, EPA provides financial assistance to states, local governments, schools, hospitals, and nonprofit organizations. Work produced under contract, as well as work produced under assistance agreements, may include copyrighted material. Although federal regulations generally allow for public disclosure of copyrighted materials produced under government contracts, EPA regulations do not allow public disclosure of copyrighted material produced under assistance agreements.

EPA has awarded more than 21,000 grants valued at more than \$40 billion, according to the GAO report, producing a "substantial body of publicly funded written material," and much of it may be copyrighted. EPA may only disseminate copyrighted materials to federal workers for official purposes and may not disclose them to the public.

GAO recommends EPA follow a practice similar to the [Federal Library and Information Network](#), the business subsidiary of the Federal Library and Information Center Committee, which seeks permission to disclose copyrighted material under assistance agreements at the time an agreement is made. EPA currently does not have such a practice. The GAO makes clear, "without permission from copyright holders, however, documents prepared under EPA assistance agreements, using taxpayer dollars, will remain unavailable online to the public."

The EPA, in responding to the GAO recommendations, agreed to identify ways of gaining permission from assistance recipients to disclose copyrighted material. However, the EPA feels restricted by legal constraints and will not digitize materials from ongoing assistance agreements.

Despite the missing strategic plan and inventory of holdings, EPA has taken important steps to improve the operations of the library network. The GAO report commends EPA for several actions taken to improve communications with agency staff on the operations of the library network, including regular teleconferences with library managers and staff and a live chat feature connecting staff to librarians. Numerous other positive steps are being taken to improve the usability of the agency's online library system. The GAO report cites work that is underway to improve searchability of documents and navigation of the site.

EPA libraries contain a vast amount of information on environmental protection and management, basic and applied sciences, and local and regional environmental and public health issues. The network includes extensive coverage of issues pertaining to legislative mandates such as hazardous waste, drinking water, pollution prevention, pesticides, and other toxic substances. The information is used to evaluate environmental threats, assess new chemicals, inform policy decisions, and provide the essential data that agency and

nongovernmental scientists need to challenge the scientific claims of polluting industries. Therefore, improving access to the network's holdings is an important part of protecting public health and the environment.

As agency staff work to complete and implement the strategic plan, EPA may need to look beyond merely providing access to digital copies of its materials online. As one library advocate [suggests](#), the agency should be able to provide library services to mobile phones and exploit social media like Facebook and Twitter in order to connect to users and potential users. The library network should also include topic-specific RSS feeds and other alert systems to push information out to the public.

The agency's [vision](#) is to create "the premier environmental library network that provides timely access to information and library services to its employees and the public." For a full recovery from the Bush-era assaults and to progress into a 21st century information network, EPA must implement the GAO's recommendations and begin adopting the newest online technologies to ensure all users have access to this publicly funded information.

All Eyes on Regulation in Post-Election Environment

Facing a Republican majority in the House and a slimmer Democratic majority in the Senate, President Obama and administrative agencies may increasingly turn toward regulation to accomplish policy goals. In contrast, new lawmakers and congressional leaders vow to use their power to roll back regulations, cut spending, and shrink the size of government.

The 112th Congress will be more skeptical of Obama's agenda than the 111th – in the midterm elections, many Republicans framed their campaigns as a referendum on Obama's presidency, and some Democrats distanced themselves from the White House. As a result, the administration will find it difficult, if not impossible, to score major victories in the next Congress.

A shift toward regulation carries both pros and cons. The administration can move at its own pace and shape policy without the compromises and delays inherent in legislating. However, in writing new rules, regulators are bound by statute, and regulation is usually not a powerful enough tool to enact major or systemic changes.

Previous presidents have encountered similar situations and have chosen to look at regulation differently in response to changes in Congress. After Republicans gained control of the House in the 1994 elections, President Bill Clinton shifted some of his focus toward the administrative side of government. Additionally, the Clinton administration expended time and energy responding to increased congressional oversight and investigation. President George W. Bush was also forced to deal with a less compliant Congress when Democrats regained control in the 2006 elections.

Congressional Republicans have shown a desire to tighten oversight of regulatory decisionmaking. The House Republicans' [A Pledge to America](#), a policy agenda unveiled by House Republican leadership in September, calls for congressional approval of all "major" regulations – those expected to have annual costs or benefits to the economy of \$100 million or more. "The Pledge's proposal will either result in significant delay or will completely stop the executive branch from carrying out its statutory and constitutional responsibilities," according to an [analysis by OMB Watch](#).

A [document](#) released after the election by Rep. Eric Cantor (R-VA), the likely House Majority Leader, calls for House committees to review proposed and existing regulations and issue reports, presumably recommending alteration or repeal of regulations the committees dislike. The document derides regulation, commenting on its cost to businesses without mentioning its benefits to society as a whole.

Climate change regulations written by the U.S. Environmental Protection Agency (EPA) are a likely target of congressional scorn. The agency has finalized several rules under the Obama administration that limit climate-altering greenhouse gas emissions. The most controversial has been EPA's stationary source rule, which will curb emissions from power plants and other large facilities beginning in 2011. Conservative lawmakers and many in the business community have criticized the stationary source rule, as well as other clean air and climate rules EPA has pursued.

Some Republicans have attacked the scientific conclusions EPA has used to support its regulations. An attempt to overturn EPA's 2009 endangerment finding, which officially recognized greenhouse gases as a threat, [was defeated in June](#), but similar attempts are likely to surface in the 112th Congress. Fifty percent of Republicans newly elected in the midterm elections deny the existence of human-caused climate change, [according to ThinkProgress.org](#), a blog of the Center for American Progress.

The Obama administration will need to continue to look to regulation if it intends to add to its climate change record. Climate and energy legislation, passed by the House in 2009 but stalled in the Senate, is dead in the 112th Congress, insiders say. EPA has other items on its regulatory agenda that could curb greenhouse gas emissions, including a [rule proposed](#) in October to improve fuel efficiency in large trucks and other heavy-duty vehicles.

A Republican-controlled House is also unlikely to prioritize bills expanding power and authority for regulatory agencies. A [bill to improve](#) mine safety in the wake of the Upper Big Branch explosion that killed 29 miners, a [bill to require](#) new safeguards for passenger vehicles in response to the recall of millions of defective Toyota vehicles, and a [bill to expand](#) protections for workers and whistleblowers who report unsafe conditions were all introduced in the 111th Congress but did not pass either chamber. If the bills do not pass during the upcoming congressional lame-duck session, given existing rhetoric on regulation, these bills are unlikely to advance in the near future.

That will oblige the administration to look to rulemaking as the method for protecting workers and consumers. The Mine Safety and Health Administration (MSHA), National Highway Traffic Safety Administration (NHTSA), and Occupational Safety and Health Administration (OSHA), not Congress, may be expected to take the lead in crafting new policy.

The fate of [food safety legislation](#) remains a mystery. Before recessing for the elections, Senate Majority Leader Harry Reid (D-NV) filed a cloture motion on the FDA Food Safety Modernization Act (S. 510), a bill to give the Food and Drug Administration (FDA) more regulatory authority, including the power to order recalls. The motion means the Senate could tee the bill up for passage during the lame-duck session coming up later in November. However, the Senate will likely only be in session for three weeks. Even if it does pass S. 510, the bill would need to be combined with a House version (passed in 2009) in a conference committee, and the conferenced bill would need to be approved again by both chambers. Food safety legislation has bipartisan support, but it is unclear whether House Republicans would prioritize passage of a bill in the 112th Congress or whether they would push to include greater spending and regulatory requirements found in current versions.

Health care and financial regulations are also sure to draw greater scrutiny. Rulemaking agencies will continue to write regulations implementing the health care reform bill and the financial regulatory reform bill, both of which many Republican lawmakers and candidates opposed. Targeting those regulations may prove to be a successful strategy in undermining the laws' impacts if the new Congress can agree on procedures to delay or kill the rules.

Congress can target health care and financial regulations in at least one of three ways. First, Congress has the power to review major regulations and send a resolution of disapproval to the president. Even if House Republicans were successful in getting such resolutions of disapproval through the Senate, they would most certainly face a presidential veto, which Congress would unlikely be able to override.

Second, Congress has the power to conduct oversight. Cantor's plan of action calls for a significant increase in oversight in an attempt to control executive branch activity. Oversight committees are often the same ones that deal with legislation affecting the covered agencies. Thus, the fear of legislation may provide enough pressure to sway agencies.

Finally, Congress has the power of the purse. It can withhold funding from an agency to keep it from working on a particular regulation. This may be the most powerful course in trying to influence health care and financial regulations because it puts the president in a bind over whether to veto an entire spending bill over a specific restriction on a regulation.

Increased oversight and limiting funding are the most likely strategies opponents may adopt to restrict health care and financial regulations. Resolutions of disapproval have rarely succeeded in the past.

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Millions Face Loss of Unemployment Insurance

On Nov. 18, the House failed to pass a [three-month extension](#) of unemployment insurance (UI), putting the benefits of nearly 2 million Americans in jeopardy. With funds for federal benefits set to expire Nov. 30, the failure to enact an extension sets up a post-Thanksgiving battle between UI extension advocates and deficit hawks. Complicating matters, the debate over extending the Bush tax cuts will likely encroach upon the UI benefits extension dispute, increasing the likelihood that many citizens will be cut off from help as the holiday season begins.

Currently, when an unemployed individual exhausts his or her 26 weeks of state benefits, he or she can claim federal emergency benefits for up to 73 weeks or 99 weeks, depending on his or her state's UI rules. After Nov. 30, funds will not be available for the Emergency Unemployment Compensation (EUC) program and the Extended Benefits (EB) program, which were enhanced and created under the American Recovery and Reinvestment Act (Recovery Act), respectively. Without these funds, new exhausters of state benefits will not be able to join the programs, and those already claiming federal benefits will only be allowed to collect through completion of

their current "tier," which means they will not be able to stay in the program for much longer than a month.

