OMB WATCH
Promoting open government, accountability, and citizen participation since 1983

Subscribe | Blog | Donate

The Watcher

January 12, 2010 Vol. 11, No. 1

In This Issue

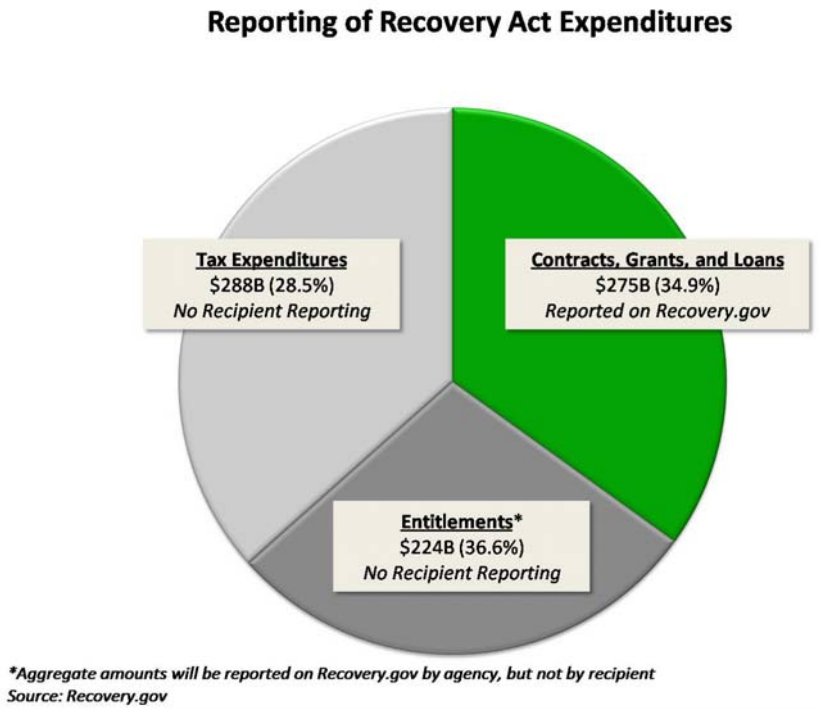
The Recovery Act Spending That Wasn't There

Recovery Act recipient reporting has received a great deal of attention in the media, and while some of this coverage has been critical (reporting on non-existent congressional districts or ZIP codes, unreliable job creation numbers, etc.), many news articles portray comprehensive oversight of the act because of transparency requirements in the law. However, approximately two-thirds of the spending in the Recovery Act bypasses these requirements, leading to a dearth of information about how the money is being spent. As time passes and Recovery Act spending continues, this lack of data is becoming more apparent, as highlighted by a recent Internal Revenue Service (IRS) report showing that millions of dollars in Recovery Act tax breaks are vulnerable to tax fraud.

About one-third of Recovery Act spending, the discretionary funding, is subject to the tight reporting requirements and provides monetary resources for infrastructure, research, green energy, and other projects. Recipients of discretionary spending must report to the federal government on the use of their funds, reports which can be found on Recovery.gov and OMB

Watch's FedSpending.org. These reports provide unprecedented details on federal spending, containing information on recipient location, place of performance, a project description, number of jobs created, and the five highest-paid employees.

The other two-thirds of Recovery Act spending include entitlement spending and tax expenditures. Entitlements are direct payments to people, such as unemployment insurance, COBRA health insurance benefits, and one-time Social Security payments; tax expenditures are the tax credits and deductions authorized by the act. Congress exempted these entitlement payments and tax cuts from the Recovery Act reporting requirements largely for privacy reasons. This means that recipients of unemployment benefits or the Making Work Pay tax credit, for instance, do not report any information to Recovery.gov, and none is displayed.



(click to enlarge)

Accordingly, there is little information available on Recovery Act tax expenditures or entitlement spending, making debate on spending efficacy difficult. As policy experts and lawmakers vigorously debate the effect of the discretionary spending – thanks to the more than 130,000 recipient reports on discretionary spending released in October – they remain largely silent on the effectiveness of tax expenditures and entitlement spending.

