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The Watcher

March 23, 2010 Vol. 11, No. 5

In This Issue

Commentary: Why Discretionary Budget Caps Are Fiscally Irresponsible

With many families around the country facing financial hardship, fiscal hawks on Capitol Hill have begun ramping up their rhetoric: If America's families are forced to make hard decisions and cut back, they argue, why shouldn't their elected leaders do the same? During the week of March 15, Sens. Jeff Sessions (R-AL) and Claire McCaskill (D-MO) introduced an amendment to H.R. 1586 that aimed to give teeth to that rhetoric. The amendment's effects on the nation's long-term debt would have been minimal, while its impacts on millions of Americans would have been severe. The amendment ultimately failed on the Senate floor.

The Sessions-McCaskill amendment would have capped discretionary spending for three fiscal years in an effort to reduce federal spending and lower the federal budget deficit. While the amendment would have had minimal effect on the country's long-term debt, it would have cut

funding for programs that are helping millions of Americans weather poor economic conditions and would have put a drag on the economic recovery. Though the amendment failed, the vote was very close; this will likely encourage its supporters to bring the amendment back at a later date.

The amendment would have enforced spending limits on both defense and non-defense discretionary spending. For fiscal year 2011, the amendment would have set a discretionary cap of $1.1 trillion – $564 billion for defense spending and $530 billion for non-defense. This limit would inch up to $1.125 trillion by FY 2013 – almost $150 billion lower than the budget President Obama proposed in February, which was criticized for failing to fully fund the public structures that are vital to the well-being of millions of Americans.

The caps would have severely limited the ability of Congress to pass any bill that would increase spending beyond the amount specified by the caps. If such a bill came to the floor, any member of Congress could object to it and effectively kill the bill. To override the cap, supporters in the Senate (and presumably the House, if it were to pass a similar bill) would need to muster an astonishing two-thirds supermajority, or 67 votes, virtually guaranteeing that the caps would stay unbroken. Alternatively, if a bill was declared "emergency" legislation, only three-fifths of each chamber would have to agree to the spending increase.

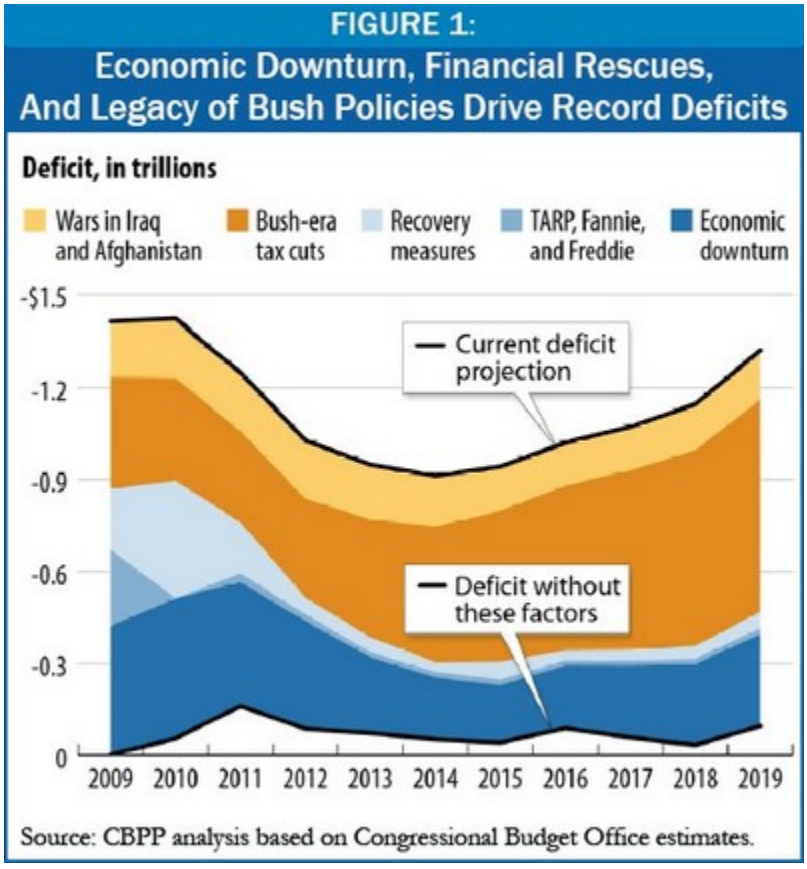
Although the caps were introduced in the name of "fiscal responsibility," they actually are the exact opposite. There is no economic or budgetary reason to limit spending at the levels called for in the bill, save the expressed desire by supporters to reduce the federal budget deficit. The caps grow at an average yearly rate of 1.8 percent, an amount not guided by economic growth, inflation, or program growth. This sort of arbitrary reduction in program funding limits the ability of Congress to respond to the constantly changing needs of the nation.

Program cuts are warranted in some cases. For example, if repeated attempts to improve an ineffective program fail, or if lawmakers deem the targeted problem solved, then funding reductions are viable budget options. Arbitrary spending limits disregard the many factors that congressional appropriators should consider when allocating funding to federal programs and agencies. By restricting the ability of Congress to fully fund all of the nation’s priorities, budget caps leave lawmakers faced with trading the welfare of one population for the good graces of supporters of another program, all the while ignoring the effectiveness of the programs under consideration.

The caps would also adversely affect the nation's economic recovery. Many economists agree that immediately reducing the federal budget deficit would result in slowing – or even reversing – the recent trend in economic growth and reduction of the unemployment rate. A number of estimates, in fact, suggest that spending that raises the short-term deficit, such as the stimulus law, has raised the nation's gross domestic product (GDP) by several points. Had discretionary budget caps been in place, the Recovery Act would likely not have passed, and the nation would be significantly worse off than it is today. And if budget caps were enacted now, the nascent recovery would be strangled before it could take hold, as federal spending would be slowed to a trickle.