To stop federal benefits from expiring, House Ways and Means Committee Chairman Sander Levin (D-MI) introduced a three-month funding extension of emergency federal unemployment insurance. Even though the bill had more than a majority supporting it, it came up short, 258-154, since it was introduced under special rules requiring a two-thirds majority to pass. Eleven moderate Democrats, along with most of the Republican caucus, balked at the \$12.5 billion cost of the extension.

If Congress successfully passes an extension, it will be the fifth time since the start of the Great Recession that an extension has been necessary. The most recent successful effort, which passed in July, occupied weeks of time in the Senate, where Republicans – most notably [Sen. Jim Bunning \(R-KY\)](#) – opposed the extension on similar spending grounds. At one point, benefits actually lapsed for three months before Democrats reached an agreement with Republicans and passed the last extension.

Though some Republicans claim that unemployment insurance discourages people from looking for work – which is [demonstrably false](#) – continuing federal benefits for the unemployed is important for several reasons. The economic recovery is taking longer than originally hoped for; the unemployment rate is still above nine percent; and there are still five unemployed workers for every new job opening. This recession is qualitatively different from ones past, typified by longer stretches of unemployment, making it crucial to maintain UI benefits longer than normal. Indeed, many, including President Obama, along with social equity nonprofits, are [claiming](#) the House-proposed three-month extension would simply be an ineffectual stopgap and are calling on Congress to extend benefits for a full year, as economists are forecasting the economy will still be sluggish into 2012.

In addition to providing stability to the unemployed, extending UI benefits would be beneficial to the economy at large. The Department of Labor recently [affirmed](#) that for every dollar the government spends on unemployment benefits, it generates two dollars of economic activity, making UI benefits one of the most powerful forms of federal spending. The Congressional Budget Office (CBO) came to a similar conclusion in January when it [noted](#) that every dollar in federal benefits generates \$1.90 in the economy. Thus, the benefits of extension far outweigh the monetary costs, which will be negligible on the long-term deficit.

If Congress fails to pass an extension, the National Employment Law Project (NELP) [estimates](#) that nearly 2 million people would lose benefits in December, and large numbers of unemployed workers would lose benefits each month after that. Economists [project](#) that expiration of the federal emergency unemployment programs would "cut consumer spending significantly and reduce already-languid gross domestic product (GDP) growth by half a percentage point." UI benefits are, therefore, a "two-for-one": the spending both stimulates the economy and helps those most in need.

Many fiscal hawks in Congress, however, think the nation does not need more UI benefits. Recently, Rep. John Kline (R-MN), the incoming chair of the House Education and Labor Committee, when asked in an [interview](#) what he would tell those who are "hanging on by a thread" if Congress fails to extend emergency unemployment benefits, replied:

Well, they, heh, the best thing to do for them is to get the economy back on track and get businesses hiring so that they have a job that they can go to. We simply don't have the money to keep extending unemployment benefits indefinitely. We just don't have the money.

Kline repeatedly pointed out that the government spends too much money and that our deficits are too high. Instead, the congressman, along with the rest of his party, would rather pass an extension of the Bush tax cuts, arguing that if Congress passes all the Bush tax cuts, it will "get the economy back on track" and the unemployed will "have a job that they can go to."

The problem is that extending the Bush tax cuts, especially for the top two income tax brackets, [does not guarantee](#) economic growth; in fact, it is one of the least effective stimulative policies available to policymakers. Additionally, failure to offset the cost of extending the top two rates – which no Republican has come out against – will add roughly \$700 billion to the deficit over the next decade. Indeed, if choosing between extending high-income tax cuts and providing the unemployed with additional time to collect benefits, Congress should choose extending UI benefits based solely on the likelihood of stimulating economic activity.

Commentary: Earmark Ban's Potential Impacts Unclear

Earmarks took center stage during the week of Nov. 15 when congressional Republicans pledged to "ban" the controversial appropriations tool in a bid to answer the supposed call of midterm voters to reform Washington. Long used by members of Congress to guide federal spending toward certain projects, earmarks can be seen by the public as a form of corruption. While proponents of the ban argue that eliminating earmarks is [good for both](#) transparency and the budget, critics of the ban argue this is not necessarily the case.

Earmarks, like most aspects of government, are not good or bad in and of themselves. Contrary to popular belief, Congress can use earmarks in a responsible manner. Because earmarks currently lack key transparency requirements, however, they can be difficult to track, which adds to the public's perception that they are a form of corruption in Washington. But with appropriate changes, such as creating a central, open, government-run earmark database, earmarks could be more transparent than the average spending measure. With full transparency, the public could know who asked for an earmark and who would benefit from it, information lacking in most federal spending bills.

Senate Republicans pledged to ban earmarks when Minority Leader Mitch McConnell (R-KY), an ardent supporter of earmarks, [agreed to the ban](#). However, the ban is not binding, and several Republican senators do not agree with the move. A push for a binding ban, offered as an

Sen. Richard Lugar (R-IN) [warned that](#) elimination of earmarks effectively cedes control over spending to the executive branch without reducing spending. Lugar said, “The Constitution explicitly states that it is the responsibility of Congress to make decisions on the appropriation of federal taxpayer funds. Earmarks should be considered and treated like amendments to any underlying spending bill. Members should have the opportunity to offer earmarks, review them, and offer motions to strike or modify them.”

These and other issues raise a question as to what impact the push to ban earmarks will have. What is one person's pork is another person's bacon. Those who dislike earmarks have gained national attention, but less visible are the many state and local policymakers and voters who appreciate nationally elected officials who bring resources back home. The federal money [translates](#) into jobs, safer communities, and more vibrant economies.

Dollar Value of Earmarks - 2010, by Bill									
		Disclosed Lawmaker Earmarks	Member Undisclosed	Total Member Disclosed and Undisclosed	Pres Sold	President and Lawmakers	Pres Undisclosed	Pres Undisclosed	Bill Totals
Congressional Earmarks	\$15,932,261,848	Ag-Rural Development-FDA	\$360,776,000	\$19,688,000	\$370,432,000	\$1,408,000	\$3,229,000	\$59,803,000	\$474,872,000
Disclosed	\$10,021,984,648	Commerce, Justice & Science	\$714,201,000	\$169,360,000	\$883,561,000	\$68,823,000	\$0	\$245,979,000	\$1,186,093,000
Undisclosed	\$5,910,277,000	Defense	\$4,197,440,200	\$5,400,091,000	\$9,597,507,200	\$0	\$0	\$0	\$9,597,507,200
		Energy & Water	\$1,023,285,000	\$188,950,000	\$1,192,235,000	\$2,145,396,000	\$2,875,351,384	\$370,148,000	\$6,383,130,384
		Financial Services	\$65,000,000	\$0	\$65,000,000	\$0	\$0	\$0	\$65,000,000
Presidential Earmarks	\$24,708,594,852	Romaneal Security	\$26,103,564	\$0,000,000	\$1,026,088,000	\$1,026,088,000	\$144,000,000	\$0	\$4,201,281,864
Pres Sold	\$9,099,667,595	Interior	\$322,805,040	\$0	\$322,805,040	\$210,464,000	\$108,595,000	\$0	\$992,944,040
With Member(s)	\$11,723,476,257	Labor-HHS-Education	\$772,301,010	\$0	\$772,301,010	\$18,648,431,000	\$198,788,000	\$0	\$892,736,010
Pres Sold (Und.)	\$885,361,000	Legislative Branch	\$200,000	\$0	\$200,000	\$0	\$0	\$0	\$200,000
		Military Construction	\$1,100,286,000	\$0	\$1,100,286,000	\$6,378,617,000	\$7,648,431,000	\$0	\$14,525,234,000
		State-Foreign Operations	\$0	\$0	\$0	\$0	\$0	\$0	\$0
		Transportation and Housing & Urban Development	\$1,210,411,034	\$153,220,000	\$1,363,631,034	\$274,620,595	\$1,080,003,073	\$169,432,000	\$3,292,768,502
			\$10,021,984,648	\$5,910,277,000	\$15,932,261,848	\$9,099,667,595	\$11,723,476,257	\$885,361,000	\$27,640,766,700

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cutting less than \$50 billion a year is small in scope. Ironically, the debate over earmarks has dominated discussion in Washington about controlling spending.

Additionally, advocates for earmarks argue that a ban on earmarks would not result in even modest deficit savings. They make this argument based on the fact that appropriations committees are given limits on spending. Thus, when earmarks are inserted into an appropriations bill, they must come out of other spending in the legislation.

Some fear that banning earmarks, without creating significant leaps in general spending transparency, could create perverse outcomes, pushing deal-making behind closed doors. For instance, members of Congress may lobby the executive branch itself. Federal agencies have some discretion when awarding federal funds, although they are often bound by many needs- and performance-based considerations. However, members of Congress can try to influence the awards process by sending letters to federal agencies requesting projects in their districts, a practice called "[lettermarking](#)." While it is unclear how influential the practice is, lettermarking is not bound by any disclosure process beyond Freedom of Information Act (FOIA) requests, making it almost impossible to track. Part of the Jack Abramoff scandal [involved lettermarking](#), with the lobbyist making donations to members of Congress who would contact federal agencies on behalf of his clients.

The end result for the district is the same, with or without earmarks: the district receives federal funding. However, lettermarking is far less transparent than not-so-transparent earmarks. The Center for Public Integrity (CPI) [recently released letters](#) showing that members of Congress were directly lobbying federal agencies for Recovery Act projects in their districts. Such letters normally never see the light of day, and CPI had to go through a long FOIA process to obtain them.