One recent report helped highlight this disparity. In November 2009, the Treasury Inspector General for Tax Administration (TIGTA), the inspector general for the IRS, released a report warning that the IRS does not know if the $288 billion in Recovery Act tax expenditures are being claimed legitimately and cannot know without extensive auditing.

The problem is that the IRS did not require additional documentation for the new credits and deductions. For instance, the Recovery Act provides funding for the First-Time Homebuyer

Credit, which provides a fully refundable $8,000 tax credit for first-time homebuyers, but the IRS does not require additional documentation for this credit, such as a HUD Settlement Statement, nor does it check the return against any third-party source, such as a housing database. Tax filers can claim the housing credit without providing any proof that they actually have purchased a house or even that a purchased house is a first-time purchase for the taxpayer. The only way the IRS can catch such fraudulent claims is through an audit.

The IRS claims requiring documentation on tax credits and deductions is too "burdensome" on businesses and individuals, because filing documentation precludes electronic filing; the IRS notes that this would prevent some two million First Time Homebuyer Credit claimants from filing electronically. But detecting fraud after federal funds have been disbursed (i.e., through an audit instead of before a return is processed) usually results in a lower rate of return on tax enforcement, since audits are a lengthy and relatively costly process compared to requiring upfront documentation.

This problem exists because Congress did not enact any transparency provisions for the tax expenditures and entitlement spending. The lack of transparency and accountability provisions in these sections of the Recovery Act is apparent now that the first round of recipient reports has been released. While Recovery.gov users can track the precise details of some $275 billion in discretionary spending, down to the location of the material suppliers for some projects, next to nothing is known about the recipients of the remaining two-thirds of Recovery Act spending.

The privacy rights of citizens should be protected, but more information on Recovery Act tax expenditures and entitlement spending is needed. Currently, there is very little information available, and accordingly, little debate. The TIGTA report caused little reaction outside of a few, tax policy-focused blogs. The most attention the issue received was in the form of a short *New York Times* article, published almost a month after TIGTA released the report. Additional data, if available, would help shed light on how this money is being used.

Chemical Secrecy Increasing Risks to Public

Excessive secrecy prevents the public from knowing what chemicals are used in their communities and what health impacts might be associated with those substances, according to a recent analysis of government data by the nonprofit Environmental Working Group (EWG). The growing practice of concealing data alleged to be trade secrets has seemingly hobbled regulators' ability to protect the public from potential risks from thousands of chemicals.

Calling the situation "a regulatory black hole, a place where information goes in – but much never comes out," EWG's analysis, *Off the Books: Industry's Secret Chemicals*, criticizes the nation's primary chemical statute, the Toxic Substances Control Act (TSCA), and highlights excessive secrecy as one of the law's biggest flaws.

By literally locking up the data within a few offices at the U.S. Environmental Protection Agency (EPA), the agency prevents researchers, in and out of government, from identifying risks and

problems with the use of the rapidly growing number of chemicals in commerce. Moreover, without the information, the public is unable to make informed decisions regarding the safety of everyday activities – from what cleaning products to use to what bedding to sleep on.

The data obtained by EWG under the Freedom of Information Act (FOIA) partially reveals the extent to which EPA is allowing chemical manufacturers to hide chemical names, the chemicals' characteristics, and often even the identity of manufacturers. EWG also found that for two out of every three chemicals that entered commerce in the past 30 years, their identity remains secret. Of the more than 83,000 chemicals in commerce, information on 20 percent is kept secret. These secret chemicals include substances that have shown a substantial risk of injury to health or the environment. The list of secret chemicals also includes those used in products specifically designed for children.

The 33-year-old TSCA includes provisions to protect information that manufacturers claim would hurt their profits if it were disclosed. Businesses can claim that such information is confidential business information (CBI) when they submit it to the agency. If the government does not raise an objection to the claim, it must protect the information from disclosure. Many offices don't have sufficient staff to review all of the CBI claims made by companies in their submissions. In the case of chemicals, the EPA does not share information claimed as CBI with other agencies, state or local officials, emergency personnel, or even within EPA itself, except under certain, highly restricted circumstances.

The use of CBI claims by chemical companies has been increasing. The EPA data show that secret chemicals make up a much greater proportion of widely used chemicals than they did 15 years ago. Secret chemicals increased five to six times by volume produced from 1990 to 2006.

