Critical Waste Issues for the 117th Congress

CITIZENS AGAINST GOVERNMENT WASTE

About CAGW

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in government.

CAGW was founded in 1984 by J. Peter Grace and nationally syndicated columnist Jack Anderson to build public support for implementation of the Grace Commission recommendations and other waste-cutting proposals. Since its inception, CAGW has been at the forefront of the fight for efficiency, economy, and accountability in government.

CAGW has more than 1 million members and supporters nationwide. Since 1984, CAGW and its members have helped save taxpayers more than $1.9 trillion. CAGW publishes special reports, including the *Congressional Pig Book* and *Prime Cuts*, as well as its official newsletter *Government WasteWatch* and blog *The WasteWatcher*, to expose government waste and educate the American people on what they can do to stop the abuse of their hard-earned money. Internet, print, radio, and television news outlets regularly feature CAGW's publications and experts.

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INTRODUCTION

The 117th Congress has passed and President Biden has signed into law the $1.9 trillion American Rescue Plan, bringing total spending supposedly related to COVID-19 to more than $5.7 trillion. Beyond these expenditures, many members of Congress are clamoring for even bigger, more intrusive government, like the Green New Deal, Medicare for All, "free" college tuition, and forgiveness of student loans.

With a record deficit of $3.1 trillion in fiscal year (FY) 2020 and a national debt of $28 trillion, this is not the time to capitulate to calls to spend more of the taxpayers' money. It is time instead for action to reduce government waste, fraud, abuse, and mismanagement, and rein in the size and scope of the federal government.

Citizens Against Government Waste (CAGW) has been exposing earmarks in the *Congressional Pig Book* since 1991 and publishing a comprehensive database of recommendations to consolidate and terminate wasteful and inefficient programs in *Prime Cuts* since 1993. The publication of *Critical Waste Issues for the 117th Congress* provides a more concentrated list of some of the most important proposals that CAGW believes will result in a smaller and more efficient government.

CAGW's *Critical Waste Issues for the 117th Congress* details 17 policy areas that require immediate attention, including the need for greater accountability and transparency in government, budget reform, entitlements, healthcare, telecommunications, and technology. Policymakers have considered many of these recommendations in the past, and completely ignored others.

The adoption of the recommendations in *Critical Waste Issues for the 117th Congress* will repair the damage done by years of runaway spending and government waste and help to create a more effective and efficient government. Excessive government spending results in greater involvement and interference in the economy and less personal freedom. Eliminating government waste would help transfer power from Washington bureaucrats back to the states and the people, where there is usually more accountability.

CAGW's mission reflects the interests of taxpayers. All citizens benefit when government programs work cost-effectively and provide money to only those who are truly in need. Duplicative and overlapping programs fail to meet those objectives. Not only will representative government benefit from the adoption of these policies, but the country will also prosper economically because government mismanagement, fiscal profligacy, and chronic deficits soak up private savings and crowd out the private investment necessary for long-term growth.

Critical Waste Issues for the 117th Congress should be mandatory reading for taxpayers, the media, and all members of Congress as they tackle the biggest issues facing America.

ACCOUNTABILITY, OVERSIGHT AND TRANSPARENCY

The Freedom of Information Act (FOIA), enacted in 1967 to codify Americans' right to request and receive in a timely manner any nonproprietary information that does not compromise national security, has become a black hole for both taxpayers and the media.[1]

The Obama administration promised to be "the most transparent administration in history" and set out to reduce the overall FOIA backlog by 10 percent annually.[2] Despite that lofty goal, the number of unanswered FOIA requests reached 200,000 in 2015, up by 55 percent from 2013.[3] To address the concerns of news organizations and taxpayers alike, Congress passed the FOIA Improvement Act, signed into law by President Obama on June 30, 2016. While the legislation certainly helped give requesters a stronger legal precedent in court by codifying presumptions of disclosure, it did little to make the process more substantive and efficient.

According to the Justice Department's Office of Information Policy, in FY 2017 the federal government's more than 400 FOIA offices reduced the backlog of unanswered requests by 3.2 percent and had an 8.3 percent increase in processed FOIA requests compared with FY 2016.[4] While those numbers show improvement, staffing and technological usage deficiencies continue to hold agencies back from reaching the annual 10 percent mark.

A March 11, 2020 Government Accountability Office (GAO) report detailed continued delays in response time and a substantial increase in the FOIA backlog.[5] The report was requested by Sens. John Cornyn (R-Texas), Dianne Feinstein (D-Calif.), Chuck Grassley (R-Iowa), Patrick Leahy (D-Vt.), and Rep. Carolyn Maloney (D-N.Y.) because some agencies were not fully complying with the FOIA Improvement Act. In FY 2018, only 27 percent of FOIA requests were fully granted. The FOIA backlog increased by 80 percent since FY 2012, partly because requests increased by 30 percent over that timeframe. Costs to litigate FOIA requests also increased by 69 percent since FY 2012.

The way in which FOIA staffers answer requests is also concerning. A March 12, 2018, Associated Press analysis stated that out of 823,222 answered requests in FY 2017, 78 percent were answered as censored files or blank.[6] In other words, only about one in five FOIA requests were fully answered.

As internal government information is being obscured, the two largest taxpayer watchdogs, the GAO and the 72 federal agency Offices of Inspector General (OIGs), continue to pay for themselves, while rooting out waste, fraud, and abuse.

A June 2016 Brookings Institution report found that "from 2010–2014, the mean annual return on investment for IGs was 13.41."[7] In other words, for every dollar spent, the OIGs brought in $13.41 in savings.

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[1] Department of Justice, "What is FOIA," https://www.foia.gov/about.html.

[2] C.J. Ciaramella, "'The Most Transparent Administration in History': A campaign promise becomes a punchline," *Reason*, January 18, 2017, http://reason.com/archives/2017/01/18/the-most-transparent-administr/.

[3] Ted Bridis, "US sets new record for denying, censoring FOIA requests," *Federal News Network,* March 18, 2015, https://federalnewsnetwork.com/management/2015/03/us-sets-new-record-for-denying-censoring-foia-requests/.

[4] Jory Heckman, "Despite hiring freeze, agencies made progress in FOIA backlog in FY 17," *Federal News Network*, June 8, 2018, https://federalnewsnetwork.com/agency-oversight/2018/06/despite-hiring-freeze-agencies-processed-record-number-of-foia-requests-in-fy-17/.

[5] Michelle Sager, "Freedom of Information Act: Federal Agencies' Recent Implementation Efforts," GAO-20-406R, Government Accountability Office, March 11, 2020, https://www.gao.gov/assets/710/705284.pdf.

[6] Ted Bridis, "US sets new record for censoring, withholding gov't files," *AP News*, March 12, 2018, https://apnews.com/714791d91d7944e49a284a51fab65b85.

[7] John Hudak and Grace Wallack, "Sometimes cutting budgets raise deficits: The curious case of inspectors' general return on investment," Center for Effective Public Management at Brookings, April 2015, https://www.brookings.edu/wp-content/uploads/2016/06/CEPMHudakWallackOIG.pdf.

In its FY 2021 budget request, GAO documented that in FY 2019, "GAO's work yielded a record $214.7 billion in financial benefits, a return of about $338 for every dollar invested."[8] Since FY 2000, GAO reports have resulted in $1.2 trillion in financial benefits and 24,750 program and operational benefits that "helped to change laws, improve public services, and promote sound management throughout government."[9]

Sufficiently supporting GAO and the OIGs and further reforming the FOIA process would help demonstrate that eradicating waste, fraud, abuse, and mismanagement is being taken seriously in Washington. It would also overcome institutional bias on Capitol Hill, in particular, that problems can be solved by creating and funding new programs rather than conducting vigorous oversight to determine the effectiveness of existing expenditures.

Members of the 117th Congress must regain the public's trust by committing themselves to scrutinizing every corner of the federal budget, reinstating and repairing some of the government's most powerful waste-fighting tools, and providing complete transparency for all federal government spending in an easily understood and searchable online database accessible to all Americans.

8 Gene L. Dodaro, "Fiscal Year 2021 Budget Request," Government Accountability Office, February 27, 2020, https://www.gao.gov/assets/710/704921.pdf.
9 Ibid.

BUDGET REFORM

The current congressional budget process was established in 1974 by the Congressional Budget and Impoundment Control Act, also known as the Congressional Budget Act (CBA).[10] The CBA created the Congressional Budget Office (CBO) and the Budget Committees in the Senate and House of Representatives. Despite Congress's intent for the CBA to improve the budget process, it has long been broken, and reform is crucial to improve accountability and transparency, and get government spending under control.

According to the CBA, Congress is supposed to agree on a concurrent budget resolution by every April 15 for the coming fiscal year to set spending and revenue levels, covering 21 broadly defined functions of government, and enact all appropriations bills by October 1. However, this timeline has been mostly ignored by Congress as all appropriations bills have been passed on time since the CBA's enactment only in four fiscal years — 1977, 1989, 1995, and 1997. Instead, Congress has resorted to passing continuing resolutions, which provide funding similar to the previous year's level without regard to the effectiveness of federal spending.[11]

In addition to performing the most basic job of members of Congress by simply adhering to the timeline for the budget resolution and appropriations bills, there are several reforms that should be adopted that would improve the process. Passing biennial budgets that cover two years would bring increased stability and predictability to a chaotic process that has been subject to partisan bickering and grandstanding, last-minute giveaways, and government shutdowns. Regular, predictable biennial budgeting would enable Congress to enact two-year appropriations in the first year and conduct vigorous oversight hearings and analysis in the second year.

Congress should also adopt zero-based budgeting. The starting number for any expenditure would be zero, instead of starting the budget at the level spent during the previous year. Spending on any program would then have to be justified, not merely assumed. Congress should also enact sunset clauses to ensure that government spending does not outlive its usefulness and future expenditures can be paused. At the same time, an evaluation of the effectiveness of federal programs can be conducted. No program that was enacted 20 or 50 years ago should automatically be renewed.

Parallel to sunset clauses to stop the automatic renewal of federal programs is the Unauthorized Spending Accountability (USA) Act, first introduced in 2016 by Rep. Cathy McMorris Rodgers (R-Wash.).[12] The objective of the legislation is to eliminate "Zombie" programs that have not been authorized and give members of Congress time to "review, rethink, and possibly eliminate programs that are no longer needed."[13]

CBO estimated that "1,046 authorizations stemming from 272 laws expired before the beginning of fiscal year 2020."[14] There was "$332 billion in appropriations contained in 2020 appropriation legislation that can be attributed to those expired authorizations — $233 billion for those authorizations with specified amounts and $99 billion for indefinite authorizations."[15] Unauthorized programs were only $35 billion 20 years ago, which at the time represented 10 percent of the discretionary budget; today, they amount to more than 30 percent of total discretionary spending.[16]

[10] James V. Saturno, Bill Heniff Jr., and Megan S. Lynch, "The Congressional Appropriations Process: An Introduction," Congressional Research Service, November 30, 2016, https://fas.org/sgp/crs/misc/R42388.pdf.

[11] Jessica Tollestrup, "Automatic Continuing Resolutions: Background and Overview of Recent Proposals," Congressional Research Service, August 20, 2015, https://fas.org/sgp/crs/misc/R41948.pdf.

[12] Rep. Cathy McMorris Rodgers (R-Wash.), "Unauthorized Spending Accountability (USA) Act of 2019," https://mcmorris.house.gov/usaact/.

[13] Ibid.

[14] Congressional Budget Office, "Expired and Expiring Authorizations of Appropriations: Fiscal Year 2020," February 2020, p. 1, https://www.cbo.gov/system/files/2020-02/56082-CBO-EEAA.pdf.

[15] Ibid., p. 2.

[16] William Christian, "The USA Act(s): A Tale of Two Spending Reform Bills," *The WasteWatcher*, Citizens Against Government Waste, March 18, 2016, https://www.cagw.org/thewastewatcher/usa-acts-tale-two-spending-reform-bills.