Congressional lobbying efforts around Recovery Act projects show that even without earmarks, lawmakers will still try to win federal funding for their districts. Without earmarks, lawmakers' lobbying efforts are simply forced into other channels, which are rarely affirmatively disclosed.

While an outright ban on earmarks is controversial, there seems to be widespread support for improved transparency of the earmarking process. Right now, it would be fairly easy for Congress to create a [framework that tags and tracks earmarks](#). In fact, Jerry Brito of the Mercatus Center at George Mason University; Jim Harper, the webmaster of WashingtonWatch.com (and Director of Information Policy Studies at the Cato Institute); and Gunnar Helleckson of Red Hat have created a website with a proposed method for cataloging all earmarks. They argue that their organizational framework provides all the information advocates need to know about the proposed spending. They also note that advocates widely agree on the need for transparency, even as there is dissension over whether to ban earmarks.

Retiring Sen. Christopher Bond (R-MO) argues that politicians who know the needs of their home states are better positioned to make spending decisions than "unknown, unaccountable bureaucrats" from Washington. He also indicates that most politicians want to disclose information about earmarks. "I disclose what I'm going to ask for," he said. "I brag about it

when I get it. I answer any questions about it. Does a bureaucrat do that with any money they send? No.” With many members of Congress just as willing to disclose the earmarks they obtain, it should be relatively simple for Congress to bring transparency to the earmarking process, a reform that would likely be far more meaningful to fiscal discipline and government openness than an outright ban on earmarks.

Whither Transparency in the Next Congress?

When the 112th Congress convenes in January, attention will be focused on the newly Republican-controlled House. On transparency issues, House Republican leaders have sounded positive tones. However, it remains to be seen whether bipartisan consensus on meaningful transparency can be achieved or whether transparency will be wielded as a partisan weapon.

Undoubtedly, divided party control of Congress will mean a more adversarial relationship between Congress and the White House and between the House and the Senate. What remains unclear, however, is whether Republicans will support the administration's many positive efforts to improve transparency while criticizing the instances where it has fallen short or dragged its feet. The House could also fall prey to the political theater that often occurs when parties in divided government compete for the public spotlight.

Past is Prologue: The 111th Congress

While the years of the 111th Congress saw the launch of new transparency measures, many were executive efforts of the Obama administration rather than acts of Congress. Congress played little role in the [Open Government Directive](#), the [Attorney General's memo](#) re-establishing a presumption of openness under the Freedom of Information Act (FOIA), or the [executive order](#) reforming the controlled unclassified information (CUI) system.

Congress was also not involved in White House efforts to [modify disclosure under the Presidential Records Act](#), to [address overclassification and declassification](#), to [establish a searchable website of White House visitor logs](#), or to post [the president's](#) and [vice president's](#) schedules online. Nor has Congress engaged in the Obama administration's actions to hire a chief technology officer and a chief information officer, to make better use of social media, or to create various dashboards such as the [IT Dashboard](#).

However, Congress did advance some transparency policies. The Recovery Act set [new precedents for spending transparency](#). After initially granting a broad FOIA exemption to the Securities and Exchange Commission (SEC) in the financial reform bill, Congress moved quickly to [rein in the exemption](#). Bills to [reduce overclassification in the Department of Homeland Security](#) and [improve the clarity of government documents](#) also passed. With the exception of the Recovery Act, all of these provisions had bipartisan support.

Some additional transparency bills have passed one house of Congress but not the other, including [whistleblower protections](#), [faster FOIA processing](#), [campaign finance disclosure](#), and a

[media shield law](#). Congress could yet act on those bills when it returns for the remainder of the lame-duck session after Thanksgiving.

Promises to Keep: The *Pledge to America*

The House Republicans' pre-election governing document, [A Pledge to America](#), promised transparency in a Republican Congress. Promisingly, when asked if he supported any parts of the *Pledge*, [President Obama pointed to transparency](#) as common ground. However, as described in [OMB Watch's analysis](#), the *Pledge* only offered one specific transparency proposal: "Read the Bill," which would require that the text of a bill be published online for three days prior to a vote.

At the same time, it should be noted that the *Pledge* calls for sharp reductions in spending. Transparency initiatives are not cost-free, although they often save money over time because of improved efficiency for agencies. Inadequate resources are often cited as reasons for limited or delayed implementation of transparency projects. For instance, the Office of Government Information Services, a sort of FOIA ombudsman housed in the National Archives and Records Administration, [has only seven staff](#). By comparison, the Scottish Information Commissioner, which plays a similar role in Scotland, [employs 24 staff](#) – for a country with a population comparable to Minnesota. Planned Republican budget cuts could further tighten the squeeze on funding for open government measures.

New Leadership, New Sheriffs in Town

Several key leaders of the House Republicans have been supportive of transparency improvements both for the House itself and for the executive branch. Minority Leader John Boehner (R-OH), whom House Republicans have selected as the next speaker, has supported some transparency reforms, including [the Open House Project](#) and others [as noted in OMB Watch's Pledge analysis](#). Rep. David Dreier (R-CA), currently ranking member on the Rules Committee, wants to [broadcast the committee's meetings](#), something most other House committees already do.

The head of the 22-member House Republican transition effort, Rep. Greg Walden (R-OR), has discussed the importance of improving transparency in all House activities, which he hopes will strengthen governance. While many have expected the new leadership to do away with the Office of Congressional Ethics, the relatively new office that has been very effective in reviewing allegations of ethics violations, Walden has said that has not been the focus of his work. He [told ABC News](#), "Our focus on the transition is looking at other things that are much more important. And that is how the House operates, how to open it up. We're not focused in on the ethics side of things at all."

Additionally, Republicans will now hold the chairs of House committees and the accompanying subpoena power. Republicans have pledged vigorous investigations of the Obama administration. The question is, will the investigations shed more light on government operations or simply create more heat and partisan bluster?

The House Oversight and Government Reform Committee, which will be chaired by Rep. Darrell Issa (R-CA), will likely convene several of these investigations. Issa is co-chair of the Transparency Caucus and recipient of the Project On Government Oversight's [2010 Good Government Award](#). As the current ranking member on the committee, Issa released a [report](#) warning of "an oncoming tsunami of opacity, waste, fraud, and abuse" and calling for vigorous congressional oversight as a solution.

Issa has spoken out in favor of a number of transparency reforms. For instance, Issa played a leading role in calling attention to the SEC FOIA exemption. He has also called for [providing public data in standardized formats](#), investigated the use of [personal e-mail addresses by government officials to discuss public business](#), and advocated for [greater investigative powers for inspectors general](#).

However, Issa has also voiced strongly partisan complaints, which could distract from meaningful transparency and accountability if allowed to dominate the committee agenda. His report on ["propaganda" by the Obama administration](#) included what *Politico*'s Ben Smith called a ["totally unsupported claim."](#) A [GAO investigation](#) requested by Issa disagreed with the report's claims that the Department of Health and Human Services misused funds to produce propaganda. Issa also pledged to [investigate the "Climategate" dust-up](#), despite several investigations that cleared the scientists involved of any wrongdoing.

Other incoming committee chairs have pledged their own investigations. Rep. Ron Paul (R-TX), currently the ranking member on a Financial Services subcommittee, [vowed to audit the Federal Reserve](#) if he assumes the chairmanship. Rep. Ralph Hall (R-TX), who now serves as ranking member on the Science and Technology Committee, called for [strong oversight of scientific integrity](#). In contrast, other [reports of possible Republican investigations](#) suggested that more partisan investigations may be in store.

Advocates Meet to Invigorate Environmental Right-to-Know Policies

Nearly 100 public interest advocates from around the country recently convened in Washington, DC, to build an agenda for improving the public's right to know about environmental and public health threats. Advocates for public health, safety, and the environment met to develop federal policy proposals that would enhance government engagement with communities and improve access to information crucial to protecting the public. The emerging agenda seeks to capitalize on recent openness initiatives by the federal government and the Obama administration's efforts to improve government transparency, participation, and collaboration.

The conference, hosted by four foundations and organized by OMB Watch, brought together representatives from labor, environmental, public health, and environmental justice organizations, as well as academia, the media, and open government groups. Part of a nearly year-long project dubbed the Environmental Information Initiative, the event allowed

participants to collaborate on defining what information needs and obstacles they face and identify what federal policy changes would help resolve these issues.

Despite the broad range of environmental and public health issues tackled by the diverse organizations, the meeting participants concurred that greater government transparency is essential to all of their respective missions. Participants agreed that with more information and better access to policymakers, communities are better equipped to protect their health and the health of their workplaces and ecosystems.

The conference looked at specific policy recommendations to improve the amount of, access to, and quality of information publicly available. Participants also reviewed proposals for empowering communities – especially minority and low-income communities – to use the information and have a voice in policymaking.

Among the topics considered at the environmental right-to-know meeting, the generation and disclosure of information on the identity and health risks of chemicals in use, as well as potentially safer substitutes, proved to be a major concern. With [more than 84,000 chemicals](#) manufactured or processed in the U.S., plus additional chemicals found in foods and food additives, pesticides, drugs, and cosmetics, understanding the potential ecological and human health impacts of so many substances presents an enormous information challenge.

However, the information needs identified by the public interest advocates extend far beyond industrial chemicals. The conference also addressed the need for access to enforcement and compliance information to hold regulators and industries accountable, the need for more monitoring of ecosystem health and wildlife populations, and better data on the demographics of impacted communities to better protect against environmental injustices, among many other needs.