Nor would the Sessions-McCaskill amendment address the long-term fiscal imbalances caused by the rapid growth of health care costs. As these costs outpace the growth of the economy, Medicare and Medicaid will continue to consume ever-larger portions of the federal budget. In 2013, Medicare and Medicaid spending will be about 5.1 percent of the size of the economy – a manageable sum. But in 2050, that number is projected to more than double to 12.7 percent. The massive growth of these programs (along with other factors) will cause the amount of debt held by the public to explode from 68 percent of GDP to 457 percent. By comparison, the Sessions-McCaskill amendment would reduce federal spending by an average of 1.2 percent of GDP annually over its three-year lifespan and would have a negligible impact on long-term debt.

There are many ways to address growing long-term fiscal imbalances, solutions which do not disproportionally affect the well-being of tens of thousands of families, the safety of our food supply, or the environment. While there may be a case for cuts in discretionary spending, increases in revenue will significantly improve the short- and medium-term fiscal outlooks. Two of the largest budget issues, according to the nonpartisan Congressional Budget Office and the Center on Budget and Policy Priorities, are the Bush-era tax cuts and the wars in Iraq and Afghanistan. Ending the wars and enacting progressive tax reform to make the tax code fairer would help balance the budget while protecting the nation's citizens.



Fortunately for the millions of Americans impacted by the weak economy, the amendment failed to pass the Senate, 56-40 (the amendment needed 60 votes for procedural reasons). However, discretionary caps will likely come up again, as supporters recognize that that the amendment

failed by such a small margin. While the growing budget deficit may eventually threaten economic prosperity, arbitrary discretionary caps are not the answer, especially now.

Recent GAO Reports Show Need for Better Data on Tax Expenditures

Two recent reports released by the Government Accountability Office (GAO), which examine the effectiveness of tax credits that target poverty and unemployment in economically distressed areas, show that Congress must require better data collection to properly assess tax expenditure programs.

Congress does not often require extensive data collection on tax expenditures, and, as shown by the recent passage of the HIRE Act, a jobs bill composed mostly of business tax credits, business tax expenditures often receive zero scrutiny.

The first GAO report, released in January, examines the New Markets Tax Credit (NMTC), which investors receive when investing in qualified Community Development Entities (CDEs) that aid low-income communities. The CDEs help finance projects such as mixed-use facilities, housing developments, community facilities, and other business activities. The report found that the governing fund that distributes the tax credits does not collect enough data to allow the GAO to come to a definitive conclusion on whether the projects supported through these tax expenditures would have existed absent the credit. As GAO noted, "Projects with NMTC financing likely contribute employment and other outcomes to low-income communities," but "[l]imitations with available data make it difficult to isolate project impacts."

The second report, released in March, looks at the Empowerment Zone (EZ), Enterprise Community (EC), and Renewal Community (RC) programs. The programs, created by Congress through various pieces of legislation between 1993 and 2000, sought to reduce unemployment and generate economic growth in certain economically depressed rural and urban Census tracks. Through the three programs, these Census tracts received grants, tax incentives, or a combination of the two from various federal agencies, including the Department of Health and Human Services (HHS), the Department of Housing and Urban Development (HUD), and the United States Department of Agriculture (USDA). As the programs evolved, the government moved away from grants and toward tax incentives, which were used almost exclusively in later years.

Like the NMTC program, the EZ, EC, and RC programs do not provide enough data for the GAO to make a conclusive determination on whether the tax incentives are having the desired effect within these specific communities. Although the GAO found that "improvements in poverty, unemployment, and economic growth had occurred" in certain targeted Census tracts, data limitations made it difficult "to accurately tie the use of the credits to specific designated communities." Though the administering federal agencies have made improvements in data collection after earlier GAO reviews of the programs, a basic data collection goal – being able to follow the use of the tax incentives through Internal Revenue Service (IRS) records – remains

unaccomplished. "It is not clear how much businesses are using other EZ, EC, and RC tax incentives," the GAO report states, "because IRS forms do not associate these incentives with the programs or with specific designated communities."

A lack of data on the use and effectiveness of tax incentives is not unique to the programs above. In fact, as noted earlier, Congress often does not even require any study or follow-up to the tax credits it provides. And, although tax expenditures – which focus on encouraging a specific activity or rewarding a particular group of people through the tax code – are a form of spending, Congress rarely scrutinizes them like it does traditional federal budget outlays. This is despite the fact that, at $1.1 trillion, tax expenditures rival the size of the entire discretionary budget. The GAO, along with nongovernmental organizations, have long called on the government to, at the very minimum, periodically review the performance of tax expenditures to help ensure that taxpayer money is spent as efficiently as possible.

The data deficiency hides a more pervasive problem, one highlighted by the new HIRE Act. To many, it appears that Congress disproportionately scrutinizes the distribution of funds to lower-income communities and individuals. For instance, the public will never see a report on the HIRE Act similar to the two recent GAO reports, because Congress did not mandate one when it passed the act.

This disparity shows up in other tax expenditures for low-income groups. A quick glance at the IRS's audit rate of those who qualify for and accept the Earned Income Tax Credit (EITC), compared to audit rates of higher-earning taxpayers, is another example. In a report on the tax gap in 2008, OMB Watch found that "[EITC] audits constituted about 40 percent of all audits performed on individual tax returns in FY 2006, even though EITC errors account for only three percent of the tax gap."