The USA Act requires unauthorized programs to be put on a rolling path to sunset after three years. Each program would receive 90 percent of funding in the first year after its authorization expired, dropping to 85 percent in the second and third years, and then all funding would be rescinded after the fourth year. The legislation would also require a sunset clause in future reauthorizations.[17]

Unauthorized programs include entire departments, not just small programs. The State Department has not been reauthorized since 2003; the Bureau of Land Management has not been reauthorized since 1996; and the Justice Department has not been reauthorized since 2009. In the Department of Veterans Affairs (VA), programs costing more than $60 billion annually have not been reauthorized, some dating back to 1998.[18]

When a new Congress convenes, the majority party in each chamber decides the rules and procedures that will govern the Senate and House, respectively. Democrats, who control the House during the 117th Congress, have revived the "Gephardt Rule," introduced by former Rep. Dick Gephardt (D-Mo.), which automatically raises the debt ceiling whenever the House passes a budget. The Gephardt Rule was initially in effect from 1979 to 1995, when it was wisely repealed by the new Republican majority. Its revival makes it easier to raise the federal borrowing limit, thus reducing the likelihood of cutting spending to help rein in the deficit and debt.

During his last month as House Budget Committee Chairman, Rep. Tom Price (R-Ga.) proposed six principles for budget reform, including strengthening enforcement, increasing transparency and constitutional authority, and changing the built-in bias toward higher spending. Chairman Price also recommended that rather than having the President submit a detailed budget in February, he should submit a policy-based budget on April 30, which would be after the House and Senate Budget Committees report their budget resolutions no later than April 15.[19]

Chairman Price's reforms also required the President's budget "to include an analysis of the costs of complying with all current and proposed federal regulations, prohibits any agency from adding new regulatory costs without eliminating existing regulations of the same amount, and requires the CBO and the Office of Management and Budget to create a regulatory baseline in order to estimate total regulatory costs."[20] He also suggested uniform budget rules for the House and Senate, full cost estimates prior to committee mark-ups, and an end to "gimmicks" like moving spending into or out of the last and first day of a fiscal year.

Other changes that should be made to the budget process include converting the concurrent budget resolution into a joint resolution that would be signed into law by the President; amending House rules to establish a point of order for a rule waiving applicable spending points of order; limiting the growth of entitlement spending to the current inflationary adjustment for each program and population growth; repealing the Gephardt rule; and enhanced rescission authority that would pass constitutional muster and give the President the power to eliminate wasteful spending in appropriations bills.

Congress's inability to adhere to the requirements of the budget process proves that the system needs reform. Following these recommendations would increase accountability, improve oversight, and increase the chances of passing the budget resolution and appropriations bills on time.

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[17] Ibid.
[18] Ibid.
[19] Rachel Cole, "Power of the Purse and Budget Process Reform," *The WasteWatcher*, Citizens Against Government Waste, December 20, 2016, http://www.cagw.org/thewastewatcher/power-purse-and-budget-process-reform.
[20] Ibid.

CIVIL SERVICE REFORM

The federal government is the largest single employer in the nation with approximately 2.1 million civilian workers.[21] Salaries are paid by taxpayers, who should expect full and open accountability for how workers perform on the job and spend their time.

One of the most prominent issues that adversely impacts the effectiveness of the federal civil service is the use of "official time." Under the Civil Service Reform Act of 1978, federal employees are allowed to conduct union business during work hours while being paid their full salary. These taxpayer-funded union duties include negotiating collective bargaining agreements and filing and handling grievances against the agencies where they are employed. There is no cap on either the number of hours an individual can spend on official time or the total number of hours that can be spent on official time government-wide or within each agency.

The Office of Personnel Management (OPM) reported that in FY 2019, federal workers used more than 2.6 million hours of official time at a taxpayer cost of $135 million.[22] The 2.6 million hours of official time represents a 27.8 percent reduction from the 3.6 million hours in FY 2016, while the $135 million is a 23.8 percent reduction from the $177.2 million in FY 2016.[23] The OPM report noted that, "there is no uniform government-wide requirement concerning the degree and specificity of records kept" for official time.[24]

In a series of executive orders issued on May 25, 2018, President Trump attempted to crack down on abuse of official time. One order instituted a 25 percent cap on the amount of time a federal employee is permitted to spend on union duties. That order also barred employees from lobbying Congress while on the taxpayers' dime, stating, "Federal employees should spend the clear majority of their duty hours working for the public."[25]

Another order streamlined the ability of departments and agencies to terminate employees in a more expedited fashion.[26] A February 2015 GAO report found that it took an average of a year or longer to fire a lackluster federal worker.[27] The executive order instituted a 30-day cap on a worker's mandated "Performance Improvement Plan."

Unfortunately, on August 25, 2018, a U.S. District Court struck down nearly all provisions in the orders[28] and the U.S. Court of Appeals for the District of Columbia Circuit denied the administration's request for an expedited appeal on October 19, 2018.[29]

As the broader effort at civil service reform sputters, a more focused, department-level reform has been enacted. After the insidious wait times scandal at the VA,[30] Congress passed and President Trump signed into

[21] Julie Jennings and Jared C. Nagel, "Federal Workforce Statistics Sources: OPM and OMB," Congressional Research Service, October 23, 2020, https://fas.org/sgp/crs/misc/R43590.pdf.
[22] Office of Personnel Management, "Taxpayer-Funded Union Time Usage in the Federal Government: Fiscal Year 2019," October 2020, https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-taxpayer-funded-union-time/reports/taxpayer-funded-union-time-fy-2019.pdf.
[23] Office of Personnel Management, "Official Time Usage in the Federal Government: Fiscal Year 2016," May 2018, https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/reports/2016-official-time-usage-in-the-federal-government.pdf.
[24] Ibid.
[25] The White House, "Executive Order Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use," May 25, 2018, https://www.whitehouse.gov/presidential-actions/executive-order-ensuring-transparency-accountability-efficiency-taxpayer-funded-union-time-use/.
[26] The White House, "Executive Order Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles," May 25, 2018, https://www.whitehouse.gov/presidential-actions/executive-order-promoting-accountability-streamlining-removal-procedures-consistent-merit-system-principles/.
[27] Government Accountability Office, "Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance," GAO-15-191, February 2015, https://www.gao.gov/assets/670/668339.pdf.
[28] Erich Wagner, "Judge Strikes Down Trump Executive Orders Limiting Federal Employee Union Bargaining," *Government Executive*, August 25, 2018, https://www.govexec.com/management/2018/08/judge-strikes-down-trump-executive-orders-limiting-federal-employee-union-bargaining/150813/.
[29] Erich Wagner, "Court Denies Trump Administration Request to Expedite Appeal of Workforce EO Decision," *Government Executive*, October 19, 2018, https://www.govexec.com/management/2018/10/court-denies-trump-administration-request-expedite-appeal-workforce-eo-decision/152173/.
[30] Curtis Kalin, "VA Scandal Rages On in 2016," *The WasteWatcher*, Citizens Against Government Waste, August 18, 2016, https://www.cagw.org/thewastewatcher/va-scandal-rages-2016.

law the Department of Veterans Affairs Accountability and Whistleblower Protection Act on June 23, 2017.[31] The law expedites the process of dismissing an employee to less than a month, shortening a process that had taken several months or years.

The fits and starts of civil service reform make it even more critical for Congress to consider key pieces of legislation that would help accomplish the goal of a leaner and more accountable federal workforce. On January 8, 2019, Rep. Ted Yoho (R-Fla.) introduced the Federal Employee Accountability Act, which would provide additional statutory authority for federal agencies to remove or demote employees for poor performance or misconduct without needing to provide evidence that doing so promotes organization efficacy.[32]

On June 19, 2019, Rep. Barry Loudermilk (R-Ga.) introduced the Modern Employment Reform, Improvement, and Transformation (MERIT) Act.[33] Sen. David Purdue (R-Ga.) introduced companion legislation in the Senate on the same day.[34] The bills would give a fired employee just 30 days to appeal and would double the probationary period for new hires, making it easier to dismiss employees who are not a good fit.

Legislation has also targeted official time. In March 2015, Rep. Jody Hice (R-Ga.) and Sen. Johnny Isakson (R-Ga.) introduced the Federal Employee Accountability Act, which would eliminate official time for federal employees.[35] Federal workers acting as union representatives would no longer be paid by taxpayers to negotiate their collective bargaining contracts.

Federal workers who collect paychecks funded with taxpayer dollars should be held to the highest performance and ethical standards. Any federal employee who breaches the public trust through poor performance or unethical behavior should be subject to a fair but swift termination process. As the executive branch implements reforms, Congress should also exercise its authority to ensure that the federal bureaucracy is not taking advantage of taxpayers.

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[31] Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, S. 1094, 115th Congress (2017), https://www.congress.gov/bill/115th-congress/senate-bill/1094.
[32] Federal Employee Accountability Act of 2019, H.R. 354, 116th Congress (2019), https://www.congress.gov/bill/116th-congress/house-bill/354.
[33] MERIT Act of 2019, H.R. 3348, 116th Congress (2019), https://www.congress.gov/bill/116th-congress/house-bill/3348.
[34] MERIT Act of 2019, S. 1898, 116th Congress (2019), https://www.congress/gov/bill/116th-congress/senate-bill/1898.
[35] Federal Employee Accountability Act of 2015, 114th Congress (2015), https://www.congress.gov/bill/114th-congress/house-bill/1658.

As the federal budget increases every year, it is possible that the budget for the Department of Defense (DOD), which is the government's largest discretionary expenditure, will eventually eclipse $1 trillion annually. The $721 billion approved for FY 2020 was one of the highest amounts in U.S. history, accounting for approximately one-sixth of federal spending.[36] Making matters worse, the DOD remains the sole federal agency that has not undergone a clean audit under the Chief Financial Officers Act of 1990.

To ensure the DOD spends its dollars wisely, the 117th Congress should focus on two key areas.

Financial Disarray

In an effort to get the Pentagon's business operations in order, members of Congress in FY 2018 created the role of Chief Management Officer (CMO). Elevated to the third-highest civilian position at the Pentagon from its previous, ineffective deputy secretary level, the CMO is tasked with improving efficiency and locating savings in the Fourth Estate, which is made up of DOD support services that are not part of the military branches.[37] The portfolio includes the Office of the Secretary of Defense, the Joint Staff, and agencies that perform tasks related to intelligence, logistics, accounting, and contract management. The Fourth Estate employs approximately 380,000 individuals and has an annual budget of more than $100 billion.

Confirmed to the position on December 19, 2019, CMO Lisa Hershman found a target-rich environment. In a February 10, 2020 interview with *Defense News*, Ms. Hershman stated that the DOD is spending vast sums to stock its commissary system with items that are of limited interest to customers.[38] Of the 1.4 million items carried, nearly one million produce less than $1,000 in revenue each year, including 23 brands of apple juice.

Efforts to find efficiencies across the Fourth Estate have already paid dividends. The CMO has claimed to have identified $22.3 billion in savings between FYs 2018 and 2021. These savings are being reinvested in warfighting, enhancing the ability of the DOD to perform its core function.

In a July 9, 2020 *Defense News* interview, Ms. Hershman made the case for the CMO office. She noted that any demotion of the CMO role would represent a "guaranteed failure" in the effort to make fundamental changes in how the Pentagon does business and show that Congress is not serious about reform.[39] During a July 10, 2020 Facebook Live broadcast with CAGW President Tom Schatz, Ms. Hershman stated, "It's not about me personally, I knew I was going to be here for a temporary amount of time," but keeping the status quo at the CMO is necessary "to make sure we've hit that tipping point and are creating game-changing results."[40] And on top of the examples of wasteful spending she provided in the *Defense News* interviews, Ms. Hershman said that her office had found 31 contracts for orange juice in one agency with only two vendors.