Recognizing that information access alone is insufficient, participants also worked to craft policy solutions that would provide tools and opportunities that equip citizens to play an active role in protecting environmental and public health. Proposals were considered that would provide information in plain language that the public can understand and to develop methods for identifying and including the fullest range of stakeholder voices.

The Obama administration, which has made improving executive branch openness a priority, also was represented at the conference. White House policy advisor Steven Croley and EPA Chief Information Officer Malcolm Jackson addressed the gathering and took questions from the audience; they were followed by a panel of career civil servants from three agencies working on transparency initiatives. The officials reviewed several of the administration's recent open government initiatives, setting the stage for the subsequent conversations on how to move the administration's transparency agenda forward and address environmental concerns. These actions have opened a window of opportunity to advance a proactive agenda to create the federal policies and processes needed to improve public access to information, giving communities a strong voice in the decision making process.

Conference Themes

Several overarching themes emerged from the deliberations. The participants strongly felt that the concerns of environmental justice communities need to be more fully incorporated into agency activities and decision making. The needs of low-income and minority communities that are impacted disproportionately by environmental threats should be made a much higher priority. Efforts to improve environmental right to know should also take into account the unique needs of workers and workplace safety, as well as populations that are especially vulnerable to public health threats, such as pregnant women, children, and the elderly.

The issue of government efficiency that may be gained through greater transparency was raised repeatedly during the conference. Agencies themselves use information to meet their statutory obligations, and government workers frequently encounter the same obstacles to finding and understanding information encountered by the public. Improved information access would improve government efficiency, reduce costs, and produce better policy outcomes. Conference participants also asserted that consumer markets would benefit from more information, such as information on the health and safety of chemicals and their substitutes. Information empowers consumers to push for the adoption of safer products and cleaner industrial processes.

Additionally, conference participants want the federal government to be a leader and push states to adopt policies that lead to more transparency and community engagement. This federal leadership should include demonstrating the adoption of best practices, including those formulated and used by the states. Several states have implemented successful policies that exceed federal open government requirements. The conference participants want the federal government to incorporate such policies as models for the development of broader federal policies.

Finally, participants also widely called for more geographic information from the government. The ability to use maps to track environmental progress, monitor threats, and identify new concerns is crucial to protecting the public. Geographic data allow researchers to monitor water and air quality, give communities tools to fend off polluting industries, and help policymakers identify populations impacted by environmental degradation.

Environmental Right to Know in Action

Participants provided numerous examples highlighting how information and the public's right to know about health threats are being used to push for safer and healthier communities. For example, the [Center for Health, Environment, and Justice](#) (CHEJ), a nonprofit advocacy group, recently released findings from a report commissioned to educate consumers about unsafe chemicals found in children's toys. The report, [Toxic Toys R Us](#), commissioned by CHEJ and the International Brotherhood of Teamsters, is part of an effort by CHEJ and others to hold toy manufacturers and retailers accountable for the safety of the products they provide.

Focusing on the giant retailer, Toys R Us, the report found that almost three-quarters of the company's toys tested contained high levels of chlorine, indicating that they were likely made

with PVC, a toxic plastic and a potential health risk for children. One-fifth of tested toys contained tin, indicating the likely presence of toxic organotins. Toy packaging also was found to contain chlorine and tin.

Similarly, the [Campaign for Safe Cosmetics](#), a coalition effort by numerous nonprofit groups, uses government, industry, and academic databases of hazardous chemicals to inform consumers about chemicals of concern in cosmetics like shampoos and lipsticks and to push for safer products.

Participants also cited examples of efforts to improve public participation as a means to improving health and safety protections. Labor organizations recently secured from the U.S. Environmental Protection Agency (EPA) [an agreement](#) to engage employees and their union representatives during environmental inspections of the nation's most dangerous industrial facilities under the Clean Air Act.

The public interest organizations represented at the conference agreed to continue to develop the policy recommendations and work for their implementation. A public release of the finalized recommendations is planned for early 2011.

Food Safety Bill Starts, Stalls in First Week of Lame-Duck Session

The U.S. Senate, hampered by politics and process, recently failed yet again to pass food safety reform legislation. The Senate is in the process of considering both related and unrelated amendments to the bill during the lame-duck session.

The bill cleared a key procedural hurdle when, on Nov. 17, the Senate voted [74-25](#) to limit debate (60 votes are necessary to invoke debate-limiting cloture), setting the stage for a final vote. The Senate debated the bill through Nov. 18 but was unable to bring the bill to a vote before breaking Nov. 19 for the Thanksgiving holiday. The Senate is expected to continue debate and to hold additional votes when it returns Nov. 29.

Senate leaders resolved concerns raised by Sen. Jon Tester (D-MT) over the bill's impact on small farms. Tester had offered an amendment aimed at exempting small farms, defined as those that sell their products directly to consumers or restaurants and that have sales of less than \$500,000 per year, from food safety inspections. The final version of the amendment would allow inspections if the small farm is tied to a foodborne illness outbreak.

Another hurdle was avoided when Sen. Dianne Feinstein (D-CA) backed away from her pledge to push an amendment banning bisphenol-A (BPA), a chemical found in plastics and other products, from baby bottles and sippy cups. "Unfortunately it has become clear that the American Chemistry Council has blocked and obstructed the agreement from being added to the Food Safety Bill currently on the floor," Feinstein said in a [statement](#). Studies have linked exposure to BPA to developmental disorders, cancer, heart diseases, and other health problems.

Sen. Tom Coburn (R-OK) continues to be the bill's leading opponent. He objects to the additional regulations and spending the bill would require. (The Congressional Budget Office [estimated](#) the bill would neither increase nor decrease the federal deficit.) Coburn has offered his own, weaker food safety bill as an amendment that would replace the current bill. A [summary](#) of the amendment says "government is the *problem* with our disjointed and ineffective food safety system, not the *solution*."

Coburn is also demanding a vote on an amendment to ban spending earmarks through FY 2013. The amendment is expected to be taken up when the Senate returns.

The food safety bill is the top item on the Senate's agenda for the week after Thanksgiving, according to Senate leadership. The Senate's first order of business is expected to be a cloture vote on Sen. Tom Harkin's (D-IA) substitute amendment, which combines the existing bill with the Tester amendment. If agreed to, the substitute amendment would essentially replace the bill.

The Senate would then vote on four amendments: Coburn's substitute amendment and earmark amendment and two similar amendments offered by Sens. Max Baucus (D-MT) and Mike Johanns (R-NE) that would repeal a controversial section of the health care reform law that requires businesses to report to the Internal Revenue Service contractor income and other income items over \$600.

After the amendments are considered, the Senate can move to a vote on final passage.

The food safety bill, [S. 510](#), the FDA Food Safety Modernization Act, would expand the regulatory authority of the Food and Drug Administration (FDA). Among other things, the bill would give FDA the authority to order firms to recall contaminated foods (a power it does not currently have) and would require the agency to conduct more frequent inspections of food facilities.

Food safety advocates support the bill, citing the need to reduce the number and severity of foodborne illness outbreaks such as this year's salmonella outbreak that sickened more than 1,600 people and led to the recall of 500 million eggs. Many large farm and food retail organizations support the bill, as well.

The Senate Health, Education, Labor, and Pensions Committee unanimously [approved](#) the food safety bill in November 2009, but the legislation awaited floor consideration throughout 2010 while the Senate dealt with other priorities such as health care and financial reform. Five Republicans on the committee, including Coburn, voted against the Nov. 17 cloture motion.

The House of Representatives [passed a similar bill](#), H.R. 2749, in July 2009. The House bill enjoyed strong bipartisan support, with 54 Republicans joining 229 Democrats in voting "aye."

Rather than reconcile the two bills in a conference committee, a process that would require each chamber to hold another vote on the compromise bill, the House could opt to take up the Senate version. Rep. Henry Waxman (D-CA), chair of the House committee with jurisdiction over the

bill, suggested he would be open to passing the Senate's version, [according to *The Wall Street Journal*](#). If the current Congress cannot pass a final version and send it to President Obama for his signature by the end of the year, the new Congress will need to restart the legislative process.

E-rulemaking Legislation Seeks Greater Transparency and Participation

On Nov. 17, Sens. Joseph Lieberman (I-CT) and Susan Collins (R-ME) introduced a bill that would expand public participation and transparency in the rulemaking process by improving aspects of the current electronic rulemaking (e-rulemaking) system. The bill would enhance technical aspects of the current federal system, encourage agency experimentation, and allow the public to track rules and better contribute to agency decisions.

E-rulemaking was one of the government's many initiatives created by the E-Government Act of 2002. The government developed Regulations.gov, the central public portal for viewing and commenting on agencies' rules. Several problems have afflicted the e-rulemaking initiative over the years, including differences in the ways that agencies submit similar information, unreliable searches, and a funding structure that prevents agencies from fully utilizing Regulations.gov.

The bipartisan legislation, the E-Rulemaking Act of 2010 ([S. 3961](#)), addresses many of these shortcomings while maintaining the current system as the core of a redesign. According to a [press release](#) issued by the two leaders of the Homeland Security and Governmental Affairs Committee (HSGAC), "The new bill addresses inconsistencies, impediments to open communication, and policy issues that have slowed progress toward a robust, publicly-accessible rule-making process."

For example, the current system is financed by a fee-for-service approach that is a disincentive for agencies to use Regulations.gov. The more participating agencies use the central system, the more it costs them. The Lieberman-Collins bill would authorize a stable appropriation of \$10 million annually through 2015 for "maintenance, improvement, and promotion of the e-rulemaking system," and end the fee-for-service funding model. Instead, agency funds could be used for improving agency websites and experimenting with innovative approaches to e-rulemaking.