According to the EWG report, "Hiding the identity of these chemicals could significantly delay or completely prevent actions to reduce exposures to compounds that by definition require an open and transparent evaluation of their risks."

The refusal to disclose chemical information can have serious consequences for public health. In 2008, a spill of fluids used in natural gas drilling sent a drilling worker to the hospital. The worker recovered quickly, but one of the nurses treating him was also exposed to the chemicals on the worker's boots, and her health gradually deteriorated. As the nurse's health declined, her physicians struggled to get the needed information on the drilling chemicals she was exposed to because the information was considered a trade secret.

The EWG study did not evaluate how frequently EPA challenges claims of CBI or what outcomes such challenges produce. However, a 2005 report by the Government Accountability Office (GAO) stated that only about 14 CBI claims were challenged per year, and that in almost every instance, the industry capitulated and agreed to disclosure of the information. The GAO report found that 95 percent of manufactures' new chemical registrations with EPA contain some information alleged to be trade secrets.

Back in December 2000, the EPA began a process to revise its regulations for dealing with confidentiality claims throughout the agency. This agency effort was geared to replace a 1994 attempt, which was abandoned due to "the complexity of the issues raised in the public comments." The 2000 initiative was also abandoned before completion.

There is some indication that the Obama administration may take action to reduce the amount of secrecy that prevents the public from understanding what chemical threats surround them. In July 2009, shortly after assuming leadership of EPA's Office of Prevention, Pesticides, and Toxic Substances, Assistant Administrator Steve Owens ordered the disclosure of 530 identities of substances produced in large amounts. Also, in a recent *Washington Post* article, Owens stated, "People who were submitting information to the EPA saw that you can claim that virtually anything is confidential and get away with it."

Although the EWG report focuses on the treatment of alleged trade secrets under TSCA, the use of CBI claims allows EPA to hide other types of industry data, such as information about pesticides, which are regulated under a different law. Recently, EPA concealed information on the inspection and enforcement histories of coal ash impoundments. These impoundments contain billions of tons of toxic waste generated from burning coal for electricity. In December 2008, the catastrophic failure of one such impoundment sent 5.4 million cubic yards of toxic coal ash flowing over 300 acres and into rivers in Tennessee. The EPA also manages alleged trade secrets under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and many other statutes.

Advocates for greater transparency of chemical information have offered numerous suggestions for reforming what they and the EPA recognize to be excessive and harmful levels of secrecy. The CBI regulations under TSCA have helped create an agency culture that is geared toward secrecy, with criminal penalties for unauthorized disclosure of CBI by agency personnel and the imposition of huge resource burdens if the agency attempts to challenge a company's trade secrets claims. Among other changes, reformers call for a narrower, clearer definition of what information may legitimately be claimed as a trade secret, greater up-front substantiation of the claims, and periodic reviews to remove outdated or unjustified CBI determinations.

Administration Revises Classification and Declassification Systems

On Dec. 29, 2009, President Obama signed an executive order (E.O. 13526) to prescribe a uniform system of classifying and declassifying government information. The new order was welcomed by open government advocacy groups and will go into effect on June 27.

The order was a result of recommendations from National Security Advisor James Jones, which were formulated by interagency review pursuant to President Obama's request in May 2009. The order was followed by a memorandum to agency heads on implementation and a presidential order clarifying authority to label records "top secret" or "secret" under E.O. 13526.

This executive order effectively revises an existing order, E.O. 12958, issued by President Bill Clinton in 1995 and amended by President George W. Bush in 2003. Among the changes the Obama executive order brings about are new declassification goals for historical records, the use of new technologies to expedite declassification, and a reduction in the number of original classification authorities.

The administration intends to reduce the backlog of records with historical value by devising a system to permit public access to backlogged records by no later than Dec. 31, 2013. The current backlog of federal records consists of more than 400 million pages. This process would be expedited by limiting the number of referral reviews these records would need before declassification unless they contain intelligence sources or design concepts concerning weapons of mass destruction. Currently, the declassification of records often requires referrals to several agencies with interests in the subject material. To ensure compliance, the Archivist of the United States is required to publicly report on the status of the backlog every six months.