Taming the bureaucratic beast has always been and will continue to be a challenge because of institutional inertia, contractor resistance, and the Pentagon's benefactors in Congress. In fact, legislators have unreasonably, but not surprisingly, taken steps to unwind the CMO position, despite its early returns on investment. The National Defense Authorization Act for Fiscal Year 2021 (NDAA), which became law on January 1, 2021, when the Senate followed the House and overrode President Trump's veto, eliminates the

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[36] Jeff Stein, "U.S. military budget inches closer to $1 trillion mark, concerns over federal deficit grow," *The Washington Post,* June 18, 2018, https://www.washingtonpost.com/news/wonk/wp/2018/06/19/u-s-military-budget-inches-closer-to-1-trillion-mark-as-concerns-over-federal-deficit-grow/?utm_term=.d9701c680662.

[37] Bradley Peniston, "Explainer: What is the Pentagon's Fourth Estate?" *Defense One*, February 6, 2020, https://www.defenseone.com/threats/2020/02/what-pentagons-fourth-estate/162939/.

[38] Aaron Mehta, "How the Pentagon found $6.5 billion in savings in 2019," *DefenseNews*, February 10, 2020, https://www.defensenews.com/pentagon/2020/02/10/how-the-pentagon-found-65-billion-in-savings-in-2019/.

[39] Ibid.

[40] Citizens Against Government Waste, "CAGW President Tom Schatz and Defense Department Chief Management Officer Lisa Hershman discuss how her office is saving taxpayers money at the department," July 10, 2020, https://www.facebook.com/CAGW/videos/vb.9364828262/1424428497765634/?type=2&theater.

CMO position within one year.[41] The duties and responsibilities of the role will be handed off to various positions at the discretion of the Secretary of Defense. Once again, the fox will be guarding the henhouse, or more appropriately, the taxpayers' money will once again be at serious risk of being wasted at the Pentagon. Given the need for national security spending to be as efficient and effective as possible in an ever-dangerous world, this decision is both regretful and dangerous.

Instead of giving up on the experiment after such a limited time, Congress should strengthen the office and support efforts to institutionalize it within the Pentagon. The role requires more time and resources to train staff, track implementation of its recommendations, and become incorporated into the culture of the DOD.

A March 14, 2019 GAO report concurred with this assessment. The report recommended providing a chartering directive to address the manner in which "the CMO's authorities should be operationalized."[42] The GAO also noted the current lack of clarity in the CMO's ability to direct military departments on business reform issues, especially in the event of disagreement between parties. Crucially, the DOD agreed with the GAO's appraisal and recommendations.

Members of Congress, particularly those who claim to strongly back the DOD, should fully support the CMO, especially since the savings enhance national security. Killing the CMO position will snuff out one of the few prospects for sorely needed institutional reform within the Pentagon.

The financial black hole at the Pentagon is nowhere more evident than in its inability to pass a financial review. On November 16, 2020, the DOD announced that for the third straight year it failed to pass a clean audit.[43] The Pentagon's latest review of its 24 agencies and $2.9 trillion in assets turned up one additional subgroup, the Defense Information Systems Agency (DISA), which came back clean. Along with the six that passed in 2019, seven of the DOD's 24 agencies have thus far returned clean audits. The Pentagon now estimates that the remainder of its agencies will not be able to pass a clean audit before 2027, 37 years after it was required to do so by law.

Acting DOD Comptroller Thomas Harker stressed patience, but this is hard to reconcile with the fact that this problem does not exist in any other federal agency. It is also hard to imagine members of Congress allowing such persistent financial ineptitude to exist anywhere else.

The review at least managed to pay for itself. The outside accounting firms hired by the Pentagon cost $203 million, and they identified approximately $700 million in savings.

The necessity for the Pentagon to get its financial house in order is revealed on a regular basis. A July 26, 2016 DOD OIG report noted that the Defense Financing and Accounting Service, which provides payments for military and civilian personnel and retirees, could not adequately document $6.5 trillion worth of year-end adjustments to general fund transactions and data.[44] The books are so bad that areas within the DOD have been on the GAO's list of programs at high risk for waste, fraud, abuse, and mismanagement since 1995.

The road to these failed audits has been long and arduous. In 2013, the Pentagon announced with much fanfare that the Marine Corps had become the first military service to attain a clean audit.[45] Then-Secretary

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41 Aaron Mehta, "'They need to answer to this': Pentagon CMO pushes back as Congress moves to shutter office," *Defense News*, December 4, 2020, https://www.defensenews.com/pentagon/2020/12/04/they-need-to-answer-to-this-pentagon-cmo-says-as-congress-moves-to-shutter-office/.

42 Government Accountability Office, "Defense Business Operations: DOD Should Take Steps to Fully Institutionalize the Chief Management Officer Position," GAO-19-199, March 2019, https://www.gao.gov/assets/700/697516.pdf.

43 Aaron Mehta, "The Pentagon failed its audit again, but sees progress," *Defense News*, November 16, 2020, https://www.defensenews.com/pentagon/2020/11/16/the-pentagon-failed-its-audit-again-but-sees-progress/.

44 Scot J. Paltrow, "U.S. Army fudged its accounts by trillions of dollars, auditor finds," *Reuters*, August 19, 2016, https://www.reuters.com/article/us-usa-audit-army/u-s-army-fudged-its-accounts-by-trillions-of-dollars-auditor-finds-idUSKCN10U1IG.

45 David Alexander, "Hagel praises U.S. Marines' progress on readying accounts for audit," *Reuters*, February 6, 2014, https://www.reuters.com/article/us-usa-defense-audits-idUSBREA1601X20140207.

of Defense Chuck Hagel even held a ceremony on February 6, 2014, stating, "I know that it might seem a bit unusual to be in the Hall of Heroes to honor a bookkeeping accomplishment, but, damn, this is an accomplishment!"

Damn, that celebration was short-lived. A July 30, 2015 GAO report on the Marine Corps audit stated that the DOD OIG "did not perform sufficient procedures, under professional standards, and consequently did not obtain sufficient, appropriate audit evidence to support the audit opinion."[46]

In November 2018, the DOD released the results of its first-ever department-wide financial review. Speaking to reporters on November 15, 2018, Deputy Secretary of Defense Patrick Shanahan stated, "We failed the audit, but we never expected to pass it."[47]

The second attempt the following year ended about as poorly as the first. On November 15, 2019, the Pentagon released its FY 2019 financial report, which provided further evidence of remarkably poor recordkeeping including $280 million in improperly tracked material at the Jacksonville Naval Air Station.[48] Amongst this total was $81 million worth of items that the Navy had no idea it possessed. The service freed up 200,000 square feet of storage space in Jacksonville by clearing out unusable materials.

After the DOD's most recent failure, it appears the agency is still years away from passing a clean audit. While it is highly unlikely that the IRS would allow private citizens to get away unpenalized with 30 years of financial ineptitude, legislators have long been more charitable to the Pentagon. They need to apply consistent pressure, or it may take another 30 years until the DOD finally gets its financial house in order.

Poor Acquisition Track Record

The acquisition side of defense spending is also a mess, including several infamous procurement disasters that are emblematic of the Pentagon's systemic problems. The foremost example is the F-35 Joint Strike Fighter (JSF).

The perennial posterchild of a broken acquisition system, the JSF program has been under continuous development since the contract was awarded in 2001 and has faced innumerable delays and cost overruns. Total acquisition costs now exceed $428 billion, nearly double the initial estimate of $233 billion. The total costs for the F-35 are estimated to reach $1.727 trillion over the lifetime of the program, of which $1.266 trillion will be needed for operations and support.[49]

On April 26, 2016, then-Senate Armed Services Committee Chairman John McCain (R-Ariz.) called the JSF program "both a scandal and a tragedy with respect to cost, schedule, and performance."[50] In February 2014, then-Under Secretary of Defense for Acquisition, Technology, and Logistics Frank Kendall referred to the purchase of the F-35 as "acquisition malpractice," a description that has yet to be improved upon.[51]

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[46] Government Accountability Office, "DOD Financial Management: Actions Are Needed on Audit Issues Related to the Marine Corps' 2012 Schedule of Budgetary Activity," GAO-15-198, August 3, 2015, https://www.gao.gov/products/GAO-15-198.

[47] Idrees Ali and Mike Stone, "Pentagon fails its first-ever audit, official says," *Reuters*, November 15, 2018, https://www.reuters.com/article/us-usa-pentagon-audit/pentagon-fails-its-first-ever-audit-official-says-idUSKCN1NK2MC?fbclid=IwAR1qfSDx_O6JTkGFclgSzEnWmRo2M-rC3fSzbTAZXwN9J1MJqjhdMnNIeukE.

[48] Department of Defense, "Agency Financial Report: Fiscal Year 2019," November 15, 2019, https://comptroller.defense.gov/Portals/45/Documents/afr/fy2019/DoD_FY19_Agency_Financial_Report.pdf.

[49] Anthony Capaccio, "F-35's $10 Billion Funding Gap Hints at a Jet Too Costly to Fly," *Bloomberg*, September 11, 2020, https://www.bloomberg.com/news/articles/2020-09-11/f-35-is-running-10-billion-short-through-2025-pentagon-finds.

[50] Ryan Browne, "John McCain: F-35 is 'a scandal and a tragedy,'" CNN, April 27, 2016, https://www.cnn.com/2016/04/26/politics/f-35-delay-air-force/.

[51] Andrea Drusch, "Fighter plane cost overruns detailed," *Politico*, February 16, 2014, https://www.politico.com/story/2014/02/f-35-fighter-plane-costs-103579.

The JSF has been plagued by a staggering array of persistent issues, many of which were highlighted in the FY 2019 DOD Operational Test and Evaluation Annual Report, which revealed 873 unresolved deficiencies including 13 Category 1 items, involving the most serious flaws that could endanger crew and aircraft. While this is an overall reduction from the 917 unresolved deficiencies and 15 Category 1 items found in September 2018, the report stated that "although the program is working to fix deficiencies, new discoveries are still being made, resulting in only a minor decrease in the overall number of deficiencies."[52]

Cost overruns resulting from the ongoing problems have plagued the F-35. The first comprehensive cost review of the program since 2012 found a funding gap of $10 billion over the next five years. On September 11, 2020, *Bloomberg* reported on an internal DOD review of the JSF program labeled "For Official Use Only."[53] Dated June 17, 2020, the report estimates that $88 billion for research and development, procurement, and operations and maintenance will be needed over the next five fiscal years. The DOD has officially called for $78 billion for these purposes.

According to the DOD report, much uncertainty exists regarding the final cost of the JSF because the aircraft has only logged about 2 percent of the total flight hours it will accrue over its lifecycle. In addition, the DOD's goal to reduce the F-35's cost per hour of flight by $10,000 to $25,000 over the next five years "is likely to prove unachievable" because of "a lack of defined actions" to cut costs.[54]

The overall poor performance of the F-35 contributed to the Air Force's decision on May 7, 2020 to scrap the 80 percent mission-capable rate directive established three years prior but moving the goalposts will not fix the situation.[55]

Many of the problems with the F-35 program can be traced to the decision to develop and procure the aircraft simultaneously. Whenever problems have been identified, contractors needed to go back and make changes to planes that were already assembled, adding to overall costs. Speaking at the Aspen Security Forum on July 24, 2015, then-Air Force Secretary Deborah Lee James stated, "The biggest lesson I have learned from the F-35 is never again should we be flying an aircraft while we're building it."[56]

Other dilemmas relating to the JSF's utility in future conflict have also cropped up. A May 2018 House Armed Services Committee (HASC) report revealed that the Navy's JSF, the F-35C, may lack sufficient range to function adequately in a future war.[57] The high cost, delays, and underperformance of the JSF has also created a readiness gap, which has forced the Air Force to purchase older aircraft as a stopgap.

Of course, the program's many problems have not stopped the Pentagon from asking for funding, and members of Congress from supplying it, oftentimes exceeding the request from the DOD. This trend continued in FY 2020, when legislators added $2.1 billion to fund the acquisition of 22 JSFs beyond the amount requested by the Pentagon. Upon completion of the development phase, additional funding will be needed to retrofit the JSFs purchased via earmarks in FY 2020, adding to overall program costs.