The bill also proposes changing the management and governing structure of the current system. The bill would create an interagency committee that would oversee the daily operations of the system; act as the liaison to agencies, through which agencies could propose new capabilities and improvements; and help develop recommendations for the online disclosure of regulatory information to the Office of Information and Regulatory Affairs (OIRA) and the Office of Electronic Government, both offices within the Office of Management and Budget (OMB).

In addition, the bill calls for the creation of a public advisory committee made up of regulatory experts and information access experts. The committee would advise and consult with the government officials overseeing the system and would be the mechanism through which public

users of the e-rulemaking system could share ideas about the most effective practices. The committee would also provide to congressional oversight committees a report outlining existing "obstacles to achieving e-rulemaking goals" and potential solutions. The advisory committee would terminate two years after its formation, unless extended by the president.

Lieberman and Collins also called for reform to the system's architecture – how the data and processes are constructed. The bill calls for broad goals intended "to achieve significant improvements." Data standards, new tools, and information retrieval and exchange processes need to be accurate and consistent, the bill says. The bill concludes that new guidelines need to be issued, for example, to help the system achieve transparency and usability of information, to ensure that agency websites and the central core of the system are interoperable, and that the system is flexible enough to evolve as technology and practices demand.

The bill reflects many of the changes proposed in a major 2008 study of the strengths and weaknesses of the current system. That [report](#), *Achieving the Potential: The Future of Federal e-Rulemaking*, was written under the auspices of the American Bar Association (ABA) by regulatory and open government experts from outside the government. The authors wrote the report to provide the administration and Congress with a comprehensive roadmap for reforming e-rulemaking.

OMB Watch, which participated in the ABA study, supports the Lieberman-Collins bill. "The public has a right to participate in the regulatory process," said Gary Bass, OMB Watch Executive Director, "and e-rulemaking reform holds the potential to make the process more transparent and more participatory."

Passage of the bill in the lame-duck session of Congress is doubtful. Even if HSGAC approves the bill and the full Senate passes it, no one has introduced a companion bill in the House. The House could adopt the Senate bill and move it quickly, but most observers expect Congress to focus only on spending bills and a few high-priority bills (see the related article in this issue on [food safety](#)) during the current lame-duck session.

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The Watcher

December 14, 2010

Vol. 11, No. 22

2010 Year-in-Review Edition

Fiscal Stewardship

[Customer Reviews of the Year in Federal Fiscal Policy](#)

Government Openness

[The Teas of Transparency](#)

Protecting the Public

[Corporate Failures Not Enough to Trigger Meaningful Regulatory Change in 2010](#)

Customer Reviews of the Year in Federal Fiscal Policy

Fiscal policy determines a lot of things in your daily life. From the number of food inspectors that USDA can employ, to the availability of FBI agents to track down suspected terrorists, to the quality of the roads you drive on, fiscal policy is what makes this country tick. If you were running a country and were shopping around for fiscal policies, would those proposed in 2010 by Congress and President Obama be the first ones you'd grab off the shelf? Before you buy, you may want to consider what other customers thought about the Fiscal Policy of the United States of America in 2010.

* * *



Fiscal Policy of the United States of America in 2010[Used]
by [United States Congress](#) & [President Barack Obama](#)



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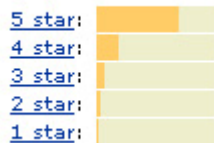
From United States Congress & President Barack Obama, 2010 Fiscal Policy of the United States of America determines a lot of things in your daily life. From the quality of the roads you drive on, to the availability of government services in your hometown, to the ability to understand what is going on in the entire fiscal process, Federal Fiscal Policy is important. This year, we have done great things with fiscal policy! We've made huge strides in spending transparency, contracting transparency, and government performance. We have yet to perfect the spending process or zero in on the perfect spending levels, but we are working on it.

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Really Helpful Reviews

89 of 100 people find this useful:

☆☆☆☆☆ **Its spending process is as broken as my first marriage**

By BipartisanBlues535 (Des Moines, IA)

Ugh, why can't Congress ever pass the yearly federal budget on time? It's honestly one of the worst things about this year. Things were working okay when I first got it, but this year, the spending process completely broke down. Congress hemmed and hawed, dragging its feet on every aspect of the budget process, as congressional Democrats apparently couldn't get it together. They never [were able to agree](#) on overall spending levels, which meant no joint budget resolution. The House totally whiffed on passing a budget resolution (instead passing "the functional equivalent" of one), the first time it hasn't passed a budget resolution since the modern budget process was created in 1974.

Even worse, Congress did not pass any appropriations bills. None!!! At all! Usually by the start of the fiscal year, Congress would have passed at least some of the spending bills. Like one or two non-controversial ones, such as one for Agriculture or one funding the Legislative branch. But no, the House [only passed two](#) and the Senate didn't vote on any. So we're now almost three months into fiscal year 2011 and do not have a budget. What a joke. Now Congress is [trying to pass](#) either an omnibus or a year-long continuing resolution, but it's not clear if either will ever pass.

I gave this year zero stars because, honestly, I can't think of how it could be any worse. I mean, I guess they could have not even tried... [Government shutdown](#), here we come!

218 of 435 people find this useful:

☆☆☆☆☆ **but why r the spending levels soooo low???**

By DeficitHawkHuntr (Florence, MA)

You'd think with Congress taking so long, the budget would at least be large enough to protect the public, provide an important safety net for working families, and maintain the myriad services that all Americans depend on, right? WRONG. It seems like every time Congress debated spending, they were only talking about cutting, especially when it came to non-security discretionary funding, which is most of the human needs budget. First, in February, President Obama [put forward](#) an FY 2011 budget that included a three-year non-security discretionary freeze (what, security spending is better than everything else?). Then, two senators tried to set [draconian discretionary spending caps](#), which would have slashed non-security spending by 15 percent in FY 2012. Although legislators thankfully voted the caps down, the margin was [too close for comfort](#). More recently, the President's Deficit Commission came out with [its plan to reduce the deficit](#), which slashed federal spending and the federal work force. Double whammy!

Now, in the lame-duck, they're trying to pass some kind of spending bill, but it'll probably be at the FY 2010 level or below, meaning a cut in real dollars. We need more government spending, not less. Talk about disappointing!!!! I would not buy this again.

36 of 49 people find this useful:



Fiscal transparency isn't great, but way better than the 2009 model!

By hughesad313 (Los Angeles, CA)

Not bad. I was hoping for [full multi-tier reporting](#) in the Recovery Act, where anyone who touches at least \$25,000 of federal money has to report on how they used it. But while I didn't get it, the Obama administration did manage to enable [sub-award reporting](#) for [USAspending.gov](#), the website for all federal contract, grant, and loan spending. Now we can see further down the money trail than ever before, although hopefully the administration will go to full multi-tier soon!

Also, Congress used Recovery.gov for non-Recovery Act spending, which is an interesting development. Maybe they'll start extending Recovery Act reporting requirements, such as [recipient reporting and actually useful narrative fields](#), to all federal spending? The Troubled Asset Relief Program (TARP) did better [fiscally](#) than expected, but wasn't a hit as far as [transparency is concerned](#). The Federal Reserve refused to [disclose its recipients](#) until it was forced to by a court.

On my wish list for 2011 is improving [data quality](#) on USAspending.gov, which is not great right now. I'd also love to see it integrate [other data sets](#), like campaign contributions or the [text of contracts](#). Then I'd add a couple stars to my review. But all in all, the manufacturer is definitely proving that it's learning its lessons when it comes to fiscal transparency. Can't wait for the 2011 model!

123 of 456 people find this useful:



Sen. Landrieu is a Lew-ser

By LandrieuWatch52 (New Orleans, LA)

This isn't really about 2010's fiscal policy, but I've just got to rant here. Back in June of this year, Peter Orszag, Obama's OMB director, [stepped down](#) after almost two years on the job. Obama picked Jack Lew, one of President Clinton's OMB directors, to replace Orszag. Everyone loved Lew, and he cruised through [two Senate hearings](#) and easily passed two committee votes. Since Lew had presided over the last period of budget surplus, it was assumed he'd be a valuable asset given the current budget problems.

But, just as everything was looking good, a senator from Obama's own party, Sen. Mary Landrieu (D-LA), [placed a hold on Lew](#)! Landrieu objected to the administration's deepwater

drilling moratorium, so she wanted to make sure she was being heard. And she certainly got the administration's attention. After a month or so, Obama gave in and [agreed to drop its moratorium](#). But Landrieu still refused to let the Senate vote on Lew! What the heck?

Landrieu finally [agreed to drop her hold](#) when the administration promised to allow more drilling permits, among other things. When Lew came up for a vote that very night, the Senate approved his nomination unanimously, proving just how popular he was. Just goes to show you how broken the Senate is.

72 of 104 people find this useful:



Federal Tax Policy. What Federal Tax Policy?

By WhyDoTheRichGetToKeepAllTheirMoney (New York, NY)

Where to begin with this thing? When Congress convened at the beginning of the year, it knew that the Bush tax cut provisions would expire in twelve months' time. What did Congress do about it? Zip. It had already [allowed](#) the temporary expiration of the estate tax to come down to the wire and [failed](#) to do anything about it at the end of last year, so you would think that members would have kept that in mind with the rest of the Bush tax cuts. BUT NOOOOOOOO! They decided to let the issue drag on, and when it seemed like a perfect opportunity to deal with them right before the midterm elections, Democrats punted, deciding to take up the tax cut issue in the lame-duck session.

Where do we stand now? Well, the president just reached a compromise with the Republicans and had to give them [EVERYTHING](#) they wanted just so the government could help out poor and unemployed people. So take a guess as to why I'm not so hot on this.