As the OMB Watch report demonstrates, it is not as if one can attribute Congress' disparity in tax expenditure oversight to a reasonable expectation that a low-income community would defraud the government while the business community would not. Indeed, economists have been questioning the merits and expected effectiveness of the provisions of the HIRE Act for some time now. It is the lack of a systematic tax expenditure data collection system that would prevent one from assessing the effectiveness of the HIRE credits, or, for example, understand the relationship between the roughly $3.3 billion in oil and gas drilling tax credits the government handed out in FY 2009 and their impact on energy production.

Tax expenditures have become exceedingly popular among lawmakers, as Citizens for Tax Justice noted in a 2009 report, not because they are good policy – indeed, when put under a spotlight, tax expenditures fail on sound tax policy grounds – but because they are easy to enact, difficult to track, and almost impossible to end.

The GAO points out that Congress has plenty of lessons to heed when requiring data collection on tax expenditures. If Congress chose to utilize these recommendations, it would not be difficult to imagine a system that allows for the routine examination of all tax expenditures. However, Congress is not likely to reverse or stop a political tool that provides such benefits, and

change on this issue will not come easily. However, the gross lack of oversight of tax expenditures, which often guarantees rank budgetary and economic inefficiencies, indicates that Congress should implement systematic examinations of the tens of thousands of tax expenditures that drain much needed revenue from the government each year.

Sunshine Week 2010 Concludes with a Number of Federal Initiatives

Each year, advocates of open and accountable government celebrate the birthday of former president James Madison, a founding father and advocate of open government, by hosting a week of events and increased public advocacy called Sunshine Week. In 2009, Attorney General Eric Holder released a memo during Sunshine Week regarding Freedom of Information Act (FOIA) implementation that encouraged disclosure of agency records. This year, transparency was highlighted through public events, legislative initiatives, and op-eds.

Sunshine Legislation

Several important new legislative initiatives at the federal level marked the open government week. In the Senate, Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX) reintroduced the Faster FOIA Act (S. 1111), which they first sponsored in 2005. If passed, the bill would create a congressional advisory panel to identify problems related to agency FOIA backlogs and processing delays and then recommend legislative changes to Congress, as well as advise on possible executive actions the president could take to reduce the processing time for records requests.

Another Sunshine Week bill, the Public Online Information Act (POIA) (H.R. 4858), was introduced in the House by Rep. Steve Israel (D-NY) on March 16. The bill creates a new standard in government, calling for public information to be posted online. Several transparency advocacy groups signed a joint letter calling for congressional hearings on the bill.

In addition to making most public records permanently available on the Internet, the bill would also establish an advisory board to determine best practices. However, the bill permits agencies to seek exclusions from the requirement to post public records online, should their online availability be deemed dangerous despite the records already being public under laws such as FOIA. Such exclusions would need authorization from the E-government administrator within the White House Office of Management and Budget (OMB). This is the first time the bill has been introduced.

Also in the House, a bill to reform the Federal Advisory Committee Act began to move forward. The bill to amend the act (H.R. 1320), introduced in June 2009, was expected to be considered via expedited procedures for noncontroversial bills. The bill would expand the requirement on government agencies to publicly report accounts of federal advisory committee meetings. The bill would also increase public knowledge of who the government gets advice from and the specific issues that are discussed. The legislation was pulled from the expedited track when Rep.

Darrell Issa (R-CA) objected on procedural grounds to changes that were made to the bill without bringing it under a rule. Issa has asked for a committee vote on the bill before it is taken up by the full House.

During Sunshine Week, the House also passed the Plain Writing Act of 2010 (H.R. 946) and sent it to the Senate. The legislation would require agencies to use plain language in any document issued to the public other than a regulation. This bill would reduce the overly legalistic and difficult-to-understand language that is confusing to many Americans. The bill calls for agencies to submit proposals on how they intend to train employees and ensure compliance with the act and establishes a central point person in the agencies who is responsible for implementation. The bill was introduced by Rep. Bruce Braley (D-IA) on Feb. 10, 2009, and passed with strong bipartisan support on a vote of 386 to 33.

Finally, measures in the Electronic Message Preservation Act (H.R. 1387), introduced on March 9 by Rep. Paul Hodes (D-NH), would require the preservation of certain electronic records by federal agencies. Further, the National Archives and Records Administration would be required to establish standards for the management, retrieval, and preservation of agency and presidential electronic records. This bill is aimed at addressing the problem of e-records management that has plagued the executive branch for decades. The bill passed the House by voice vote on March 17 and was received by the Senate on March 18.

Sunshine Reports

The need for new legislation concerning government openness was underscored by several reports and releases that emerged during Sunshine Week. In particular, the National Security Archive released an audit report concluding that only a third of federal agencies have made significant strides toward complying with the Obama administration's new FOIA policies. The Archive filed FOIA requests with 90 agencies requesting any records that demonstrate how the new policies are being implemented. The report noted that 38 agencies had either circulated the new FOIA guidance, launched new training efforts, or implemented concrete changes in practice. However, 35 agencies responded that they had no records about changes to their implementation of FOIA, and 17 didn't respond or withheld their records. The report also noted that several agencies had reduced their backlogs of outstanding requests, though some agencies continue to have requests as much as two decades old. So far, only four agencies, according to the report, show both increases in releases and decreases in denials under FOIA. The Archive noted that it is "too early to render a final judgment" but that "more pressure and leadership will be necessary."