Traditionally, declassification has been a paper-based review system, and it remains well behind the curve in use of new technologies. Government as a whole continues to struggle to incorporate new online technologies that the private sector has utilized for years. However, the potentially sensitive nature of the material being reviewed has created even greater hesitancy to experiment with such tools in the declassification process. The order requires that new technologies be pursued to better deal with the volume and complexity of the review process and keep the public better informed of decisions.

Over the years, the ability to classify a record has been delegated and extended to more and more people in agencies, which has been accompanied by, not too surprisingly, a considerable growth in the amount of material being classified. The order instructs agencies to reduce the number of people able to classify records in an effort to eliminate unnecessary classifications and reduce the total amount of information being classified. Eventually, such reductions should translate into smoother declassification reviews and fewer backlogs.

Additionally, the new order and the implementation memo establish:

- A policy that no document may remain classified indefinitely. The new order says records must be designated for declassification at 10 or 25 years unless they include certain types of confidential or intelligence information, which may be classified for up to 50 years. In extraordinary cases, the information may be classified for up to 75 years. The order adds higher standards for agencies to meet in order to exempt a record from declassification. It also creates enforceable deadlines for declassifying information exempted from automatic declassification at 25 years. In no case can information be classified for more than 75 years.

- A new National Declassification Center, which has already been created within the National Archives and Records Administration. The new center will develop declassification priorities after seeking public input and taking into account researcher

interest and impact of declassification.

- It eliminates a Central Intelligence Agency (CIA) veto of declassification decisions made by the Interagency Security Classification Appeals Panel that was established by the Bush administration.

Reportedly, the order had been subject to significant controversy and was delayed due to pressure from the intelligence community.

E.O. 12958 required the release of all classified documents 25 years or older unless a department or agency exempts them from disclosure. The limited resources that agencies have committed to preview information for possible disclosure have been overwhelmed by the amount of material being requested under the Freedom of Information Act (FOIA) or as part of the disclosures required under E.O. 12958. As a result, many agencies have enormous backlogs of documents awaiting review, as noted above.

The new order was needed to reduce these burdens and streamline the declassification process. To alleviate stresses, the order outlines how the new National Declassification Center should centralize the process to make more records available to the public more quickly and in a way that does not overly burden individual agencies. Currently, the National Archives and Records Administration is working with the Defense Change Management Organization to study how this can be done. Public input can be sent to NDC@nara.gov.

The process to revise the executive order included an unprecedented system for public input during the drafting phase. At the request of the Obama administration, the Public Interest Declassification Board (PIDB), a congressionally established advisory committee, solicited recommendations from the public. That was followed by a blog discussion in July to obtain additional public input on recommendations for a new order. The resulting order reflects many of the recommendations the public submitted to the PIDB. Meredith Fuchs of the National Security Archive stated that "the impact of the public on the final order demonstrates that, even in the national security realm, there is a role for an informed public."

As with many of the Obama administration's new government openness policies, implementation is the next hurdle for the new classification/declassification effort. Agency buy-in will be an important factor in making the new system effective in bringing down the backlog. It remains to be seen if those intelligence agencies that resisted the direction of the new executive order will embrace the new program and its goals or remain reluctant participants.

Hundreds of Rules May Be Void after Agencies Miss Procedural Step

Regulatory agencies are routinely violating federal law by not submitting final regulations to Congress, according to a recent Congressional Research Service (CRS) report. Any rule agencies have not submitted to Congress could be susceptible to a lawsuit.

According to CRS, in FY 2008, 28 federal agencies and cabinet departments failed to send copies of 101 final rules to the Government Accountability Office (GAO), the investigative arm of Congress. As of Oct. 26, 2009, 96 of the 101 rules still had not been submitted, raising questions about their legality.

The rules in question cover a broad range of regulatory policy issues. Among the 96 rules still not submitted:

- A February 2008 regulation changing the rules for leasing and management in the Alaska National Petroleum Reserve.
- A June 2008 rule changing procedures for employee drug and alcohol testing in the transportation sector.
- Multiple habitat preservation rules for species covered under the Endangered Species Act.

