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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.