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[52] Robert Behler, "Director, Operation Test and Evaluation: FY 2019 Report," Department of Defense, December 20, 2019, https://www.cagw.org/sites/default/files/pdf/2019DOTEAnnualReport.pdf.
[53] Capaccio, "F-35's $10 Billion Funding Gap Hints at a Jet Too Costly to Fly."
[54] Ibid.
[55] Valerie Insinna and Stephen Losey, "US Air Force bails on Mattis-era fighter jet readiness goal," *Defense News*, May 7, 2020, https://www.defense-news.com/air/2020/05/07/the-air-force-bails-on-mattis-era-fighter-jet-readiness-goal/.
[56] Richard Sisk, "Air Force Secretary Acknowledges Wide Range of Problems with F-35," *Military.com*, July 28, 2015, https://www.military.com/daily-news/2015/07/28/air-force-secretary-acknowledges-wide-range-problems-f35.html.
[57] John M. Donnelly, "Navy's Top-Dollar Stealth Fighter May Not Go the Distance," *Roll Call*, May 21, 2018, https://www.rollcall.com/news/policy/f-35c-navy-stealth-range?bt_alias=eyJ1c2VySWQiOiAiZjUwNDAwNTUtNmU2ZC00ZDQ4LWJlNDctM2EwMWM0ODMzMGM0In0%3D&utm_campaign=newsletters&utm_source=rollcallafternoon&utm_content=051818&utm_medium=email.

Members of Congress proposed adding more earmarks for the F-35 in FY 2021. In a March 17, 2020 letter to the chairman and ranking members of the HASC and Defense Appropriations Subcommittee, the Congressional JSF Caucus argued that the Pentagon must purchase 19 additional aircraft in FY 2021 beyond the 79 it intended to acquire.[58] The letter encouraged a 24 percent increase in the number of JSFs to be purchased and inexplicably suggested this would "further reduce overall program costs." The authors revealed their motive for requesting the acquisition of more JSFs by stating that the platform "bolsters our domestic economy by supporting more than 1,800 suppliers and more than 254,000 direct and indirect jobs across the country." Since FY 2001, members of Congress have added 29 earmarks for the JSF program, costing $8.9 billion.

The deficiencies that have plagued the DOD in recent years have been identified ad nauseum. The Pentagon's track record in addressing its financial shortcomings and procurement failures makes it evident that these problems will continue until members of Congress hold the DOD to a much higher standard of effectiveness and efficiency.

[58] Congressional Joint Strike Fighter Caucus, "Letter to chairman and ranking members of the House Armed Services Committee and Defense Appropriations Subcommittee," March 17, 2020, https://larson.house.gov/sites/larson.house.gov/files/FY21_F-35_NDAAHAC-D_Ltr.pdf.

EARMARKS

The clamor for a return of earmarking, which is the most corrupt, inequitable, and costly practice in congressional history, has grown cacophonous. The November elections appear to have altered the decision made on February 7, 2020, when then-House Appropriations Committee Chairwoman Nita Lowey (D-N.Y.) abandoned a planned return to an open system of earmarking for FY 2021, reversing her position a month earlier that she was open to bringing back the practice.[59] If she had moved forward, she would have been going up against Senate Republicans, who on May 23, 2019, became the first group of members of Congress to agree to a permanent ban on earmarks, by a vote of 28-12.[60]

The new House Appropriations Committee Chairwoman Rosa DeLauro (D-Conn.) supports the return of earmarks.[61] She has been joined by legislators from both parties, including 117th Congress Senate Appropriations Chairman Patrick Leahy (D-Vt.); 116th Congress Senate Appropriations Committee Chairman Richard Shelby (R-Ala.); Senate Appropriations Committee members Roy Blunt (R-Mo.), Susan Collins (R-Maine), Dick Durbin (D-Ill.), Lisa Murkowski (R-Alaska), and Patty Murray (D-Wash.); House Appropriations Committee members Tom Cole (R-Okla.), Marcy Kaptur (D-Ohio), Harold Rogers (R-Ky.), Mike Simpson (R-Idaho), and Debbie Wasserman Schultz (D-Fla.), who was named CAGW's Porker of the Month in October 2020 for advocating for the return of earmarks "the right way"; along with House Majority Leader Steny Hoyer (D-Md.) and Majority Whip James Clyburn (D-S.C.).[62]

The House Majority Leader has been banging the earmark drum for years. CAGW named Leader Hoyer its October 2018 Porker of the Month for saying a return of the wasteful practice would help "fix government."[63] In an October 1, 2020 House Rules Committee hearing Rep. Hoyer stated, "My belief is that members of Congress elected from 435 districts around the country know, frankly, better than those who may be in Washington what their districts need."[64]

Rep. Emanuel Cleaver (D-Mo.) advocates for the return of earmarks with religious zeal. During a February 20, 2020 hearing on the constitutional role of Congress including on authorization of the highway bill, Rep, Cleaver stated, "This used to be time where everybody was 'Hallelujah,' I mean Republicans, Democrats, dancing, kissing. This is the time to be saved."[65]

Since the return of earmarks is very much on the table for the 117th Congress, it is worth revisiting why this corrupt, inequitable, and costly practice was subject to the moratorium in the first place. The movement gained traction due to the tireless work of members of Congress such as then-Rep. Jeff Flake (R-Ariz.) and the late Sen. John McCain (R-Ariz.); high-profile boondoggles like the Bridge to Nowhere; and a decade of scandals that resulted in jail terms for Reps. Randy "Duke" Cunningham (R-Calif.) and Bob Ney (R-Ohio) and lobbyist Jack Abramoff.

Earmarks provide the most benefit to those with spots on prime congressional committees. In the 111th Congress, when the names of members of Congress who obtained earmarks were included in the appropriations bills, the 81 House and Senate appropriators, making up 15 percent of Congress, were responsible for 51 percent of the earmarks and 61 percent of the money.

[59] Caitlin Emma, "House Democrats shelve plan to bring back revamped earmarks," *Politico*, February 7, 2020, https://www.politico.com/news/2020/02/07/house-democrats-shelve-plan-to-bring-back-revamped-earmarks-112016.
[60] Benjamin Wermund, "Senate Republicans permanently ban earmarks," *Politico,* May 24, 2019, https://www.politico.com/story/2019/05/24/senate-republicans-permanently-ban-earmarks-3323611.
[61] Jennifer Shutt, "Hoyer: Earmarks are likely coming back next year," *Roll Call,* November 20, 2020, https://www.rollcall.com/2020/11/20/hoyer-earmarks-are-likely-coming-back-next-year/.
[62] Citizens Against Government Waste, "CAGW Names Rep. Debbie Wasserman Schultz October 2020 Porker of the Month," October 2020, https://www.cagw.org/porker-of-the-month/cagw-names-rep-debbie-wasserman-schultz-october-2020-porker-month.
[63] Citizens Against Government Waste, "CAGW Names House Minority Whip Steny Hoyer October 2018 Porker of the Month," October 2018, https://www.cagw.org/porker-of-the-month/cagw-names-house-minority-whip-steny-hoyer-october-2018-porker-month.
[64] Susan Davis, "Democrats Want to Bring Earmarks Back As Way To Break Gridlock In Congress," National Public Radio, December 9, 2020, https://www.npr.org/2020/12/09/944314781/democrats-want-to-bring-earmarks-back-as-way-to-break-gridlock-in-congress.
[65] Ibid.

As Sen. McCain explained regarding those making the case for a return to earmarks, "The problem with all their arguments is: the more powerful you are, the more likely it is you get the earmark in. Therefore, it is a corrupt system."[66] A return to rampant earmarking would increase the risk of corruption and reinstate the grossly inequitable distribution of money that has always favored a small group of legislators.

Another argument centers on the Article I tax and spending power given to Congress. As Sen. Mike Lee (R-Utah) and Rep. Jeb Hensarling (R-Texas), co-leaders of the Article I Project, wrote in 2017 in regard to earmarks, "Congress needs to assert its power of the purse, but not in this manner."[67] As practiced in the past, Lee and Hensarling continued, "earmarking was not the innocuous exercise of Congress' constitutional spending power; it was the tool lobbyists and leadership used to compel members to vote for bills that their constituents — and sometimes their conscience — opposed." Bringing back earmarks, they wrote, "would make our job harder, make Congress weaker and make federal power more centralized, less accountable and more corrupt."[68]

Those sentiments echo President James Monroe's May 4, 1822 Special Message to Congress regarding its authority to spend money on internal improvements in the U.S.: "It is, however, my opinion that the power should be confined to great national works only, since if it were unlimited it would be liable to abuse and might be productive of evil."[69]

One of the more frequently used arguments in favor of earmarks is that they help pass legislation, which even President Trump mentioned on January 9, 2018.[70] A November 29, 2020 op-ed by *The New York Times* editorial board made this argument, stating the return of earmarks would restore "positive incentives for lawmakers to embrace negotiation and compromise could provide at least some counterbalance to the partisan forces fueling rigidity and gridlock."[71]

As CAGW President Tom Schatz noted in his January 4, 2021 op-ed in *The Hill*, this argument is wrong for several reasons.[72] He cited the six criteria for earmarks made by the House Select Committee on the Modernization of Congress, along with a recommendation for a new "Community-Focused Grant Program" that would support programs that begin at the local level with community support. This concept "is prima face absurd. Almost every federal expenditure 'helps' a community, from building weapons systems at the DOD to the hundreds of agencies and programs that include community, development, economic, or similar words in its title."[73] Beginning programs at the local level is "the normal system of requesting money from competitive federal grant programs. The use of earmarks usurps and perverts that process."[74]

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66 Burgess Everett, "Earmarks divide Republicans," *Politico*, May 7, 2014, https://www.politico.com/story/2014/05/earmark-debate-congress-106470.

67 Mike Lee and Jeb Hensarling, "Earmarks weaken Congress, won't drain the swamp," *Washington Examiner,* February 9, 2017, https://www.washingtonexaminer.com/earmarks-weaken-congress-wont-drain-the-swamp.

68 Ibid.

69 James Monroe, "Special Message to the House of Representatives Containing the Views of the President of the United States on the Subject of Internal Improvements," May 4, 1822, reproduced online at The American Presidency Project, https://www.presidency.ucsb.edu/documents/special-message-the-house-representatives-containing-the-views-the-president-the-united.

70 The White House, "Remarks by President Trump in Meeting With Bipartisan Members of Congress on Immigration," January 9, 2018, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-bipartisan-members-congress-immigration/.

71 Editorial Board, "Republicans and Democrats Need to Work Together. Earmarks Can Help," *The New York Times*, November 29, 2020, https://www.nytimes.com/2020/11/29/opinion/republicans-democrats-earmarks.html.

72 Tom Schatz, "Earmarks are inequitable, corrupt, and costly – they should not be brought back," *The Hill*, January 4, 2021, https://thehill.com/blogs/congress-blog/politics/532473-earmarks-are-inequitable-corrupt-and-costly-they-should-not-be.

73 Ibid.

74 Ibid.

Members of Congress struggled just as mightily to pass the appropriations bills on time prior to the earmark moratorium. Moreover, earmarks cause members to vote for excessively expensive spending bills that cost tens or hundreds of billions of dollars for a few earmarks worth a few million or sometimes just thousands of dollars.[75]

And CAGW has been able to uncover hundreds of earmarks, using the definition it established in 1991 in conjunction with the bipartisan Congressional Porkbusters Coalition, even after the establishment of the earmark moratorium.