Typically, when agencies publish final rules in the *Federal Register*, they also identify a future date when the rule will take effect, often 30 or 60 days after the publication date. When the rule takes effect, it is considered to have the full force of law. However, the Congressional Review Act (CRA), passed in 1996, added another step that requires that final rules "shall be submitted to Congress before a rule can take effect." The act also requires submission to the Comptroller General, the head of GAO. The law's intent is to give Congress an opportunity to review regulations. If Congress objects to the regulation, the act spells out procedures for congressional disapproval of the rule.

According to the CRS report, agencies' failure to submit rules to Congress was not limited to FY 2008. On five separate occasions from 1999 to 2009, the GAO compared its log of submitted rules to those published in the *Federal Register* and found significant discrepancies. For example, in 2005, GAO identified 460 regulations that had been published but that GAO had not received. Overall, "GAO said that it (and presumably Congress) did not receive more than 1,000 final rules during 7 of the past 10 years," the report says.

CRS more recently reviewed GAO's data for the early part of FY 2009 and identified 22 rules that had not been submitted. GAO's log of rules it has received is available online at www.gao.gov/fedrules.

The repeated failure of agencies to submit rules raises questions as to why a seemingly simple problem has not been rectified. Agencies should be aware of the problem: GAO has regularly transmitted its findings to past administrations, according to the CRS report, and has mentioned the problem in congressional testimony.

After each of its five reviews, GAO wrote to the Office of Information and Regulatory Affairs (OIRA), a branch of the White House Office of Management and Budget (OMB) in charge of executive branch regulatory policy. The letters discussed the implications of CRA compliance and included lists of rules not submitted to GAO.

Although OIRA oversees agency rulemaking activity, it has failed to respond to GAO's concerns. "GAO and OIRA officials said they were not aware of any effort by OIRA to contact federal agencies regarding the missing rules during the time periods covered by" four letters sent between 1999 and 2008, the CRS report says.

The most recent GAO-to-OIRA letter was sent May 26, 2009, and included the list of 101 rules not submitted to GAO during FY 2008. When contacted by CRS, OIRA denied having received the letter. "Subsequently, however, on November 12, 2009, the Deputy Administrator of OIRA sent an e-mail to federal agencies saying that it 'had come to my attention that your agency may not have submitted final rules to Congress and to [GAO] as required by the Congressional Review Act,'" the report says. "He urged the agencies to 'contact the GAO to determine which rules they have not yet received from your agency'," but did not include the list of rules prepared by GAO.

OMB spokesperson Tom Gavin told BNA news service (subscription required), "We take very seriously our statutory responsibilities and encourage agencies to follow the law, including the Congressional Review Act. Agency compliance is not something we have direct control over. When we do hear of problems, we try to encourage agencies to follow the law."

The fate of rules that have been published in the *Federal Register* but not submitted to Congress is uncertain. Under the CRA, agencies' responsibility and ability to submit a rule does not expire. Submitting the rule now, even if it had been published years earlier, should, from a purely legal standpoint, cause it to go into effect immediately.

However, if agencies fail to submit rules, they will be susceptible to judicial review. Because of the plain language of the act, any regulated entity could make a case that it need not comply with a rule that has not been submitted to Congress. Regulated entities could also use an agency's failure to submit a rule as an argument for defying enforcement action, such as a fine or lawsuit, under that rule.

Despite the requirement that rules "shall be submitted to Congress before a rule can take effect," a separate section of the CRA injects confusion into judicial review of the effectiveness of a rule. Section 805 of the act states, "No determination, finding, action, or omission under this chapter shall be subject to judicial review."

Case law for the act is both limited and inconsistent. At least two U.S. district courts, citing Section 805, have ruled that courts may not decide whether a rule can be enforced based on its submission status under the act. However, a different court rejected those courts' interpretation and found that the judicial review exception does not apply to an agency's failure to submit a rule to Congress. That court placed a greater weight on congressional intent, citing a statement by then-Sen. Don Nickles (R-OK) printed in the *Congressional Record* after passage of the bill; the statement says, "The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect." (For further discussion, see the May 2008 CRS report, *Congressional Review of Agency Rulemaking: An Update and Assessment of The*

Congressional Review Act after a Decade, available at, www.fas.org/sgp/crs/misc/RL30116.pdf).