Oh, and it's not like the rich can't afford to chip in a little more, either. In February, the IRS released [data on the 400 richest taxpayers from tax year 2007](#), and a blogger at the *Wall Street Journal* [noted](#) that these richest of the rich were worth three times (!) as much as they were in 1992 (and yes, that's adjusting for inflation) and paid an effective tax rate of just 16.6 percent. Over this same time period, the average income of the middle class increased by just 13 percent, and even the richest five percent, who aren't exactly poor, only saw a 27 percent jump in average income (when adjusted for inflation).

254 of 377 people find this useful:



Federal Contracting Not Flushing as Much Taxpayer Money Down the Toilet

By xxNorthrupGrumblingxx (St. Louis, MO)

This was a little good and a little bad. First the good. The Commission on Wartime Contracting continued to [call out](#) the cheaters, schemers, and crooks within and without the government

contracting racket. The administration also continued to follow through with the president's prescriptions laid out in his March 2009 contracting memo. The administration [reduced](#) no-bid and high-risk federal contracts and began taking the [first steps](#) toward making government contracts [universally recognizable](#) across government, which will allow the public to see what's going on.

And now, the bad. The International Stability Operations Association (ISOA) decided to put together a [code of conduct](#) that it said it will hold security contractors to and supposedly all the problems in that industry will go away. I'm not holding my breath. Also, the administration kept dragging its feet on [implementing](#) a high-road contracting policy that would really help the government get quality and affordable work from its contractors. Maybe [next year](#).

199 of 301 people find this useful:



Tough to Measure that Government Performance, but Getting Easier

By pencilpusher79 (Arlington, VA)

I've got to say that I was kind of impressed with this. Not only did the administration implement quite a few no-nonsense solutions within the [IT realm](#) – which will lead to better and much less wasteful spending on the basics that allow the government to operate in this digital age – but it put together systems to [crack down](#) on improper payments and contractors who avoid paying their taxes. The efforts, which are part of a larger package begun by the administration called the [Accountable Government Initiative](#), are designed to bring greater accountability and transparency to the federal government. Also, the administration began the process of [making more contracting information available](#).

The only minus was that the administration's [effort](#) still hasn't reformed the definition of "inherently governmental," and a federal pay freeze is really going to hurt efforts to beef up the procurement workforce with quality candidates and keep them in the government. All in all, though, things could be worse.

451 of 507 people find this useful:



Earmark bans aren't the answer

By P0rkUlus

Look, I happen to think a few bucks to study volcanoes might be well worth the \$ should [Yellowstone](#) blow, so I can't say I really hate the pork. Even if you're not a fan of [teapot museums](#), I really don't understand your hyperventilating over this tiny bit of the budget (a measly one percent!). It seems like every year someone is calling for a ban on them. This year, congressional Republicans finally [made good on a campaign promise](#) and [agreed to not request any earmarks for the coming fiscal year](#). Although, it looks like some Republicans are trying to get around the ban by redefining what an earmark is. You want "out-of-control" and non-

transparent spending? Take a [peek at the Pentagon's checkbook](#).

The Teas of Transparency

2010 was a banner year for government transparency, with many significant advances and only a few disappointments. However, there were other events outside the world of government openness that seeped into the collective consciousness, and one of the most notable was the rise of the Tea Party in American politics. For this year-in-review article, we decided to take a somewhat tongue-in-cheek approach to assessing and commenting on events in government openness, playing off the theme of tea. Thus, we present to you ... the Teas of Transparency.

Double-Brewed Tea

At the very end of 2009, the Obama administration [released](#) the Open Government Directive (OGD), which included an aggressive timeline of deliverables for 2010. This year, the OGD work received intense support and energy from both the White House and federal agencies. White House officials have overseen a robust interagency working group on open government that has as much interest and involvement at the end of the year as it did at the beginning.

Most agencies kicked off their 2010 OGD work by launching new Open Government [webpages](#) and engaging the public in [online discussions](#) to gather ideas on improving transparency, public participation, and collaboration. Then, on April 7, dozens of agencies across the federal government [released](#) their open government plans. Overall, the plans were heralded as a [major leap forward](#) for open government, even as some inconsistencies and disappointments were noted about particular aspects of individual plans.

The open government community moved fast to evaluate the agency plans. An effort coordinated by [OpenTheGovernment.org](#) had reviewers compare each plan against the specific requirements established by the OGD. The [evaluation](#) found some exceptional plans but noted that most plans needed at least some improvement. Many agencies incorporated much of this feedback and quickly produced updated plans that addressed many of the issues raised by the access advocates. These improvements were recognized with [improved evaluation scores in a second round of scoring](#) by access advocates.

During the latter half of 2010, agencies turned their focus from planning to implementation, with online tools and policies continuing to roll out from various agencies. The emphasis was on data disclosure under the OGD and contributed significantly to the explosion of datasets posted on [Data.gov](#), which now houses more than 300,000 datasets. Critics have raised concerns that agencies are not focusing on high-value datasets and that Data.gov is not designed for the average user, creating less enthusiasm for the hard work agencies have done on the OGD in 2010.

Slow-Brewed Tea

In November, President Obama signed a new [executive order](#) on controlled unclassified information (CUI), reforming the system of safeguarding information that is not classified but is still considered "sensitive." The order was praised by many government openness advocates. Previous practices for handling CUI stymied public access and inhibited information sharing inside government.

The new executive order establishes CUI as the sole system for controlling unclassified information, replacing an ad hoc system developed by agencies without clear public definitions or meaningful oversight. By May 2011, the National Archives and Records Administration (NARA) will establish government-wide procedures for CUI. Agencies will submit proposed CUI categories for review by NARA, citing a specific basis in statute, regulation, or government-wide policy. By November 2011, NARA will publish a list of the approved categories, including their definitions and associated procedures. Any future categories would also have to be approved by NARA. The order also makes clear that designating information as CUI does not exempt it from disclosure under the Freedom of Information Act (FOIA).

It took the administration almost the entire year to issue the CUI order, and while transparency advocates were pleased with the content, many important details remain to be worked out. We believe CUI is slow-brewed tea, and we'll find out in 2011 if it is weak or strong.

Tea that Shall Not Be Named

The Obama administration continued to assert the state secrets privilege in court cases in 2010. In September, the administration moved to dismiss [Al-Aulaqi v. Obama](#), a case regarding an American citizen allegedly targeted for killing by the government. The court did dismiss the case in December but did not rule on the government's state secrets claim. In 2009, Attorney General Eric Holder issued a [new policy](#) reforming the procedures for asserting state secrets claims. The reforms included a narrowing of the use of the privilege to specific evidence and limiting its use to dismiss whole cases. In the *Al-Aulaqi* case, the government stated that it had complied with these new policies. [Legislation to reform the state secrets privilege](#), introduced in 2009, did not move in 2010.

The Price of Tea in China

Spending transparency was also a major theme throughout 2010. [Recovery.gov](#) continued to provide transparency to over \$200 billion in federal stimulus spending with regular data updates, site improvements, and a shift to new cloud computing on the backend. [USAspending.gov](#), the government's main site for disclosing federal spending, received a major upgrade and a new interface in 2010. In October, USAspending.gov also began providing information from grant and contract recipients and sub-recipients for the first time since its launch. This upgrade, which had been intended since the Federal Funding Accountability and Transparency Act of 2009 required the creation of the site, had proven too difficult to

accomplish until the new reporting improvements established under the Recovery Act provided a successful model.

Of course, spending transparency isn't just about the numbers, it also depends on the quality of those numbers. The Sunlight Foundation launched a new site, [Clearspending](#), that revealed significant inconsistencies between spending being reported in USAspending.gov and the Catalogue of Federal Domestic Assistance. Quality of spending data was already on the government's agenda. In February, the White House issued a [framework](#) for federal spending data quality requiring agencies to finalize plans by May 14. Initially, few of the [agency plans](#) seemed to be available online, but most agencies have now published them to their websites.

Darjeeling Tea

Speaking at the United Nations (UN) in September, President Barack Obama moved beyond domestic transparency efforts like the OGD and the CUI executive order and called for [improved government openness worldwide](#). He challenged UN members to return in 2011 with "specific commitments to promote transparency; to fight corruption; to energize civic engagement." Exactly how the administration will follow up the president's call remains to be seen, but one hint came in November, when the U.S. and India announced a [Partnership on Open Government](#) to share experiences.

Spilled Tea

The whistleblower website Wikileaks sparked intense controversy this year. In April, the website released a [classified military video](#) of a 2007 Baghdad airstrike that killed two Reuters journalists – video that the military had refused to release under FOIA. In July, Wikileaks released [more than 70,000 classified documents from the Afghan war](#). Some transparency and human rights advocates criticized the site for not redacting the names of Afghans who had collaborated with the U.S. military, which led to redactions of such details from its next release of [nearly 400,000 classified documents](#) from the Iraq war.

But the biggest controversy came in November, when Wikileaks began publishing [more than 250,000 U.S. diplomatic cables](#), more than 100,000 of which are classified. Among the documents were revelations that [military contractors](#) in Afghanistan may have hired child prostitutes and that the State Department [ordered diplomats](#) to spy on top United Nations officials.

The White House [condemned the latest release](#), saying, "President Obama supports responsible, accountable, and open government at home and around the world, but this reckless and dangerous action runs counter to that goal." OMB [ordered federal employees](#) not to view the documents and [directed agencies](#) to review their policies to safeguard classified information. The Justice Department is considering [how it might prosecute](#) Wikileaks' editor-in-chief, Julian Assange. But the American Civil Liberties Union warned that prosecuting Assange or others associated with Wikileaks would raise [serious constitutional concerns](#). Transparency advocates such as the [Electronic Frontier Foundation](#) and the [Association for Progressive Communications](#)

also rushed to Wikileaks' defense. However, others, such as [Citizens for Responsibility and Ethics in Washington](#), argued that Wikileaks' actions would ultimately damage transparency efforts.