FY 2020 marked the third year in a row that members of Congress set a record for the cost of earmarks during the supposed earmark moratorium. Released on July 15, 2020, the FY 2020 *Congressional Pig Book* exposed 274 earmarks, a decrease of 2.8 percent from the 282 in FY 2019. While the number of earmarks declined slightly, their cost went in the opposite direction. Legislators added $15.9 billion in earmarks in FY 2020, an increase of 3.9 percent from the $15.3 billion in FY 2019. The cost of the FY 2020 earmarks is only 3.6 percent less than the $16.5 billion in FY 2010, the last year prior to the moratorium.[76]

While the increase in the cost of earmarks from FY 2019 is significant, it pales in comparison to the growth since FY 2017. The $15.9 billion in FY 2020 is an increase of 133.8 percent from the $6.8 billion in FY 2017. The number of earmarks has also risen sharply. The 274 earmarks in FY 2020 are a 68.1 percent increase from the 163 in FY 2017. The number and cost for the first six years were much lower than they had been prior to the moratorium. On average, there were 109 earmarks costing $3.7 billion annually between FYs 2012 and 2017. But, like everything else in Congress, the restraint only lasted for a short period of time. Between FYs 2017-2020, legislators added an average of 263 earmarks costing $15.3 billion.[77]

The primary cause of this upsurge in earmarks is the two consecutive budget deals that revoked the spending restraints imposed by the 2011 Budget Control Act. The Bipartisan Budget Act of 2018, signed into law on February 9, 2018, paved the way for a 13.4 percent increase in spending in FYs 2018 and 2019. The subsequent Bipartisan Budget Act of 2019 covering FYs 2020 and 2021, which became law on August 2, 2019, lifted spending caps by $320 billion.[78] The budget deals covering the past three years have resulted in the cost and number of earmarks increasing by far more than the overall jump in spending.

A downside of the earmark moratorium has been a reduction in transparency. Rather than being listed in the "Congressionally Directed Spending" section at the end of appropriations bills, earmarks are now found throughout the appropriations bills, making it hard for them to be identified and eliminated through floor amendments.

The FY 2020 earmarks were again contained in omnibus packages containing thousands of pages. Voting on blocks of spending bills bundled together with minimal time for review is a strong indicator of a poorly functioning legislative process.

In FY 2020, as in each of the years following the establishment of the moratorium, there were fewer earmarks than in the peak years, but far more money was spent on average for each earmark and no detailed description was provided. For instance, legislators added 25 earmarks costing $1,082,791,000 for the Army Corps of Engineers in the FY 2020 Energy and Water Development and Related Agencies Appropriations Act. These earmarks correspond to 482 earmarks costing $541,653,000 in FY 2010.[79]

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[75] Sean Kennedy, "All About Pork: The History, Abuse, and Future of Earmarks," Citizens Against Government Waste, 2015, https://www.cagw.org/sites/default/files/users/user98/All%20About%20Pork%202015-FINAL.pdf.
[76] Citizens Against Government Waste, "Congressional Pig Book Summary," July 15, 2020, https://www.cagw.org/reporting/pig-book.
[77] Ibid.
[78] John Parkinson, "House passes Trump's bipartisan deal to lift spending caps, suspend debt limit for 2 years," ABC News, July 25, 2019, https://abcnews.go.com/Politics/house-passes-trumps-bipartisan-deal-lift-budget-spending/story?id=64573914.
[79] Ibid.

In other words, the average dollar amount for the Corps of Engineers earmarks in FY 2020 was $43.3 million, while in FY 2010 the average was $1.1 million. The “Congressionally Directed Spending” section at the end of the FY 2010 bill contained the names of the members of Congress requesting each project and its location, as required by the transparency rules at the time. In stark contrast, the FY 2020 earmarks, which cost $541.1 million more than the FY 2010 projects – almost exactly double the amount – contained no such data and simply created a pool of money to be distributed later without any specific information about the eventual recipients.[80]

Since FY 1991, CAGW has identified 111,417 earmarks costing $375.7 billion. The cost of earmarks peaked in FY 2006, when members of Congress added 9,964 projects costing $29 billion.[81] The 117th Congress seems likely to move forward with some kind of earmark “reform,” meaning that the most corrupt, costly, and inequitable practice in history is likely to come back. Instead of acquiescing, taxpayers should demand that the 117th Congress permanently ban earmarks.

80 Ibid.
81 Ibid.

ENERGY

Both the Senate and the House of Representatives will consider energy legislation in the 117th Congress. The primary principles for these bills should be to free the energy market from government intervention, ensuring a secure supply of energy to meet the needs of a growing economy, and increasing domestic production of critical and conventional energy resources through the innovation and creativity of the private sector. These principles are antithetical to any plans to advance the Green New Deal and similar programs.[82]

Rep. Alexandria Ocasio-Cortez (D-N.Y.) and Sen. Ed Markey (D-Mass.) were the primary sponsors of the Green New Deal during the 116th Congress, which would cost Americans as much as $93 trillion, according to the American Action Forum. Nearly $5.4 trillion would be used for a low-carbon electricity grid, a net zero emissions transportation system would cost anywhere between $1.3 trillion to $2.7 trillion for net zero emissions transportation system; $6.8 trillion to $44.6 trillion would go to guaranteed jobs; $36 trillion would be used to fund universal healthcare; $1.6 trillion to $4.2 trillion would go to guaranteed housing; and $1.5 billion would be used for food security.[83]

The House of Representatives attempted to add elements of the Green New Deal like clean energy and solar tax credits in COVID-19 stimulus bills, including the Coronavirus Aid, Relief, and Economic Security Act and the Health and Economic Recovery Omnibus Emergency Solutions Act.[84] However, they were not part of the final legislation.

President Biden announced on his first day in office that the United States would be rejoining the Paris Climate Agreement, which the United States officially withdrew from in November 2020.[85]

When President Donald Trump announced in June 2017 that the U.S. would withdraw from the agreement, The Heritage Foundation explained that the impact of the agreement would destroy $2.5 trillion in gross domestic product (GDP) by 2035, waste the taxpayer's money on the U.S. contribution to a $100 billion annual Green Climate Fund, and hurt American energy competitiveness.[86] The Obama administration sent $1 billion in taxpayer funds to the Green Climate Fund without congressional authorization.[87]

After the expansion of oil and gas exploration and development under the Trump administration helped lead to U.S. energy independence, President Biden banned oil and gas exploration on federal lands and cut off the Keystone XL Pipeline on his first day in office. This caused the immediate loss of more than 1,000 pipeline jobs, with thousands more to come, and it will also have a significant impact on tens of thousands of jobs in the energy industry in states like Louisiana and New Mexico, which also depend on the income from oil and gas exploration to fund education, healthcare, and conservation programs.[88]

All federal lands and waters that are not part of the national park system or congressionally designated areas should be open to exploration and production for America's growing energy needs. States should be delegated the authority to manage resource development within their borders and off their shores.

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[82] United States Congress, "Recognizing the duty of the Federal Government to create a Green New Deal," February 7, 2019, https://www.congress.gov/bill/116th-congress/house-resolution/109/text.

[83] Douglas Holtz-Eakin, Dan Bosch, Ben Gitis, Dan Goldbeck, Philip Rossetti, "The Green New Deal: Scope, Scale, and Implications," American Action Forum, February 25, 2019, https://www.americanactionforum.org/research/the-green-new-deal-scope-scale-and-implications/.

[84] Anthony Adragna, Gavin Bade, Eric Wolff, "Clean energy backers' anger grows as House ignores aid plea," *Politico,* May 21, 2020, https://www.politico.com/news/2020/05/21/clean-energy-coronavirus-relief-bills-273550.

[85] Ari Natter, "Biden Picks John Kerry, Paris Accord Author, as Climate Czar," *Bloomberg,* November 23, 2020, https://www.bloomberg.com/news/articles/2020-11-23/biden-picks-john-kerry-paris-accord-architect-as-climate-czar.

[86] Nicolas Loris and Katie Tubb, "4 Reasons Trump Was Right to Pull Out of the Paris Agreement," The Heritage Foundation, June 1, 2017, https://www.heritage.org/environment/commentary/4-reasons-trump-was-right-pull-out-the-paris-agreement.

[87] Ibid.

[88] Reps. Steve Scalise (R-La.) and Yvette Herrell (R-N.M.), "Reps. Scalise, Herrell: Biden's reckless, job-killing executive orders must be reversed," *The Washington Times*, January 28, 2021, https://www.foxnews.com/opinion/scalise-herrell-biden-energy-executive-orders.

ENTITLEMENTS

The national debt is fast approaching $28 trillion with each taxpayer now owing more than $222,000 or approximately $84,000 per citizen. While $3.5 trillion was added to the debt for COVID-19 relief, and President Biden's $1.9 trillion plan, plus additional interest on the debt, will bring the total to more than $5.7 trillion, the country was already in deep financial trouble before most people knew anything about the novel coronavirus.[89]

In FY 2020, total federal outlays were $6.6 trillion, or 31.2 percent of the GDP. The deficit was $3.1 trillion, or 15 percent of the GDP and the highest since 1945.[90] In January 2020, prior to the coronavirus entering the country, CBO predicted that total outlays would be $4.6 trillion, or 21 percent of the GDP and the deficit would be $1.02 trillion or 4.6 percent of the GDP. In FY 2019, federal outlays were $4.4 trillion or 21.0 percent of GDP.[91]

The CBO stated in its January 2020 report, "Other than a six-year period during and immediately after World War II, the deficit over the past century has not exceeded 4.0 percent for more than five consecutive years. And during the past 50 years, deficits have averaged 1.5 percent of GDP when the economy was relatively strong (as it is now). Because of the large deficits, federal debt held by the public is projected to grow, from 81 percent of GDP in 2020 to 98 percent in 2030 (its highest percentage since 1946). By 2050, debt would be 180 percent of GDP – far higher than it has ever been."[92] According to the Federal Reserve Bank of St. Louis, debt held by the public equaled 127.3 percent of GDP at the end of the third quarter in 2020.[93]

Even though the COVID-19 epidemic spending significantly added to the deficit and debt, the U.S. already had a long-term overspending problem. Most of that spending is on mandatory programs, the budgetary term for entitlement programs, which make up about 62 percent of total federal outlays. In 2019, entitlement spending was $2.73 trillion, is expected to be $4.6 billion in 2020, and $3.2 billion in 2021. These numbers represent 12.9 percent of the GDP in 2019, 22.4 percent in 2020 and 15.2 percent in 2021.[94]

The three largest entitlement programs are Social Security, Medicare, and Medicaid. In FY 2019, Social Security, including Disability Insurance (SSDI), cost $1.04 trillion, is expected to be $1.09 trillion in FY 2020, and $1.14 trillion in FY 2021. Medicare, the nation's health insurance for those 65-plus and younger people with disabilities, cost $775 billion in 2019, is expected to be $862 billion in 2020, and $810 billion in 2021. Medicaid, which was expanded under the Patient Protection and Affordable Care Act (ACA), or Obamacare, in 2010, was $409 billion in 2019 and is expected to be $466 billion in 2020, and $537 billion in 2021.[95]

Social Security

The Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds (OASDI), released on April 22, 2020, stated that for the short term, "Social Security's total cost is projected to be less than its total income in 2020 and higher than its total income in 2021 and all later years. Social Security's cost has exceeded its non-interest income since 2010. For 2020,

[89] U.S. Debt Clock, https://usdebtclock.org.
[90] Congressional Budget Office, "Monthly Budget Review: Summary for Fiscal Year 2020," November 9, 2020, p. 1, https://www.cbo.gov/system/files/2020-11/56746-MBR.pdf.
[91] Congressional Budget Office, "Budget Outlook: 2020-2030," January 2020, p. 7, https://www.cbo.gov/system/files/2020-01/56020-CBO-Outlook.pdf.
[92] Ibid., p. At a Glance.
[93] Federal Reserve Bank of St. Louis, "Federal Debt: Total Public Debt as Percent of Gross Domestic Product," December 22, 2020, https://fred.stlouisfed.org/series/GFDEGDQ188S.
[94] Congressional Budget Office, "An Update to the Budget Outlook: 2020-2030, September 2020," pp. 6-7, https://www.cbo.gov/system/files/2020-09/56517-Budget-Outlook.pdf.
[95] Ibid, p. 12.