According to the CRS report, "The issue of whether a court may prevent an agency from enforcing a covered rule that was not reported to Congress has not been resolved conclusively."

The CRS report, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, was written by specialist Curtis W. Copeland and published on Dec. 29, 2009. A copy of the report obtained by OMB Watch (with an incomplete appendix) is available at www.ombwatch.org/files/regs/PDFs/CRS122909.pdf.

Improving Implementation of the Paperwork Reduction Act

On Oct. 27, 2009, the White House Office of Information and Regulatory Affairs (OIRA) opened a public comment process on ways to improve implementation of the Paperwork Reduction Act (PRA). The PRA covers a range of information resource management issues and topics, although it is best known for creating OIRA and establishing a paperwork clearance procedure. The law was passed in 1980 and last reauthorized in 1995, well before current technological capabilities that allow for greater public participation and streamlined information collection and reporting.

Under the PRA, agencies are required to send to OIRA for its approval all proposed or renewed information collection requests affecting more than nine people, as well as all forms used for statistical purposes. OIRA's review is premised on whether the information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility.

The PRA (and OIRA in its implementation) treat all information collection requests the same, regardless of how many people or organizations are impacted by an information collection activity or the importance of the agency's need for the information. OIRA does not assign personnel to reviews based on how many "burden hours" an agency creates. However, OIRA may choose certain requests for special scrutiny based on burden-hour estimates. As a result, critics have argued that OIRA has periodically politicized the process by using its review power to delay and frustrate agencies' efforts to collect information essential to informed rulemaking.

The *Federal Register* notice announcing the request for comments asked the public to focus on several aspects of PRA implementation. For example, commenters were asked to address ways to improve how agencies calculate the burden imposed on the public when they collect information, whether these burdens should be monetized, and how government can maximize the usefulness of information collected by agencies.

The comment period closed Dec. 27, 2009, and about 20 different comments were submitted for OIRA's consideration. Those commenting included business associations and individual companies, foundations, public interest groups, individuals, and state and local public health organizations. The comments are available online.

OMB Watch's comments focused on three broad areas. First, the comments addressed flaws in OIRA's review of agency information collection requests and burden-hour estimates and called on the administration to provide agencies with more flexibility so that not every information collection request is reviewed by OIRA.

Second, OMB Watch argued that information collection under the PRA could be substantially different in light of the rapid technological and web-based improvements in recent years and urged the administration to capitalize on those improvements to increase transparency, enhance citizen engagement, improve data quality, and minimize unnecessary burdens.

Third, the comments urged OIRA to reorient itself toward PRA responsibilities other than information collection and to focus more on those functions, most importantly information dissemination and information resources management.

OMB Watch's recommendations for improved PRA implementation included:

- OIRA should more frequently delegate to agency chief information officers the responsibility for approving certain classes of information collection requests.
- OIRA should allow and encourage agencies to implement pilot programs for managing information collection request review.
- The focus on burden calculations is misapplied and inefficient. The Office of Management and Budget (OMB) and agencies should, therefore, work together to develop an overarching view of information collection that places an emphasis on electronic reporting and transparency as means to hasten citizen interaction with the government.
- OIRA should work with agencies to begin considering a one-stop reporting source.
- OMB should work with agencies to identify best practices for information resources management and dissemination.
- OIRA, along with the Office of the Chief Information Officer, should provide leadership on establishing identifiers, starting with organizational identifiers, in order to take advantage of new web-based data integration, aggregation, and interpretation tools.

Several themes were repeated in the comments by other organizations, especially the need to streamline aspects of the information collection and dissemination processes. For example, groups across the political spectrum called for OIRA to delegate at least routine information collection approvals (especially voluntary collections) to agencies and allow agencies to use pilot programs to determine new ways to engage the public. Another common theme was a call for OIRA to find ways to expedite information reporting and at least certain types of reviews and approvals. To reduce duplicative reporting, several groups called for "one-stop" information reporting sites.