Unlike previous administrations, the Obama White House addressed Sunshine Week directly in public statements. The administration disagreed with the Archive's findings of limited progress, contended that agencies have already made significant strides on FOIA, and noted that the most recent data support such a conclusion. In a post on the White House blog by administration counsel Norm Eisen, a brief memorandum by Chief of Staff Rahm Emanuel, and a statement by President Obama, officials lauded the successes of the administration such as releasing visitor logs and data reporting through Recovery.gov and Data.gov. Further, Eisen stated that "we

believe that the first-year Chief FOIA Officer Reports that are forthcoming from the agencies will show progress on FOIA..."

The Justice Department posted these FOIA officer reports on its website on March 17. The data that is publicly available from the FOIA Annual Reports shows that while full granting of FOIA requests is down, as the Archive demonstrates, the combination of both full and partial granting of FOIA requests is on par with previous years. Further, the data from the reports also show a clear drop in agency backlogs to a level consistent with the level of backlogs that existed under the Clinton administration. These data are collected on a fiscal year basis, meaning that data collection ended September 30, 2009, roughly six months after the Obama FOIA policies were announced. Given this brief timeframe, it is surprising that the data is already showing some change.

Sunshine Events

Several open government events occurred throughout the week and focused on federal transparency.

- The Freedom Forum kicked off Sunshine Week with its 12th annual National Freedom of Information Day Conference, which explored the status of freedom of information with speakers from the administration as well as Congress.
- The OpenTheGovernment.org coalition hosted its annual Sunshine Week webcast featuring three panels on embedding transparency into government, improving the ability of citizens to request information through FOIA, and using government data in innovative ways.
- The Collaboration on Government Secrecy at American University's Washington School of Law held a one-day conference covering a wide array of government transparency issues.
- The Sunlight Foundation launched a transparency campaign around the principle that public records should be posted online.

OSHA Proposal Cuts Workers' Right to Know about Chemical Risks

A recent proposal by the Occupational Safety and Health Administration (OSHA) would endanger workers by reducing the amount of information on chemical hazards provided to them, according to several public interest groups. OSHA's proposal is part of its effort to make its Hazard Communication Standard conform to a United Nations system for classifying chemicals. The effort has been criticized by several public interest groups who view portions of it as an unnecessary contraction of workers' right to know and as contrary to the rhetoric of transparency and movement toward greater disclosure seen elsewhere in the Obama administration.

Considered to be a powerful tool for informing workers about chemical risks and safety measures, the Hazard Communication Standard (HazCom) is referred to as the "Workers' Right to Know." OSHA's HazCom standard requires chemical manufacturers and importers to evaluate chemicals they produce or import and determine if they are hazardous. Manufacturers must provide information on the hazards and safety measures to "downstream" users – employers, employees, and other chemical users – through Material Safety Data Sheets (MSDS).

According to the nonprofit government watchdog, Public Employees for Environmental Responsibility (PEER), "OSHA's plan would be a reversal in the right-to-know approach to chemical handling that would also mislead workers about actual hazards."

As part of the agency's effort to conform to the United Nations standard, OSHA has proposed to eliminate a longstanding requirement that chemical manufacturers include certain information on chemical hazards in the MSDS. Specifically, OSHA wants to remove the requirement to include chemicals' Threshold Limit Values (TLVs), which are quantitative judgments of chemical exposure levels that are hazardous to humans and are developed by the American Conference of Governmental Industrial Hygienists (ACGIH), an independent, nonprofit scientific research group focusing on workplace safety issues. OSHA has also proposed removing a requirement that chemical manufacturers include in the MSDS cancer hazard evaluations by the International Agency for Research on Cancer (IARC). Critics likewise view the proposed elimination of the IARC information as detrimental to workers' right to know.

In place of the TLV requirement, OSHA would require a different set of exposure limits developed by the agency. These OSHA hazard figures, called Permissible Exposure Limits (PELs), have been criticized as being decades out of date, biased by economic rather than scientific analyses, developed with little transparency, and less protective of worker safety. Moreover, there are no PELs developed by OSHA for thousands of chemicals handled by workers.

The proposal to reduce the required information on MSDS was originally proposed by the Bush administration in 2006 with strong industry support.

According to the Center for Progressive Reform, a nonprofit think tank, the proposed HazCom changes are not necessary to conform to the U.N. standard, called the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). The GHS was designed to be flexible enough to allow authorities to adapt to their own nations' needs. Moreover, the changes would not meet the requirements of the Occupational Safety and Health Act and could be challenged in court as being "arbitrary and capricious."

In testimony submitted at a public hearing on the issue, the Center for Progressive Reform determined that "the [MSDS] serve as a critical vehicle for conveying hazard information to workers. Accordingly, the protection of workers is best served by including more – not less – information in the [MSDS]."

The proposed changes to the HazCom standard would eliminate certain requirements to provide information to workers and others through the MSDS. However, the MSDS have long been regarded by many as ineffective for informing the public about the hazards of chemicals. MSDS have been criticized for containing incomplete, inaccurate, or contradictory information.

In 2004, the U.S. Chemical Safety and Hazard Investigation Board (CSB), an independent federal agency that investigates major industrial chemical accidents, found that deficient MSDS were a cause or contributing factor in 10 of 19 major accidents the board had investigated. The then-head of the CSB, Carolyn Merritt, testified before the Senate that, "Deficiencies in hazard communication and Material Safety Data Sheets are among the common causes of major chemical accidents that result in loss of life, serious injures, and damage to property and the environment."

OSHA originally planned three public hearings across the country to gather comments on its HazCom proposal. A hearing in California has been cancelled, and a hearing in Pittsburgh, PA, is scheduled for March 31.