program cost is projected to be less than total income by about $4 billion and exceed non-interest income by about $73 billion."[96]

For the long term, the trustees stated under intermediate assumptions, "OASDI cost is projected to exceed total income starting in 2021, and the dollar level of the hypothetical combined trust fund reserves declines until reserves become depleted in 2035" and "the OASI Trust Fund reserves become depleted in 2034 and the DI Trust Fund reserves become depleted in 2065."[97]

It has been known for some time that retiring Baby Boomers would significantly increase the costs of OASDI. According to the trustees, the expected cost increases to OASDI will occur more rapidly than the projected non-interest income through 2042, because the number of baby-boomer beneficiaries will increase much faster than the number of people from lower birthrate generations who are reaching working age. Between 2042 and 2049, it is expected the cost rate will gradually decline as retiring Baby Boomers are replaced by retiring lower-birth generations. Thereafter it is expected that increased life-expectancy will cause OASDI costs to increase relative to non-interest income but more slowly than between 2010 and 2042.[98]

The trustees concluded, "The OASI Trust Fund and the DI Trust Fund are projected to have sufficient reserves to pay full benefits on time until 2034 and 2065, respectively. Legislative action will be needed to prevent reserve depletion in those years. In the absence of such legislation, continuing income to the trust funds at the time of reserve depletion would be sufficient to pay 76 percent of OASI benefits and 92 percent of DI benefits."[99]

As they have before, the trustees recommended that Congress take action to "address the projected shortfalls in a timely way in order to phase in necessary changes gradually and give workers and beneficiaries time to adjust to them. Implementing changes sooner rather than later would allow more generations to share in the needed revenue increases or reductions in scheduled benefits."[100]

Social Security, along with the SSDI program, makes monthly income payments to insured workers and their families at retirement, death, or disability. Social Security was created in 1935 and is the largest single program in the federal budget, paying monthly benefits to 69.8 million beneficiaries as of November 2020.[101]

In 1930, the average life expectancy at birth was 58 for men and 62 for women and the retirement age was 65. The younger death rate in the early part of the 20th century was due to high mortality rates in infants and children. A better measure for the death rate and its relationship to Social Security is to determine when a person reached adulthood. In 1940, the percentage of population surviving ages 21 to 65 for men was 54 percent and 61 percent for women. At that time, if an adult reached the age of 65, a man was expected to live on average 12.7 years longer and a woman 14.7 years longer. If a man reached 65 in 1990, he can be expected to live an average of 15.3 years longer to 80, and a woman an average of 19.6 years longer to 85.[102] Twenty years later, a man turning 65 in 2020, can be expected to live to 84 on average and a woman to 87 on average.[103] People are living longer and improving the financial status of Social Security is critical

[96] The Board of Trustees, Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, "The 2020 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds," p. 2, https://www.ssa.gov/oact/TR/2020/tr2020.pdf.
[97] Ibid., p. 3.
[98] Ibid., pp. 3-4.
[99] Ibid., p. 23.
[100] Ibid., p. 24.
[101] Social Security Administration, "Research, Statistics & Policy Analysis," November 2020, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot.
[102] Social Security Administration, "Life Expectancy for Social Security," November 2020, https://www.ssa.gov/history/lifeexpect.html.
[103] Social Security Administration, "Retirement & Survivors Benefits: Life Expectancy Calculator," November 2020, https://www.ssa.gov/OACT/population/longevity.html.

to promoting a sustainable budget and ensuring that earned benefits will be paid. Reforms will entail making sacrifices and tough choices, no matter how politically unpopular, but changes must be made to avoid an even bigger financial crisis.

Currently, the earliest retirement age at which benefits can be paid is 62, but that retiree will receive only 75 to 79.6 percent of his or her full-retirement-age monthly benefit, depending on date of birth.[104] The full retirement age was 65 until 1983, when Congress passed the Social Security Amendments of 1983 to gradually raise the full retirement age for people born in 1938 or later. For example, if someone was born in 1942, the full retirement age is 65 years and 10 months. If someone was born in 1953, his or her full retirement age is 66. The full retirement age for those born in 1960 and beyond is 67.[105]

Medical science and care continue to improve and will bring advancements that will help Americans to live longer and healthier lives. Small robots will deliver drugs or act as interventional tools, new vaccines will treat certain forms of cancer, genetics will be used to attack germs that are resistant to drugs, and patients with chronic diseases will wear sensors that will help them manage their disease.[106] Because Americans are living longer, Social Security's normal retirement age (NRA) should continue to be raised. Additional changes in retirement and benefit structures should be made so the retirement program can be saved for current and future beneficiaries.

In its July 2020 report, "Summary of Provisions That Would Change the Social Security Program," the Social Security Office of the Chief Actuary provided eight types of policy changes that would close or reduce the long-term financing shortfalls in the program. They included reducing the Cost-of-Living Adjustment (COLA), changing the level of the monthly benefits, raising the retirement age, setting benefit levels to inflation rather than wage growth, redirecting some of the funds to an individual retirement account, and taxing benefits. These ideas, which can be found in a summary table, would address the solvency issue of Social Security in varying degrees. Several have been proposed by policy makers, including members of Congress.[107]

The most aggressive proposal in COLA adjustments would be to reduce the annual amount by one percent for 75 years starting in December 2021. Doing so would reduce the long-range actuarial balance shortfall by 59 percent.[108]

Another proposal combines several changes to change the retirement age. It includes increasing the NRA 3 months per year starting for those age 62 in 2021 until it reaches 70 in 2034, indexing the NRA of the expected retirement years to potential work years, and increasing the earliest retirement eligibility age from 62 to 64. This would reduce the long-range actuarial balance shortfall by 47 percent.[109]

In the *Critical Waste Issues for the 115th Congress*, CAGW called for and continues to support eliminating the indexing of Social Security benefits to wage levels and instead base it on price inflation, or Progressive Price Indexing. Implementing this policy for middle-income and upper income families would eliminate much of Social Security's increases being driven by higher benefit costs.[110]

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104 Social Security Administration," Retirement Benefits," November 2020, https://www.ssa.gov/benefits/retirement/planner/1943.html.
105 Social Security Administration, "Retirement Age Calculator," November 2020, https://www.ssa.gov/benefits/retirement/planner/1960.html.
106 Ramin Zahed, Keck Medicine of USC, "6 Medical Advances Helping Us Live Healthier Lives," https://www.keckmedicine.org/6-new-medical-breakthroughs-helping-us-live-longer-healthier-lives.
107 Social Security, "Summary of Provisions that Would Change the Social Security Program," July 1, 2020, https://www.ssa.gov/OACT/solvency/provisions/summary.pdf.
108 Ibid., p. 4.
109 Ibid., p. 18.
110 Citizens Against Government Waste, *Critical Waste Issues for the 115th Congress*, p. 25, https://www.cagw.org/sites/default/files/pdf/CAGW_2017-CriticalWaste-WebLinks-Active.pdf.

CAGW has also called for some of the changes mentioned in the chief actuary's report in the *2020 Prime Cuts* that would provide $108.5 billion in savings over five years. These recommendations include raising the retirement age and linking benefits to average prices instead of average earnings.[111]

Social Security Disability Insurance

SSDI makes up 13 percent of total Social Security expenditures, costing $145 billion in FY 2020 and $149 billion in FY 2021.[112] Under current law, the balance of the SSDI fund is expected to be exhausted by 2065.[113]

According to the trustees, the prior year's report reported that SSDI reserve depletion would be 2052. They state for the second year in a row, there were significant changes in the SSDI depletion because there was a change in the assumed disability incidence rate and SSDI applications and benefit awards which were at historically low levels in 2019. According to the trustees, disability applications have declined significantly since 2010 and the total number of disabled workers has declined since 2014.[114]

The total number of disabled workers receiving SSDI benefits was approximately 2.7 million in 1985 and rose to approximately 9.0 million in 2014. It then declined to about 8.7 million in December 2017.[115]

A 2015 GAO report showed widespread fraud and poor oversight of the SSDI program. From 2005 to 2014, the Social Security Administration overpaid $11 billion in SSDI benefits to beneficiaries who had returned to work and received earnings above program limits.[116]

GAO's March 2019 report, "High-Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas," revealed that "[m]anagement attention and efforts are needed across the government to ensure that disability programs provide benefits in a timely manner, reflect current ideas about disability, and achieve positive employment outcomes."[117] GAO found that the Social Security Administration and the VA, which also manages a disability program, struggle to meet their programs' needs, mismanage their workloads, especially appealed claims, and rely on outdated criteria to determine whether individuals qualify for benefits. In 2003, the GAO made 35 recommendations to this program and as of December 2018, 10 remained open.[118]

Medicare

The 2020 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplemental Medical Insurance Trust Funds stated, "Expenditures from the HI trust fund exceeded income each year from 2008 through 2015. In 2016 and 2017, however, there were fund surpluses amounting to $5.4 billion and $2.8 billion, respectively. In 2018 and 2019, expenditures again exceeded income, with trust fund deficits of $1.6 billion and $5.8 billion, respectively. Deficits are projected to persist for the remainder of the projection period, requiring redemption of trust fund assets until the trust fund's depletion in 2026."[119]

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111 Citizens Against Government Waste, "2020 Prime Cuts Database," https://www.cagw.org/reporting/prime-cuts/database.
112 Congressional Budget Office, "An Update to the Budget Outlook: 2020-2030," p. 12.
113 Board of Trustees, Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, p. 3.
114 Ibid.
115 Social Security Administration, "Trends in Social Security Disability Insurance Enrollment," November 30, 2018, p. Summary, https://fas.org/sgp/crs/misc/R45419.pdf.
116 GAO, "Disability Insurance: SSA Could Do More to Prevent Overpayments or Incorrect Waivers to Beneficiaries," GAO-16-24, October 2015, p. GAO Highlights, https://www.gao.gov/assets/680/673426.pdf.
117 Government Accountability Office, "High-Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas," GAO-19-157SP, March 2019, p. 259, https://www.gao.gov/assets/700/697245.pdf.
118 Ibid., pp. 259-261, https://www.gao.gov/assets/700/697245.pdf.
119 The Board of Trustees, Federal Hospital Insurance and Federal Supplemental Medical Insurance Trust Funds, "The 2020 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplemental Medical Insurance Trust Funds," (2020 Annual Report), p. 24, https://www.cms.gov/files/document/2020-medicare-trustees-report.pdf.