A poignant example of how OIRA currently implements the PRA was provided by state and local public health agencies. They cited how OIRA's data collection approval process hinders HIV-related surveillance activities. Two projects funded by the Centers for Disease Control and Prevention (CDC) designed to collect information about the behaviors of people at risk or

already infected with HIV are jeopardized. The surveillance surveys collect information to monitor and evaluate health trends. One commenter noted that OIRA review of these data collection requests has sometimes exceeded a year, severely impacting CDC's ability to revise health information based on reporting from state and local agencies.

The comments make clear that OIRA's focus on improving PRA implementation is important. The comments also make clear that OIRA needs to manage its PRA responsibilities more efficiently and effectively, updating its implementation to reflect current paperless capabilities and providing agencies with increased flexibility to manage their responsibilities.

Federal Court Rules on Voting Rights of Incarcerated Felons

A 9th Circuit Court of Appeals panel ruled 2-1 that Washington State felony inmates are entitled to vote under Section 2 of the Voting Rights Act of 1965. The court held that current restrictions, which strip convicted felons of the right to vote while incarcerated or under Department of Corrections supervision, unfairly discriminate against minorities.

In *Farrakhan v. Gregoire*, six "minority citizens of Washington state who have lost their right to vote pursuant to the state's felon disenfranchisement provision, filed [suit] in 1996 challenging that provision on the ground that, due to racial discrimination in the state's criminal justice system, the automatic disenfranchisement of felons results in the denial of the right to vote on account of race, in violation of Section 2 of the Voting Rights Act," according to the appeals court's opinion.

Section 2 of the Voting Rights Act (VRA) states that "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

The lawsuit focuses on the disparate impact that felon disenfranchisement laws have on racial minorities. It contends that because "nonwhites make up a large percentage of the prison population, a state law prohibiting inmates and parolees from voting is illegal because it dilutes the electoral clout of minorities," according to the Spokane *Spokesman-Review*.

The 9th Circuit agreed, finding that "the discriminatory impact of Washington's felon disenfranchisement is attributable to racial discrimination in Washington's criminal justice system" and therefore violates Section 2 of the VRA.

The decision is a major victory for nonprofit organizations that advocate on behalf of incarcerated individuals. Ryan Haygood, co-director of the NAACP Legal Defense Fund, which participated in the suit, told the *Seattle Post-Intelligencer* that the "disparities aren't reflective of the actual participation in crime. They're reflective of the discrimination in the criminal justice system."

Lawrence A. Weiser, a Gonzaga University law professor involved in the case since the mid-1990s and director of Gonzaga's clinical law program, told the *Post-Intelligencer* that "the disenfranchisement law has always been used to disenfranchise minority communities." Weiser also said that "attorneys for the prisoners turned to a series of studies conducted in Seattle and elsewhere in the state showing that racial minorities were charged with crimes at rates far higher than could be explained by differences in levels of criminal activity."

If the decision stands, it could have a major impact on felon disenfranchisement statutes nationwide. Felon disenfranchisement laws vary from state to state. According to the *Spokesman-Review*, nearly 40 states and the District of Columbia have less restrictive felon disenfranchisement laws than Washington. Only two states, Maine and Vermont, allow incarcerated felons to vote. Kentucky and Virginia deny the right to vote to all individuals convicted of a felony.

Felon disenfranchisement was a big issue during the 2000 and 2008 presidential elections. Grassroots and nonprofit organizations urged eligible ex-offenders to vote. They also educated ex-offenders, who often erroneously thought they were barred from voting.

During the 2008 election season, a *Washington Post* article focused on efforts to urge ex-offenders in Florida to vote. Ex-offenders in Florida with felony convictions are eligible to vote thanks to a law passed in 2006, which allows nonviolent ex-offenders with felony convictions to vote if they have completed probation, paid restitution, and do not have any charges pending. The *Post* article focused on the efforts that nonprofits, such as the ACLU and People for the American Way, played in "reaching out to ex-offenders through Web sites that help people figure out whether the state [of Florida] has acted on their cases."

According to the *Post-Intelligencer*, "Attorneys for [Washington State] have two weeks in which to request a hearing by the 11-judge [*en banc*] Circuit Court panel. Should they decide instead to request a review by the Supreme Court, that petition must be filed within three months."