Auto Safety Regulator under Scrutiny after Toyota Fiasco

Incidents of sudden acceleration that led to the recall of millions of Toyota vehicles have sparked a debate over whether the National Highway Traffic Safety Administration (NHTSA), the federal agency in charge of auto safety, needs enhanced powers and resources.

Lawmakers and advocates have criticized NHTSA's response to the acceleration defects in Toyotas. Since 2003, NHTSA has opened investigations into sudden acceleration in response to driver complaints but closed the cases without taking remedial action. Eventually, Toyota recalled floor mats from certain models, blaming the mats for sticking accelerator pedals, but as problems persisted, the company issued a larger recall.

The Toyota controversy has thrust auto safety onto Congress's agenda. On March 11, the House Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection held a hearing to critique NHTSA and discuss ways to improve its performance in the future. Panel members signaled that they will consider new legislation modifying or increasing NHTSA's authority, but they did not discuss specifics.

Though it already has the authority to do so, NHTSA has not ordered a recall in more than 30 years. NHTSA Administrator David Strickland told the committee that recalls are negotiated with automakers, who conduct them voluntarily, all but eliminating the need for NHTSA to use its mandatory recall authority.

Manufacturers also conduct recalls without any input from NHTSA. Of the 492 recalls announced in 2009, 340 were conducted entirely at manufacturers' discretion, Dave McCurdy of the Alliance for Automobile Manufacturers testified. "The remaining 152 recalls were 'influenced' by NHTSA," he said.

NHTSA should be able to levy greater fines on delinquent automakers, witnesses said. The current statutorily imposed limit on civil penalties is $16.4 million. "This amount might be considered by a large, multi-billion dollar manufacturer as just the 'cost of doing business,'" Amy Gadhia of Consumers Union, publisher of *Consumer Reports*, told the committee. "We recommend removing this cap on civil penalties to act as a deterrent for future violations of the law."

NHTSA has not come close to exercising the penalty authority it has now. A $1 million fine of General Motors in 2004 was the largest in NHTSA's history. "The agency did not impose any penalties from 2004 to 2008," according to the testimony of Joan Claybrook, who served as NHTSA administrator under President Clinton.

Nor has NHTSA adequately tapped its rulemaking capabilities. According to the *Unified Agenda*, a listing of agencies' pending and recently completed regulations, the agency has issued only four major auto safety regulations in the past five years: a rule requiring greater roof strength, a rule modifying side impact standards, a rule requiring electronic stability control, and a rule requiring warning lights for under-inflated tires.

During the hearing, panel members credited NHTSA and its regulations with improving auto safety. In 2009, traffic fatalities reached their lowest level since 1954, according to NHTSA. Still, almost 34,000 people died in traffic accidents in 2009.

Claybrook and Gadhia both listed new standards NHTSA could adopt to improve auto safety. A rule mandating brake override systems, the kind that could prevent sudden accelerations such as those in Toyotas, should be on NHTSA's rulemaking agenda, they said. Secretary of Transportation Ray LaHood told lawmakers in a previous hearing that NHTSA will consider developing such a standard.

In addition to new authorities and stronger regulations, NHTSA needs corresponding increases in resources, witnesses said. President Obama's FY 2011 budget plan requests $133 million for NHTSA's vehicle safety program, a cut of more than $7 million from current levels.

Of the $133 million, $23 million would be dedicated to rulemaking, and $18 million would be directed to enforcement. According to the committee, NHTSA's Office of Defects Investigation (ODI) would receive $10 million from the enforcement pot. The office maintains 57 employees responsible for reviewing 30,000 complaints per year.

During the hearing, Strickland defended his agency's record and the FY 2011 budget request. He emphasized that the request will allow the agency to hire 66 new employees. A fraction of those employees will be assigned to ODI, but Strickland has yet to determine exactly how many.

Witnesses also criticized NHTSA's Early Warning Reporting system, a database for manufacturer reports on production and safety information. The agency does not disclose the majority of information in the database.

Claybrook and Gadhia recommended the database be made public. "As the Toyota cases make clear, even excellent letters or defect investigation petitions from consumers that cause the agency to take a look at an issue can be dismissed by NHTSA, but without the early warning information the public cannot weigh in and be effective advocates in response," Claybrook said.

Modernizing the Occupational Safety and Health Act

On March 16, a House subcommittee held a hearing on proposed legislation to modernize the Occupational Safety and Health Act (OSH Act). The House bill, the Protecting America's Workers Act (PAWA), would update civil and criminal penalties and provide enhanced protection to workers who report unsafe working conditions.

Rep. Lynn Woolsey (D-CA), chair of the Workforce Protections Subcommittee of the House Education and Labor Committee, introduced the bill in April 2009. The recent hearing focused mainly on changes to civil and criminal penalties and to modernizing worker protections. The OSH Act has not been significantly revised since it was enacted in 1970, according to Woolsey's opening statement.

In addition to revising penalties, PAWA would extend occupational safety and health protections to state and local workers. The bill would also strengthen whistleblower protections by prohibiting retaliation against workers who report workplace hazards, illnesses, and injuries, or who refuse to work under conditions the worker believes could result in serious injury or illness.

Among those testifying at the hearing was the Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), Dr. David Michaels, who told the subcommittee that the Obama administration "strongly supports" PAWA. He noted that, although workplace injuries and illnesses have declined by 65 percent since 1973 as a partial result of the OSH Act, "the workplaces of 2010 are not those of 1970: the law must change as our workplaces have changed. The vast majority of America's environmental and public health laws have undergone significant transformations since they were enacted in the 1960s and 70s, while the OSH Act has seen only minor amendments."