Established in 1965 under Title XVIII of the Social Security Act, Medicare provides health insurance to individuals age 65 and older and those with disabilities.[120] In 2020, it is expected that 63 million people will be served, which include 54 million aged and 9 million disabled. The program is run by the Centers for Medicare and Medicaid Services (CMS), which contracts with private entities to process claims, conduct audits, and oversee quality control. Medicare is composed of Part A or Hospital Insurance (HI), Part B, or Supplementary Medical Insurance (SMI), Medicare Part C (Medicare Advantage) and Part D, the Prescription Drug Benefit. It has been expanded beyond its original purpose to include people younger than 65 who cannot work because of a medical condition that will last at least a year or result in death and have end-stage renal disease. Those who have received disability payments for 24 months are entitled to Medicare Part A, but those that suffer from amyotrophic lateral sclerosis (Lou Gehrig's disease) have the waiting period waved.[121]

The 2019 GAO High-Risk List included Medicare, which it has since 1990, "due to its size, complexity, and susceptibility to mismanagement and improper payments," and the program "continues to challenge to the federal government because of (1) its outsized impact on the federal budget and the health care sector as a whole, (2) the large number of beneficiaries it serves, and (3) the complexity of its administration."[122] The GAO report also cited improper payments as a significant risk. These are payments that "either were made in an incorrect amount or should not have been made at all – which reached an estimated $48 billion in fiscal year 2018."[123]

According to a CMS November 2020 report, improper payments for Medicare Fee for Service (FFS), or Parts A and B, were $25.7 billion, an improper payment rate of 6.27 percent. For Medicare Part C, it was $16.3 billion, an improper payment rate of 6.78 percent. Medicare Part D had $930 million in improper payments, an improper payment rate of 1.15 percent. The total amount for improper payments was $42.9 billion.[124]

The Medicare Trustees 2020 Annual Report noted that the HI trust fund, which is supported by payroll taxes, is subjected to a greater variation in asset growth because the tax rates do not change, unless a law is passed, to meet expenditures. For SMI, current law allows for the annual determination for Parts B and D beneficiary premiums and general revenue financing to cover expected costs for the following year. Even though both funds are vastly different in how they are paid for, the two programs work and rely on one another to provide benefits to millions of beneficiaries. Thus, any financing changes proposed to one program will affect the other and must be considered before implemented.[125]

In addition, an increasing number of beneficiaries are participating in Medicare Advantage. Most beneficiaries can enroll in this program, which utilizes private health insurers that contract with Medicare to provide both Parts A and B. Use of Medicare Advantage has risen from 12.8 percent in 2004 to 37.5 percent in 2019.[126]

Medicare Advantage plans offer services in addition to those found in traditional FFS Medicare, including reduced Part B and D premiums, vision, hearing, and dental services.[127] There is no separate funding mechanism for Medicare Part C, as it comes from Part A and Part B trust funds.[128]

[120] Congressional Research Service, "Medicare Primer," May 21, 2020, https://fas.org/sgp/crs/misc/R40425.pdf.
[121] Ibid., pp. 1-2, 6.
[122] Government Accountability Office, "High-Risk Series," p. 241.
[123] Ibid.
[124] Centers for Medicare and Medicaid Services, "Fact Sheet: 2020 Estimated Improper Payment Rates for Centers for Medicare and Medicaid Services," November 16, 2020, https://www.cms.gov/newsroom/fact-sheets/2020-estimated-improper-payment-rates-centers-medicare-medicaid-services-cms-programs.
[125] The Board of Trustees, 2020 Annual Report, p. 18.
[126] Ibid., p. 20.
[127] Congressional Research Service, "Medicare Primer," p. 22.
[128] The Board of Trustees, 2020 Annual Report, pp. 148-149.

For SMI, the Trustees believe the fund "is expected to be adequately financed over the next 10 years and beyond because income from premiums and general revenue for Parts B and D are reset each year to cover expected costs and ensure a reserve for Part B contingencies. The monthly Part B premium for 2020 is $144.60."[129]

In the report, the trustees described their "explicit test" for short-range financial adequacy of the HI trust fund: "If the HI trust fund ratio is at least 100 percent at the beginning of the projection period, then it must remain at or above 100 percent throughout the 10-year projection period, and alternatively, if the fund ratio is initially less than 100 percent, it must reach a level of at least 100 percent within 5 years (with no depletion of the trust fund at any time during this period) and then remain at or above 100 percent throughout the rest of the 10-year period."[130]

The HI fund does not meet the short-range test. The trustees wrote, "Failure of the trust fund to meet this test is an indication that HI solvency over the next 10 years is in question and that action is necessary to improve the short-range financial adequacy of the fund. While the short-range test is stringent, its purpose is to ensure that health care benefits continue to be available without interruption to the millions of aged and disabled Americans who rely on such coverage."[131]

Looking at the 75-year actuarial outlook, the trustees wrote, "financial outcomes are inherently uncertain, particularly over periods as long as 75 years, such estimates are helpful for assessing the trust fund's long-term financial condition."[132] This is due to comparing dollar values now and into the future. Also, income levels for determining eligibility for additional HI tax are not indexed, therefore more employees will be subjected to a higher tax of up to 80 percent by the end of the long-range projection period.

The trustees also offered two examples to "illustrate the magnitude of the changes needed to eliminate the deficit." For the HI trust fund to remain solvent throughout the 75-year projection period, one choice could be to immediately increase the standard 2.90-percent payroll tax to the amount of the actuarial deficit of 3.66 percent. Another option could be to reduce expenditures by 16 percent immediately.[133]

The trustees admitted that increasing taxes, cutting benefits, or making any significant reforms to Medicare would likely occur gradually; but, the sooner lawmakers act, the less a longer delay would result in more severe adjustments.

An October 2017 CBO report, "A Premium Support System for Medicare: Updated Analysis of Illustrative Options," said such a system could save taxpayers $419 billion between 2022 and 2026, without grandfathering; in other words, requiring all Medicare beneficiaries to move to the premium support program, like Medicare Advantage, once it began. The savings would come about because competing private insurers would help to drive down premium costs. As a result, there would be a lower federal contribution compared with FFS costs per capita.[134]

If grandfathering were allowed, enabling beneficiaries to choose to stay in the current Medicare program after the premium support program began, the CBO found that net federal spending for Medicare would drop by $50 billion between 2022 and 2026.[135]

[129] Ibid., p. 7.
[130] Ibid., p. 56.
[131] Ibid.
[132] Ibid., p. 26.
[133] Ibid., pp. 28-29.
[134] Congressional Budget Office, "A Premium Support System for Medicare: Updated Analysis of Illustrative Options," October 2017, p. 1, https://www.cbo.gov/system/files?file=115th-congress-2017-2018/reports/53077-premiumsupport.pdf.
[135] Ibid.

The Heritage Foundation Senior Domestic Policy Fellow Robert Moffit wrote in an October 18, 2020 *Record-Courier* op-ed that Medicare beneficiaries are already, "voting with their feet. Today, Medicare Advantage (MA) enrolls more than 24 million Medicare beneficiaries, or more than one third of the total Medicare population. For 2021, CMS projects that 26.9 million beneficiaries will enroll in the program, or about 42% of all Medicare beneficiaries. Since 2017, when the Trump administration took over program management, there has been a 44% increase in MA enrollment."[136]

While Medicare Advantage plans have always been comprehensive, Moffit noted that plan choices are sharply increasing and will offer far more benefits, like telehealth. More plans will also offer other important benefits like, "palliative and hospice care, as well as a range of supplemental benefits, particularly for the chronically ill, including adult day care, caregiver support and transportation services. Based on 2020 data, CMS reports continuing improvements in health plans' quality metrics, particularly for MA plans that offer prescription drug coverage."[137]

He warned however that congressional progressives are looking to destroy Medicare Advantage and if they should succeed with the help of the Biden administration, seniors should be aware, "you would no longer have to concern yourself with your personal choice about the best health plan for you and your family. That will be none of your business. You will get what federal officials give you – whether you like it or not."[138]

Members of Congress should be prepared for an onslaught of vocal objections and anger if they agree to take away healthcare choices for tens of millions of senior citizens.

Medicaid

Medicaid is the largest public health program serving low-income individuals and families. It covered 69.8 million and 6.7 million enrolled in the Children's Health Insurance Program (CHIP) or 76 million people in August 2020 in 50 states and the District of Columbia.[139] Medicaid is a jointly funded, federal-state health insurance program. When the program was created in 1965, it provided health insurance to low-income children, caretaker relatives, the elderly, the blind, and the disabled. Through the years, other individuals became eligible for Medicaid, especially when it was expanded to include able-bodied adults under Obamacare.[140]

The federal government matches every dollar spent by the states with a calculated amount dependent on per capita income, called the Federal Medical Assistance Percentage (FMAP), and a multiplier, which can vary from year to year. While the FMAP average is 50 percent, and can be no lower than that amount, some states get much more. For example, Mississippi will receive a match rate of approximately 77.8 percent and 13 states will only receive 50 percent for 2021.[141]

Not only is Medicaid expensive, but it also invites fraud. In 2019, the Department of Health and Human Services OIG was able to recover $1.9 billion in civil and criminal payments, with a return on investment of $6.41 for every dollar spent.[142] According to the 2020 CMS improper payment report, improper payments

[136] Robert Moffitt, "Commentary: How the Medicare Advantage Program is Breaking Records," *Record-Courier*, October 18, 2020, https://www.record-courier.com/story/opinion/2020/10/18/heritage-foundation-medicare-advantage-faces-progressives-criticism/3675946001.
[137] Ibid.
[138] Ibid.
[139] Medicaid.gov, "July 2020 Medicaid and CHIP Enrollment Data Highlights," https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html.
[140] Medicaid.gov, "Program History," https://www.medicaid.gov/about-us/program-history/index.html.
[141] Kaiser Family Foundation, "Federal Medical Assistance Percentage 2021," https://bit.ly/32xJ231.
[142] Department of Health and Human Services Office of Inspector General, "Medicaid Fraud Control Units Fiscal Year 2019 Annual Report," p. At a Glance, https://www.oig.hhs.gov/oei/reports/oei-09-20-00110.pdf.

were $86.5 billion for Medicaid, an improper payment rate of 21.36 percent. For CHIP, the amount was $780 million, an improper payment rate of 27.0 percent.[143]

Obamacare allowed states to expand Medicaid coverage to nearly all low-income people under the age of 65, including able-bodied adults with incomes at or below 138 percent of the federal poverty level. Medicaid expansion under Obamacare also provides a much larger FMAP payment. Starting in 2014 and through 2016, the federal government covered 100 percent of Medicaid expansion dollars. In 2017, that amount dropped to 95 percent, gradually diminishing to 93 percent in 2019 and to 90 percent in 2020 and beyond.[144]

According to the CBO, about 18 million adults will receive insurance through Medicaid expansion in 2021 at a cost of $22 billion,[145] compared with 11.4 million people who obtained private insurance by April 2020 through the Obamacare marketplaces.[146] As of this report, 12 states have not adopted Medicaid expansion while 38 states and Washington, D.C., have expanded or will soon be implementing expansion.[147]

According to Brian Blase, a former special assistant to President Trump at the National Economic Council and now a policy consultant, Medicaid enrollment increased by about 13 million people and is the main vehicle that reduced the uninsured in the United States. He said, the "massive expansion of Medicaid – a welfare program that traditionally served low-income children, pregnant women, seniors, and individuals with disabilities – is not what the ACA's proponents talked about when selling the law to the American people. Medicaid expansion crowds out services for more vulnerable populations on the program and has generally had disappointing health results. The expansion increased the number of services provided to recipients and generally boosted financial protection, but also led to an increase in unnecessary emergency department use. The impact on the health of enrollees is less clear. One study found that expanding the population of Medicaid enrollees has led to longer waiting times for care. Another study found that states that expanded Medicaid had a significant slowdown in ambulance response time. For some people with pressing medical conditions, this slowdown could be life-threatening."[148]

A January 23, 2020 *Forbes* article by Andrew Millsap, "Medicaid Spending is Taking Over State Budgets," discussed how the program has increased from an average of 12 percent of state budgets in 2000 to an average of 17 percent and is still growing. But looking just at the average rate shows the vast and alarming differences among states. For example, states that spent the largest percentage of their state revenue on Medicaid in 2017 were Louisiana, Massachusetts, Missouri, New York, Pennsylvania, and Rhode Island. New York spent almost 30 percent and Massachusetts spent 22 percent, with the other states' percentages between these two figures. Only four states had Medicaid spending at lower than 10 percent of their budget in 2017: Hawaii at 8.2 percent, Idaho at 9.9 percent, Nevada at 9.4 percent, and Utah at 5.8 percent.[149]

143 Centers for Medicare and Medicaid Services, "2020 Estimated Improper Payment Rates for Centers for Medicare and Medicaid Services," November 16, 2020, https://www.cms.gov/newsroom/fact-sheets/2020-estimated-improper-payment-rates-centers-medicare-medicaid-services-cms-programs.

144 Kaiser Family Foundation, "Summary of the Affordable Care Act," April 25, 2013, https://www.kff.org/health-reform/fact-sheet/summary-of-the-affordable-care-act.

145 Congressional Budget Office, "Federal Subsidies for Health Insurance Coverage for People Under 65: 2020 to 2030," September 20, 2020, p. 7, https://www.cbo.gov/system/files/2020-09/56571-federal-health-subsidies.pdf.