Cracked Teapot

The BP oil spill in the Gulf of Mexico brought tremendous public attention to numerous failings of the nation's oil drilling regulatory system and its emergency response capabilities. It also highlighted ongoing problems with federal, state, and local governments' understanding of key environmental right-to-know issues.

Response to the spill was hampered by restrictions on media access to the spill, confusion concerning the quantity and fate of the leaked oil, and criticism over the [delayed disclosure](#) of the chemical ingredients of the millions of gallons of dispersants used to combat the spill. BP initially directed its contracted cleanup workers to not speak with the media, an order that was later rescinded but continued to be sporadically enforced. The U.S. Coast Guard made huge portions of the Gulf and beaches [off-limits to reporters](#) with a rule threatening criminal penalties for entering a 65-foot "safety zone" around cleanup operations and equipment. The rule was eventually revised, but media still needed special permission to enter safety zones.

On the chemical side of things, manufacturers of the approximately 1.84 million gallons of dispersant used throughout the Gulf claimed the ingredients were trade secrets, which significantly delayed their disclosure despite serious concerns about health and environmental effects.

Government estimates consistently underestimated the flow rate of the gushing oil, and BP initially failed to provide information needed to make more accurate calculations. [Disclosure of the fate of the oil](#) once it was released into the water column also became an area of [controversy](#). The administration's estimate of what happened to the oil and how much remained in the Gulf – the so-called oil budget – presented an unexpectedly positive analysis. The [National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling](#), set up by President Obama, along with [other experts](#), criticized the lack of transparency surrounding the methods and science behind the government analysis.

EPA Steeps Its Tea in a Crystal Pot

Though the BP oil spill disaster sucked a lot of the air out of the room, 2010 was also a positive year for our environmental right to know. The year saw a continuation of significant transparency initiatives at the U.S. Environmental Protection Agency (EPA). The agency's [strategic plan](#) for fiscal years 2011-2015, released in the fall, seeks to increase openness throughout the agency's operations. Incorporated throughout the plan are the concepts of transparency, accountability, and community engagement.

The agency added an assortment of new online information tools intended to help the public access, understand, and put to use government data on environmental and public health issues.

The EPA launched the [Health and Environmental Research Online](#) (HERO) database on March 24. The free, online, searchable database contains thousands of scientific studies used by EPA to assess the risks of environmental and health impacts from exposure to hazardous pollutants and chemicals.

EPA also developed an [online interactive map](#) providing information on agency enforcement actions and cases involving violations of several environmental statutes since 2009, focusing on the Chesapeake Bay watershed and airshed. EPA developed a separate online interactive map of the whole United States that provides Clean Water Act violation and enforcement data for smaller facilities known as "non-major" facilities. Environmental and public health advocates have made improved access and searchability of enforcement information and mapping tools a right-to-know priority.

EPA in 2010 continued to expand its presence online, with issue-specific forums and webpages. In response to the BP spill, the agency launched an [informational website](#) – available in three languages – that provided news updates as well as air and water testing data for the Gulf region.

What's In My Tea?!

In 2010, the EPA took several steps toward disclosing more chemical health and safety information that has been inappropriately hidden from the public as alleged trade secrets. Chemical companies have long overused and abused their ability to claim information submitted to EPA as confidential business information (CBI) under the Toxic Substances Control Act (TSCA), thus hiding chemical health and safety information from the public.

In January, EPA [announced](#) that companies would no longer be allowed to claim that the identity of a chemical is CBI if the chemical's name is already public. Next, EPA made the non-confidential portions of the TSCA inventory available for [free online](#), instead of placing that information on a CD-ROM that users previously had to purchase. Finally, in May, the EPA [announced](#) it will review all claims by manufacturers that a chemical's identity should be treated as CBI when the identity is part of a health and safety study or the study's underlying data. The agency expects that unless the disclosure of the chemical identity explicitly reveals how the chemical is produced or processed, the secrecy claim will be rejected, allowing the public to link the chemical to its health and safety information.

Bitter Tea of Deadly Chemicals

Shifting gears from the administration to Congress, the year began hopefully for advocates of improved security and environmental right-to-know related to thousands of chemical plants across the country. In November 2009, the House had passed a compromise comprehensive chemical security bill that would have required facilities to assess options for reducing the risks of a terrorist attack that could send a poison gas cloud wafting into communities. The bill authorized the Department of Homeland Security (DHS) to require those chemical facilities that posed the greatest risk to convert to the safer methods that the facilities identified in their assessments – but only under certain conditions. The bill still lacked crucial accountability

measures, granting DHS the power to bury the program in excessive secrecy and deny to the public information needed to keep communities safe. Despite its shortcomings, the bill was headed for likely action in the Senate, presenting new opportunities to strengthen public and worker protections.

However, in 2010, the House-passed legislation ran into a [brick wall](#) in the obstructionist Senate. The Senate Homeland Security and Governmental Affairs Committee voted in July to merely extend the existing, inadequate chemical security program housed at DHS. The current program [exempts](#) hundreds of facilities and prohibits DHS from requiring specific security measures, including the adoption of proven and economical safer technologies. The current program also is devoid of any meaningful accountability or transparency measures. Hope is rapidly fading as the calendar runs out in the Senate for action on [separate legislation](#) introduced by Sen. Frank Lautenberg (D-NJ). The Lautenberg legislation mirrors many of the measures in the House-passed bill, including expanding chemical security protections to drinking and waste water treatment plants. It remains unclear what further actions will be taken by the next Congress when it convenes in January 2011.

Mixed Tea

Beyond the failure on a key environmental right-to-know policy, Congress produced mixed results on transparency, passing a few measures and only debating a few others. After initially granting a broad FOIA exemption to the Securities and Exchange Commission in the financial reform bill, Congress quickly [reined in the loophole](#). Bills to [reduce overclassification at DHS](#) and [improve the clarity of government documents](#) also became law.

[Faster FOIA processing](#), [more robust campaign finance disclosure under the DISCLOSE Act](#), and a [media shield law](#) passed only one house of Congress and don't look likely to move in the remainder of the lame-duck session. [Improved whistleblower protections](#) did pass the Senate during the lame-duck session and may still become law. Other transparency bills, such as the [Public Online Information Act](#), never even made it to a floor vote in either house.

Tea Party (Boston or Alice)

November's midterm elections unleashed a wave of transparency gossip. Leaders in the newly Republican-controlled House have made [positive noises on some transparency issues](#), and President Obama said that he thinks [transparency could be common ground](#) between him and the House.

However, much remains to be seen. Within the House itself, Republicans have [pledged](#) to enact "Read the Bill" rules, [requiring legislation to be published](#) online three days prior to a vote in committee and on the floor. Incoming Rules Committee chair Rep. David Dreier (R-CA) wants to [broadcast video of the committee's meetings](#), as most other House committees already do. However, House Republicans have been less clear about their plans for the Office of Congressional Ethics, which was created in 2008 to investigate ethics violations and which

many good government and transparency advocates support. Some fear that the Republican leadership wants to limit appropriations for OCE and let it die a slow death.

The biggest questions, though, relate to how the House will approach transparency in the executive branch. Rep. Darrell Issa (R-CA), Transparency Caucus co-chair, will assume the chairmanship of the Oversight and Government Reform Committee. Issa has supported many thoughtful transparency measures, but he has also promised a battery of investigations of the Obama administration. Some of the described investigations could shed valuable light on executive actions, but others appear to be partisan hobbyhorses based on conspiracy theories and myth. Out of all of this, we could get principled oversight of government, or we could get political theater in oversight clothing. Only time will tell whether the 112th Congress will be a reform-minded Boston tea party or more like having tea with the Mad Hatter.

Corporate Failures Not Enough to Trigger Meaningful Regulatory Change in 2010

In 2010, Big Business was often in the news for the wrong reasons. The BP oil spill disaster, the explosion at a Massey Energy mine that killed 29, and the recall of millions of Toyota vehicles, to name a few, made headlines throughout the year, both for their human, economic, and environmental toll and for the negligence they exposed. Despite these failures, 2010 was an excellent year for America's corporate elite. Profits skyrocketed, lobbyists fended off new regulation, and corporate access to Washington decision makers grew even more robust.

American citizens weren't nearly as fortunate: Unemployment continued to hover around 10 percent; workplace hazards, contaminated foods, and environmental pollutants continued to threaten the health of communities and lives of individuals; and the democratic process continued to favor special interests over average citizens.

Time and time again in 2010, Congress let the American people down. Congress took a pass on numerous opportunities to enact policies that could protect the country from health, safety, and environmental hazards.

In the boxes below, OMB Watch briefly describes four major regulatory crises in 2010, each following a similar pattern: the exposure of a gap in regulation, the identification of the need for reform, and the failure of Congress to enact significant change, often under the corrupting influence of Big Business.

The crisis: On April 20, BP's Deepwater Horizon oil rig exploded, and the ensuing spill released at least 185 million gallons of oil into the Gulf of Mexico over the next several months. The explosion killed 11 rig workers.

The regulatory failure: [The crisis exposed](#) conflicts of interest and gross incompetence at the Department of the Interior's Minerals Management Service (MMS), the agency responsible for both managing leases and overseeing lessees.