Michaels emphasized that OSHA has a limited ability to inspect the many workplaces throughout the country and, therefore, the agency needs to have penalties large enough to create incentives for companies to comply with OSHA regulations. According to his written testimony, "Swift, certain and meaningful penalties provide an important incentive to 'do the right thing.' However, OSHA's current penalties are not large enough to provide adequate incentives. Currently, serious violations – those that pose a substantial probability of death or serious physical harm to workers – are subject to a maximum civil penalty of only $7,000. Let me emphasize that – a violation that causes a 'substantial probability of death – or serious physical harm' brings a maximum penalty of only $7,000. Willful and repeated violations carry a maximum penalty of only $70,000 and willful violations a minimum of $5,000." The average OSHA penalty is approximately $1,000, he told the subcommittee.

Woolsey's bill would increase the penalty for willful and repeated civil violations, for example, from $70,000 to $120,000; it would increase the maximum civil penalty from $7,000 to $12,000. The bill adds an additional penalty for violations that result in the death of an employee by allowing OSHA to fine the violator $50,000 to $250,000. The bill would also allow OSHA's penalties to be adjusted according to inflation. Michaels noted that penalties for violations "have been increased only **once** in 40 years despite inflation during that period." He added that penalties under the Clean Air Act could be 50 times higher than what OSHA could impose for the same incident.

OSHA's criminal penalties have not been updated in the history of the OSH Act and "are weaker than virtually every other safety and health and environmental law," according to Michaels' testimony. "The maximum period of incarceration upon conviction for a violation that costs a worker's life is six months in jail, making these crimes a misdemeanor," he noted. In Woolsey's opening comments, she said that the Justice Department told the subcommittee that Justice rarely prosecutes these criminal misdemeanors because the violations aren't felonies.

Support for increasing OSHA's civil penalties came from another witness, John C. Cruden, Deputy Assistant Attorney General in the Environment and Natural Resources Division of the Justice Department. Cruden supervises attorneys prosecuting environmental crime cases in which violations have resulted in death or in which defendants knowingly put workers at risk of death or injury. He told the subcommittee that the successful prosecution of environmental crimes has rested on stiff criminal penalties in environmental statutes, not the criminal provisions in the OSH Act. He said, "[T]he Department of Justice supports the strengthening of the OSH Act's criminal penalties to make those penalties more consistent with other criminal statutes and further the goal of improving worker safety."

Eric Frumin, health and safety coordinator for Change to Win, a coalition of five major labor unions, also supported increased penalty authority for OSHA. Although the agency can only impose small fines, he criticized OSHA for its lax enforcement. Frumin cited the small number of inspections OSHA conducts compared to a growing workforce, weak enforcement programs, and the low fines levied against violators. In FY 2007, for example, the final median penalty (after negotiation and settlement) for workplace fatalities was $3,675.

Although supportive of the PAWA's proposed increased penalties, Frumin noted, "The penalties proposed by PAWA are *very* modest. The new criminal sanctions are equally modest. Even with these improvements, we all recognize that if passed, PAWA will not put the OSH Act on an even par with the sanctions that negligent employers have already faced for years under our environmental laws."

The final witness at the hearing was a representative of the U.S. Chamber of Commerce, an association of business groups. Jonathan Snare is a partner in the Washington, DC, office of the Morgan Lewis & Bockius law firm and a former head of OSHA and the Department of Labor's Solicitor's Office during the Bush administration. Snare argued that PAWA was misguided by focusing on penalties, sanctions imposed after injuries and illnesses occur. OSHA has "sufficient

penalties and enforcement tools" and should instead focus on compliance assistance programs and working with companies to ensure illnesses and injuries are avoided.

A companion bill (S. 1580) with the same title was introduced in the Senate by the late Sen. Edward Kennedy (D-MA) in August 2009 and has been referred to the Committee on Health, Education, Labor, and Pensions.

Commentary: A Call for Change on Legal Services Corporation Funding Restrictions

For the past 14 years, the Legal Services Corporation (LSC), which funds legal services for the poor, has been forced by Congress to place severe restrictions on legal aid programs that receive LSC funds. These restrictions also extend to non-federal funds raised by legal services programs. Since their passage, the restrictions have been plagued by repeated First Amendment questions and have sparked calls for change.

Background on the LSC Funding Restrictions

The LSC Act specifically prohibits organizations receiving LSC funding from using LSC or private funds to engage in: political activities; most criminal cases; "challenging criminal convictions against officers of the court or law enforcement officers; organizing activities, including training for – or encouraging of – political or labor activities"; litigation to receive "non-therapeutic abortions" or "compel the provision of abortion services over religious or moral objections"; and "proceedings involving desegregation of public schools, military service or assisted suicide."

In 1996, Congress expanded the LSC restrictions to apply to funds from all sources, including federal, state, local, and private funds, with the exception of tribal funds. It also prohibited additional activities, including: class actions; all abortion-related litigation; representing prisoners; representing people who are being evicted from public housing for allegedly distributing illegal drugs; redistricting activities; lobbying governmental bodies, with limited exceptions; and representing non-U.S. citizens, with limited exceptions.

Current LSC rules also require legal aid programs that wish to lobby, spend private dollars on class action lawsuits, comment on proposed regulations, or represent certain types of clients, such as prisoners or certain immigrants, to set up physically separate offices with separate staff.

A Brief History of Judicial Efforts to Remove LSC Funding Restrictions

The first legal challenge to these restrictions was brought by the Legal Aid Society of Hawaii (*LASH v. LSC*) and several other LSC-funded programs in 1997. LSC then revised its regulations in May 1998 to set up conditions under which private funds could theoretically be used for advocacy. Known as the "program integrity regulation," the rule requires physical separation

between LSC-funded recipients and any organizations that engage in restricted activities. (45 C.F.R. 1610)

After this change, the U.S. Court of Appeals for the Ninth Circuit found that the new rule was not a violation of the First Amendment protection of free speech. LASH and the other plaintiffs filed a petition asking the U.S. Supreme Court to review the case, but that petition was denied. Since 1998, a legal services program that wants to engage in restricted advocacy must set up a separate organization, with separate physical facilities and separate executive directors, staff, and budgets.

The next legal challenge to the LSC restrictions addressed a rule barring lawyers from using federal funding to challenge welfare reform laws in the course of representing clients seeking welfare benefits. *Legal Services Corporation v. Velazquez* was filed in the U.S. District Court for the Eastern District of New York in 1997 on behalf of legal aid lawyers, clients, and funders. In February 2001, the U.S. Supreme Court struck this provision down as an unconstitutional restriction of free speech.

In 2001, a coalition of lawyers, low-income clients, and New York City officeholders filed *Dobbins v. Legal Services Corporation*, arguing that it is unconstitutional for the government to regulate the privately funded activities of legal services programs.

In December 2004, the U.S. District Court for the Eastern District of New York struck down application of the rule imposing the restrictions on private funding. The court also issued a preliminary injunction against the physical separation requirement. The court ruled that the LSC violated the plaintiffs' First Amendment rights by requiring too great a degree of physical separation between federally funded approved activities and privately funded restricted activities.

The government had argued that shared facilities and staff create public confusion about what is LSC-funded activity and what is not. The court said the government's concerns can be met by having legally separate programs with strict accounting for shared facilities and staff to ensure LSC funds are not spent on restricted activities and having separate public areas for LSC and privately funded activities.

After an appeal by the government, the U.S. Court of Appeals for the Second Circuit held in December 2006 that the district court had used the wrong legal standard and lifted the preliminary injunction.

In 2007, the Supreme Court declined a request to review the *Dobbins* case, returning the case to the District Court for application of the new legal standard described by the Court of Appeals. Under the rule, the only way for a legal aid office to use non-federal dollars on certain work, such as representing clients in class action lawsuits or providing assistance to certain categories of legal immigrants, would be to establish a physically separate facility with separate staff.

Recent Legislative Efforts to Lift LSC Funding Restrictions

Legislative efforts to overturn the LSC funding restrictions have increased in the past year. In March 2009, Sen. Tom Harkin (D-IA) introduced the Civil Access to Justice Act of 2009 (S. 718) that ends the restrictions on the use of non-federal funds by LSC grantees, except those related to abortion litigation and a few other activities. "Lifting these restrictions allows individual states, cities and donors the ability to determine themselves how best to spend non-federal funds to ensure access to the courts," said Harkin.

Public sentiment also appears to be on the side of providing legal access to those in need. Since the Reagan administration, conservatives have sounded a drumbeat of opposition directed at the LSC. The Reagan budgets annually proposed elimination of legal services, only to have those services protected by Congress. Over the years, LSC funding has limped along. However, with the recent economic downturn, there has been a noticeable uptick in support for legal services. According to the Associated Press, two-thirds of those polled in 2009 on behalf of the American Bar Association said they favor federal funding for people who need legal assistance. Notably, Congress increased funding for the LSC in the last appropriations cycle.

A *Washington Post* editorial in March 2009 added to the calls for change, asking lawmakers to "unshackle Legal Services from congressionally-imposed restrictions that have kept it from working more efficiently and broadly." The editorial also called for support of the Harkin bill.

Also in 2009, a number of organizations signed a joint letter that draws upon the current economic crisis to highlight the need to remove the funding restrictions. According to the letter, "Families and communities across the country are suffering because of the restrictions" and "those most knowledgeable about issues critical to low-income clients cannot engage themselves in legislative and administrative reform efforts." The letter made clear that restrictions that may seem like technicalities to some have direct, real-world impacts on the most vulnerable Americans.

Despite public support and recent legislative efforts on the issue, most of the restrictions on LSC-funded grantees remain. Though most of these restrictions were lifted by the Senate version of the FY 2010 Commerce, Justice, and Science (CJS) appropriations bill, that language was stripped out by the conference committee that handled the FY 2010 omnibus appropriations bill, of which the CJS appropriations were a part. The only restriction that Congress ultimately lifted during the FY 2010 appropriations process was that covering the award of attorneys' fees.

The Need for Legislative Support of the Civil Access to Justice Act of 2009

At this critical time in our nation, legislative support for the Civil Access to Justice Act of 2009 is crucial. The harsh economic times and the foreclosure crisis that we are currently experiencing make it more necessary than ever to provide low-income individuals with access to legal aid

services and skilled advocates. The current, unduly burdensome LSC restrictions only serve to limit access to the legal system to those who need it most.

The Civil Access to Justice Act would change all that by addressing the most problematic restrictions on LSC grantees: those that prevent the use of non-federal funds to advocate on behalf of the neediest of our communities. The Act would lift most of the restrictions listed above except those related to abortion, prisoners challenging prison conditions, and people convicted of illegal drug possession in public housing eviction proceedings.

The act also "increases the yearly LSC authorization to $750 million, which matches the amount (adjusted for inflation) appropriated in 1981, the high-water mark for LSC funding. LSC's current $390 million appropriation is well below the amount needed to adequately fund the program," according to a press release from Rep. Bobby Scott (D-VA), who introduced the House version of the bill in October 2009.