The reform: Despite his expressed support for deepwater drilling just weeks earlier, President Obama ordered a six-month ban on new and existing deepwater drilling, which Interior [made official](#) on May 30. Interior [reorganized](#) MMS and renamed it the Bureau of Ocean Energy Management, Regulation and Enforcement. Meanwhile, clean energy advocates seized upon the crisis to push for limits on drilling as well as for clean energy legislation.

The corporate influence: The oil industry and its allies in Congress pushed back against Obama's moratorium, and the Interior Department [ended the ban](#) on Oct. 12, weeks before it was scheduled to do so. (However, the administration [will not offer](#) leases off the Atlantic coast or in the eastern Gulf.) Spill response legislation [passed in the House](#) in July but died in the Senate.

The crisis: On April 5, an explosion at Massey Energy's Upper Big Branch mine in West Virginia killed 29 miners. It was the worst coal mine disaster in the U.S. in almost 40 years.

The regulatory failure: Despite Massey's track record of health and safety violations, the Mine Safety and Health Administration (MSHA) had been unable to more aggressively enforce safety regulations against the mining giant; Massey and others [had – and continue to –](#) tie up the bureaucracy by appealing many of the violations cited against them.

The reform: MSHA has [increased](#) its inspection presence at mines with historically poor health and safety records. Legislation to strengthen MSHA's hand and protect whistleblowers was introduced in both chambers.

The corporate influence: The National Mining Association and the National Association of Manufacturers both lobbied against the bill. The [bill failed](#) in a December House vote. In the Senate, [Republicans blocked](#) an attempt to pass the bill by unanimous consent.

The crisis: Beginning in 2009 and continuing into 2010, Toyota recalled more than seven million cars and trucks over concerns that the vehicles could suddenly accelerate out of drivers' control.

The regulatory failure: Since 2003, the National Highway Traffic Safety Administration (NHTSA) had investigated at least six complaints about unintended acceleration in Toyota vehicles but [failed to take action](#).

The reform: Bills were introduced in both the House and the Senate. The legislation would have strengthened NHTSA's enforcement authority and required new safety standards in vehicles.

The corporate influence: The auto industry and the U.S. Chamber of Commerce opposed many of the bills' requirements. The bills passed their respective committees in both chambers. Industry lobbying at the committee stage [appeared to be successful](#) in removing deadlines for new safety standards. Neither bill was taken up by the full chamber in either house.

The crisis: The string of high-profile foodborne illnesses that has drawn increasing attention over the last several years continued in the summer of 2010 when more than 1,800 people were sickened by salmonella-contaminated eggs. Two firms, Wright County Egg and Hillandale Farms, recalled more than 550 million eggs as a result.

The regulatory failure: The Food and Drug Administration (FDA) [does not possess](#) the power to order mandatory recalls, nor does it have sufficient resources to inspect food facilities on a consistent basis.

The reform: The House had [already passed](#) a food safety reform bill before the illness outbreak occurred. The Senate's health panel had approved a similar version, but the full Senate had yet to consider the bill. The Senate passed its bill in December but has since been [sidetracked](#) by procedural concerns.

The corporate influence: Large farm interests and the U.S. Chamber of Commerce support the bill. Small farms [won a concession](#) in the Senate when they were exempted from certain requirements. Larger farms [opposed](#) the small-farm exemption.

In response to these events, the administration attempted to make changes around the margins with policies like the drilling moratorium and increased safety inspections, but the systemic problems exposed by these crises beg for systemic fixes. Unfortunately, Congress chose to comply with industry demands, leaving the public behind.

While these examples clearly illustrate the corrupting influence of money in politics, corporations scored perhaps their biggest win in the courts where judges voted to *liberalize*

corporate spending and influence. On January 21, the U.S. Supreme Court overturned two tenets of the Bipartisan Campaign Reform Act, also known as the McCain-Feingold Act, which had restricted corporate contributions in elections. The Court's decision in [*Citizens United v. Federal Election Commission*](#) lifted the ban on corporate spending for express advocacy. It also removed the requirement that corporations set up political action committees (PACs) in order to make political contributions. Corporations [may now contribute](#) to PACs and other associations directly from their general accounts for the purpose of influencing elections.

[*SpeechNow.org v. Federal Election Commission*](#) extended the reasoning of the *Citizens United* decision to include not only campaign spending but certain campaign donations. In *SpeechNow.org*, the U.S. Court of Appeals for the District of Columbia ruled that there should be [no limits placed](#) on contributions to political action committees. Prior to this ruling, contributions to PACs were limited to \$5,000 annually per individual. Based on the *Citizens United* decision, the court struck down limitations on contributions to PACs.

The decisions' impacts were felt almost immediately. The *Citizens United* ruling opened up the possibility for significant additional spending in the 2010 congressional elections. Forty percent of outside contributions fell into the loopholes created by the decision, [according to the Sunlight Foundation](#), and the spending tilted toward Republican candidates generally favored by business interests.

Emboldened by their string of victories, business lobbyists ramped up their efforts to rollback existing regulations and fend off new ones. The Business Roundtable, a coalition of top corporate executives, launched the opening salvo when it [submitted to the White House](#) a list of laws, regulations, taxes, and other policies it wants to see reversed. The list, attached to a June letter to then-OMB Director Peter Orszag, leaves no regulatory stone unturned, arguing against scores of policies intended to help and protect Americans, including recently passed financial reform and health care laws; greenhouse gas emissions rules; worker health and safety policy (including mine safety); pending food safety and auto safety legislation; government contractor responsibility measures; and even oil spill prevention rules.

The U.S. Chamber of Commerce (Chamber), a lobbying and campaign expenditure powerhouse, has been the most vocal critic of the Obama administration's regulatory record. In November, the group launched [ThisWaytoJobs.com](#), a website that maligns regulation, and announced the formation of a lobbying task force dedicated to halting regulations and fighting public protections. [The Chamber said](#) it will first target energy and labor standards and attempt to undermine implementation of health care and financial reform.

It should be noted that the business representatives and corporate lobbyists patrolling Washington do not necessarily speak for the entire business community. For example, three business groups, the Small Business Majority, American Businesses for Clean Energy, and We Can Lead, commissioned a [poll](#) released in July that surveyed small business owners about their views on climate and energy legislation and its impact on the economy. Fifty percent of the respondents said they support legislation, while 42 percent said they oppose it. Many small businesses are optimistic about legislation's potential effects and recognize that resolving these

issues may be better for small business in the long run by reducing uncertainty about federal policy.

Nonetheless, in 2010, Big Business and organizations purporting to represent small business found an audience on Capitol Hill for their anti-regulatory message. In the House, centrist Democrats did not hesitate to join Republicans in voting against public protections. For example, 27 Democrats and 166 Republicans teamed up to [defeat](#) mine safety legislation, and 39 Democrats joined 154 Republicans in [voting](#) against an oil spill response bill.

In the Senate, procedural holds continued to be used with little discretion, forcing bills to first clear a 60-vote threshold to invoke cloture and end debate before coming up for a simple-majority vote. The strategy meant that corporate lobbyists needed to attract only 41 opponents to legislative proposals, such as energy or mine safety reform, in order to scuttle the bills. Even the Senate's food safety legislation, which enjoyed broad bipartisan support, [was subject to a hold](#), lengthening the amount of time the Senate spent considering the bill on the floor.

After the 2010 elections, congressional Republicans began laying the groundwork for what will likely be a full assault on regulation when they assume control of the House – and close the gap in the Senate – in 2011. House Republicans' [Pledge to America](#) – a document outlining their policy agenda – includes a [proposal for legislation](#) that would require congressional approval for all new major regulations. The bill would further politicize regulation by forcing rules through the legislative process and creating yet another locus where anti-regulatory interests can exercise their influence. Even rules supported by Congress would suffer: If an agency were to finalize a rule during congressional recess, or if approval of a rule was not a priority for one or both chambers, implementation could be delayed.

Republicans and some Democrats are also likely to continue to target greenhouse gas emissions standards set by the U.S. Environmental Protection Agency (EPA). In 2010, two senators led serious challenges against EPA's efforts to curb climate-warming emissions. Sen. Lisa Murkowski (R-AK) and 40 co-sponsors [pushed legislation](#) to overturn EPA's scientific finding that declared greenhouse gases a threat, a finding that underpins the agency's greenhouse gas standards. The resolution lost on a narrow, [47-53](#) procedural vote in June. Separately, Sen. Jay Rockefeller (D-WV) [introduced a bill](#) targeting a specific EPA regulation imposing emissions limits on stationary sources like oil refineries and power plants. The Senate did not vote on Rockefeller's bill.

The congressional power shift is likely to foster an even more favorable climate for Big Business and groups like the Chamber in 2011. Prospects for positive legislative reform in mine safety, worker safety, auto safety, energy policy, or other regulatory areas are all but dashed, and the problems exposed by the regulatory crises of 2010 will remain.

What this means for public protections overall is somewhat unclear. As already noted here and in two recent OMB Watch reports (see [The Obama Approach to Public Protection: Rulemaking](#) and [The Obama Approach to Public Protection: Enforcement](#)), the Obama administration has

been quite active in some areas of regulation, but it needs legislative authority to do more to protect our air, our water, our food, and our public health.

Furthermore, the Office of Information and Regulatory Affairs has been reluctant to reform the regulatory process in any meaningful way, leading to some frustrating rulemaking delays and less transparency than hoped during 2010. The administration has also not been immune to the corrupting influence of Big Business, demonstrated by its actions related to the oil spill moratorium and EPA's [pending coal ash rule](#).

If it is to be successful in protecting the public and blocking congressional and industry assaults on regulation, the Obama administration and the agencies charged with enforcing our nation's laws and regulations will need to show greater resolve. They will have to stand firm and make a solid commitment to ensure that special interests are not put ahead of the public interest.

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