The Civil Access to Justice Act would expand access to justice to low-income populations by lifting those restrictions and helping to ensure that federally funded legal services providers are able to assist their clients in the most effective way possible. The battle over LSC restrictions has been going on for far too long. It is time to pass and implement the Civil Justice Act of 2009 and end LSC restrictions on the use of non-federal funds for advocacy.

National Broadband Plan Seeks to Increase Civic Engagement

On March 16, the Federal Communications Commission (FCC) released its 376-page National Broadband Plan, setting forth a strategy to expand access to broadband Internet services to millions of people. Chapter 15 of the broadband plan is specifically intended to make it easier for Americans to actively participate in civil society and hold their government accountable.

According to experts, broadband services for all Americans is “the” infrastructure challenge of the 21st century. Like the highway systems created more than 80 years ago, broadband is the next way to stimulate the economy, create jobs, and increase quality of life for the majority of citizens, advocates say.

More specifically, the Internet is an extremely valuable tool for individuals and groups to engage in advocacy, and ultimately, increased online access will strengthen the level of citizen participation in our democracy. High-speed access to the Internet enables more citizens to gain a magnitude of information, from the skills to use the information effectively to opportunities to engage with others in their community to solve problems. People can find information about government performance, services the government provides, and in some cases can even register to vote online.

In 2009, as part of the American Recovery and Reinvestment Act, Congress directed the FCC to develop a National Broadband Plan to ensure that every American has "access to broadband capability." The broadband plan recommendations include faster Internet speeds (up to 25

times the current average), freeing airwaves for mobile broadband services, and putting billions of dollars into subsidized service for poor and rural communities. The plan is rather broad and includes increased public education programs to narrow the digital divide, ways to improve energy efficiency and health care, and plans to integrate broadband to improve economic conditions.

Notably, the FCC sees the connection between Internet access as a vehicle for meaningful engagement with government officials and the many other opportunities it provides to improve Americans' civic participation. The introduction to the chapter on civic engagement states, "Civic engagement is the lifeblood of any democracy and the bedrock of its legitimacy. Broadband holds the potential to strengthen our democracy by dramatically increasing the public's access to information and by providing new tools for Americans to engage with this information, their government and one another."

Civic Engagement Recommendations

There are five recommendations within the civic engagement chapter:

1. Create an open and transparent government
2. Improve access to media and journalism, including increased funding to public media for broadband
3. Use social media to increase civic engagement
4. Increase innovation in government
5. Modernize the democratic process through such means as online voter registration.

Good government advocates say these recommendations are commendable because the availability of government data will allow the public and advocacy organizations to more easily and actively participate in their communities and our democracy. The Internet has already become one of the primary sources for learning about and communicating with the government and elected representatives in Congress.

In calling for a more open and transparent government, the FCC recommends that all public information, such as those responses given under the Freedom of Information Act, as well as all legal documents, should be available for free online in searchable formats, as well as machine-readable formats. The plan also calls on government to improve the quality and accuracy of information given to the public, and it urges government to embrace new ways of inviting public participation and collaboration, including broadcasting all town hall meetings.

The plan recognizes social media as a growing opportunity to engage with the government and others, with social networking sites and the user-generated videos on YouTube as just two examples. The FCC's plan states, "Government must take advantage of these trends and adopt broadband-enabled tools to encourage citizens to communicate with government officials more often and in richer ways – and to hold these officials more accountable."

For example, a short YouTube video details some interesting statistics on social media and how it is shaping our society. It also compares other forms of media to demonstrate just how fast the social media sphere is growing. Consider that radio took 38 years to reach 50 million users, TV took 13 years to reach 50 million users, the Internet took four years to reach 50 million users, and Facebook added 100 million users in just nine months.

The broadband plan also recommends modernizing the election process. One of the simplest ways to be active in our democracy is through the ballot box. Nonprofit organizations have traditionally been active in ensuring the protection of Americans' voting rights. If the system was improved, it might alleviate some of the burden these groups currently shoulder.

The FCC report states, "By bringing the elections process into the digital age, government can increase efficiency, promote greater civic participation and extend the ability to vote to more Americans." The FCC questions a paper-based system for voter registration and recommends modernizing the election process with electronic voter registration, portability of voting records, and automatic updates of voter files with the most current address information available. The agency also suggests that the Department of Defense develop a secure Internet-based project that allows members of the military serving overseas to vote online.

It is not clear when the broadband plan's civic engagement recommendations will be addressed, but the FCC is scheduled to hold its next open meeting on April 22. Many of the recommendations will require action from the FCC, the communications industry, Congress, and other outside stakeholders.

The Need for Greater Broadband Access

Vigorous advocacy on the issue of broadband access and the FCC's plan has already begun. For example, the Center for Media Justice (CMJ) and the Media Action Grassroots Network (MAG-Net) have launched a campaign that includes calling for universal broadband access.

Organizations have issued statements in support of the FCC's broadband plan, but many also have critical questions that need to be answered. The American Library Association (ALA), for instance, "applauds the plan's focus on a more open and transparent government. The use of the Internet to provide government information and services certainly enhances access to the government – for those who have ready Internet access from their homes or workplaces." However, the ALA notes a very important issue: "Access to government information and services is not as enhanced for those Americans without ready Internet access, especially for vulnerable populations. Many of these people come to libraries for broadband access and librarian assistance to enable them to obtain what they need from the government."

From raising awareness about important local issues to gathering people for community events, inexpensive and easy web tools are helpful ways to organize in communities. However, those without access do not benefit and are ultimately left out of the conversation. A survey by the Census Bureau for the National Telecommunications and Information Administration recently found that minorities, seniors, the less-educated, the unemployed, and low-income households

are still much less likely to have broadband service in their homes. Universal broadband access would help to level the playing field for these communities.