146 Centers for Medicare and Medicaid Services, "Health Insurance Exchanges 2020 Open Enrollment Report," April 1, 2020, p. 1, https://www.cms.gov/files/document/4120-health-insurance-exchanges-2020-open-enrollment-report-final.pdf.

147 Kaiser Family Foundation, "Status of State Action on the Medicaid Expansion Decision," https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act.

148 Brian Blase, "The Disappointing Affordable Care Act," *Forbes Apothecary*, September 23, 2020, https://www.forbes.com/sites/theapothecary/2020/09/23/the-disappointing-affordable-care-act.

149 Adam Millsap, "Medicaid Spending is Taking Over State Budgets," *Forbes*. January 23, 2020, https://www.forbes.com/sites/adammillsap/2020/01/23/medicaid-spending-is-taking-over-state-budgets/?sh=30385b94dfd0.

Millsap pointed out that as more of a state's budget is consumed by Medicaid, there is less money for other government services like education and infrastructure. For example, Louisiana doubled its share of revenue spent on Medicaid from 2000 to 2017, and its budget for education declined by 16 percent. Alaska saw a 14 percent decrease in education as Medicaid increased from 3 percent to 13 percent of the budget.[150]

Like the wildly inaccurate estimates for Medicare, the figures for Medicaid were way off. In 1965, the House Ways and Means Committee predicted Medicaid would cost $238 million in its first year; its cost was more than $1 billion. By 1971, Medicaid spending reached $6.5 billion, far more than anyone estimated. In 1969, the Senate Finance Committee reported the following: "Expenditures under the Medicaid program have increased much more rapidly than anyone had anticipated. Between 1965 and 1970, total Federal, State, and local costs will have risen from $1.3 billion to $5.5 billion."[151]

It has been said that it will only be a matter of time before Congress looks to decrease the 90 percent FMAP for Medicaid expansion, relying on the states to pick up the remaining cost for the ACA-created program. In December 2018, the CBO provided this option to reduce the national debt.[152] During the deficit-reduction talks in 2011, former President Obama offered this option as a budget pay-for, worth $100 billion over 10 years.[153]

The best way to reform and restrain Medicaid spending while introducing more innovation and oversight and providing better care to beneficiaries is by using federal block grants or per capita allotments while turning over full control of the program to the states. Enabling patients to use Medicaid funds to obtain private insurance that would compete for their business could be accomplished by adopting the ideas in Health Care Choices Proposal or the Republican Study Committee's (RSC), "The RSC Health Care Plan: A Framework for Personalized, Affordable Care," which are discussed in the healthcare reform section of this report.

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150 Ibid.

151 John Daniel Davidson, "50 Years Later, Medicaid and Medicare Still Spend Us Into Oblivion," *The Federalist*, July 31, 2015, https://thefederalist.com/2015/07/31/medicare-medicaid-same-problems-50-years-ago.

152 Congressional Budget Office, "Options for Reducing the Debt: 2019–2028," December 13, 2018, https://www.cbo.gov/budget-options/2018/54728.

153 Avik Roy, "Governors' Worst Nightmare: Obama Proposed Shifting Costs of Obamacare's Medicaid Expansion to the States," *Forbes*, July 19, 2012, https://www.forbes.com/sites/theapothecary/2012/07/19/governors-worst-nightmare-obama-proposed-shifting-costs-of-obamacares-medicaid-expansion-to-the-states/#633ae7a52572.

EXCESS FEDERAL REAL PROPERTY DIVESTITURE

The federal government is the largest property asset owner (buildings, structures, and land) in the United States. According to the General Services Administration (GSA), "in fiscal year 2018 civilian agencies spent billions of dollars to operate about 398,000 civilian real property assets (buildings, structures, and land) across every state, including nearly 127,000 buildings covering 1.1-billion square feet."[154] A 2017 Congressional Research Service (CRS) report found that, "In FY 2016, federal agencies owned 3,120 buildings that were vacant (unutilized) and another 7,859 that were partially empty (underutilized)."[155]

The federal government has shown that it can neither manage its existing properties nor justify the amount of empty land it owns. As a result of these deficiencies, the GAO has had federal real property management on its High-Risk List since 2003.[156] The March 2019 High-Risk Series report noted that, despite "high-level attention" to improve real property management, "federal agencies continue to face long-standing challenges, including: (1) effectively disposing of excess and underutilized property, (2) relying too heavily on leasing, (3) collecting reliable real property data for decision making, and (4) protecting federal facilities."[157] The GAO noted that the Federal Real Property Profile (FRPP), which was created in 2004, was unreliable and inaccurate. While the DOD has almost half of the government's buildings, the data provided for the FRPP was not dependable. The GAO suggested that the Office of Management and Budget (OMB), which works with GSA to maintain and update the FRPP, should "refocus agency attention on meeting space reduction targets …"[158]

The McKinney-Vento Homeless Assistance Act of 1987 (McKinney-Vento Act) requires that excess federal property be offered to states, municipalities, or nonprofit groups that provide services for homeless people before such property can be sold to anyone else.[159] In addition, under the status quo, empty office buildings cannot be sold without agencies first undergoing a complex and rigorous review by the GSA. If shelters are not interested, the property is screened for other public uses and sold for up to a 100 percent discount of market value. Finally, if no public service can be identified, the property is auctioned and sold.[160]

A June 2015 GAO report found that only 122 of 40,000 screened federal properties had been transferred to homeless advocacy groups since the law's enactment in 1987.[161] A February 2016 CRS report found that this requirement can add months or years to the divestment process.[162] A month after that report was published, former Rep. Jeff Denham (R-Calif.) told the *Los Angeles Times* that this existing requirement meant that "[a] homeless advocacy group could actually put a hold on any property that we were trying to sell. That created a disincentive for agencies actually trying to sell."[163]

Rep. Denham sponsored the Federal Asset Sale and Transfer Act of 2016 (FASTA), Pub. L. No. 114-287, which created the Public Buildings Reform Board (PBRB). The board was tasked with identifying up to $7.25 billion in potential opportunities to sell, consolidate, dispose of, or redevelop under underutilized and

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154 Government Accountability Office, "FEDERAL REAL PROPERTY: GSA Should Improve Accuracy, Completeness, and Usefulness of Public Data," GAO-20-135, February 2020, p. 1, https://www.gao.gov/assets/710/704358.pdf.
155 Congressional Research Service, "The Federal Assets Sale and Transfer Act of 2016: Background and Key Provisions," October 31, 2017, https://crsreports.congress.gov/product/pdf/R/R44999/4.
156 Government Accountability Office, "High-Risk Series: An Update," GAO-03-119, January 2003, https://www.gao.gov/assets/240/237063.pdf.
157 Government Accountability Office, "High-Risk Series," GAO-19-157SP, March 2019, p. 78, https://www.gao.gov/assets/700/697245.pdf.
158 Ibid., p. 80.
159 General Services Administration, "Resources for the McKinney-Vento Homeless Assistance Program," January 23, 2019, https://disposal.gsa.gov/s/homelessassistance.
160 Citizens Against Government Waste, *Prime Cuts*, October 2020, https://www.cagw.org/reporting/prime-cuts.
161 Government Accountability Office, "FEDERAL REAL PROPERTY: Current Efforts, GAO Recommendations, and Proposed Legislation Could Address Challenges," GAO-15-688T, June 16, 2015, https://www.gao.gov/assets/680/671497.pdf.
162 Garrett Hatch, "Disposal of Unneeded Federal Buildings: Legislative Proposals in the 114th Congress," Congressional Research Service, February 12, 2016, https://fas.org/sgp/crs/misc/R44377.pdf.
163 Sarah D. Wire, "The government spends $1.7 billion a year on 770,000 empty buildings, and one Central Valley congressman is fed up," *Los Angeles Times*, March 3, 2016, https://www.latimes.com/politics/la-pol-ca-jeff-denham-government-property-bill-20160303-story.html.

vacant federal properties over five years, including $750 million in the first six months after FASTA was signed into law in December 2016. The law also requires GSA to provide and maintain a public database of federal property assets.[164]

As of January 2020, the PBRB was working with the GSA on the sale of 12 federal properties valued at between $500-$750 million. Like other commercial real estate, the coronavirus had an impact on this process. Rather than selling the properties individually, the board decided to sell them together in a single transaction, while leaving open the potential for selling them one at a time. The GSA intended to list the properties for sale in early 2021, but given the continued negative impact of the coronavirus on commercial real estate, the listing is likely to be postponed.[165]

A January 29, 2021 GAO report on the PBRB questioned the evaluation process for the sale of these properties as "vague or incomplete" and recommended increased documentation and transparency for future decisions.[166] The report noted that even with increased efficacy in the evaluation process, the PBRB's ability to find appropriate properties would be challenging since there is a lack of reliable data from the FRPP. For example, the FRPP listed the GSA Auburn, Washington Complex as being utilized by five agencies, yet a trip to the property revealed that the "warehouses were vacant and few staff were available at the buildings."[167] This report was issued 11 months after a February 2020 GAO report on the accuracy and usefulness of FRPP data, which includes about 398,000 buildings, structures, and land, determined 67 percent of property addresses were incomplete or improperly formatted.[168] The GAO cited water towers in Maryland and antennas on top of buildings in Alexandria, VA, and Washington, D.C. as among the inaccurately identified properties.[169]

Another proposal to resolve these longstanding issues regarding federal property was made by the RSC's GEAR Task Force report, which recommended selling excess space that is either unused or underutilized by agencies of the federal government.[170] On March 9, 2020, H.R. 6128, the Eliminate Excess Space Act was introduced by Rep. Greg Murphy (R-N.C) to enact this proposal.[171] Rep. Murphy is expected to reintroduce the legislation in the 117th Congress.

This legislation would streamline the approval process when seeking to eliminate excess federal property, including removing the requirement for agencies to have access to them before screening for other potential transactions. If enacted, the Eliminate Agency Excess Space Act would give the tools to identify and eliminate unneeded real estate and save taxpayers $15 billion over five years.[172]

The divestiture of federal property has long been complex and convoluted. Commonsense reforms like those proposed in H.R. 6128, along with the implementation of GAO recommendations, would more efficiently reallocate excess federal property across the country and save taxpayers billions of dollars.[173]

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164 Federal Asset Sale and Transfer Act, Pub. L. No. 114-287, H.R. 4465, 114th Congress (2016), https://www.congress.gov/114/plaws/publ287/PLAW-114publ287.pdf.
165 Public Buildings Reform Board, "About," https://www.pbrb.gov/.
166 Government Accountability Office, "FEDERAL REAL PROPERTY: Additional Documentation of Decision Making Could Improve Transparency of New Disposal Process," GAO-21-233, January 29, 2021, p. What GAO Found, https://www.gao.gov/assets/720/712107.pdf.
167 Ibid., p. 27.
168 Government Accountability Office, "FEDERAL REAL PROPERTY: GSA Should Improve Accuracy, Completeness, and Usefulness of Public Data," GAO-20-135, February 2020, pp. What GAO Found, 5, https://www.gao.gov/assets/710/704358.pdf.
169 Ibid., p. 13.
170 Republican Study Committee GEAR Task Force, "Power, Practices, Personnel: 100 + Commonsense Solutions To A Better Government," February, 6, 2020, https://rsc-banks.house.gov/sites/republicanstudycommittee.house.gov/files/GEAR%20Report_Single%20Spread%20FINAL.pdf.
171 Eliminate Agency Excess Space Act, H.R. 6128, 116th Congress (2020), https://www.congress.gov/bill/116th-congress/house-bill/6128.
172 Thomas Schatz and Cody Leach, "Reducing the Cost of Government Through Effective Management Reforms," Citizens Against Government Waste, December 2020, https://www.cagw.org/sites/default/files/pdf/ReducingGovernmentCosts.pdf.
173 Government Accountability Office, "Financial Audit: Bureau of the Fiscal Service's FY 2020 and FY 2019 Schedules of Federal Debt," GAO-21-124, November 9, 2020, https://www.gao.gov/products/gao-21-124.

Following the financial crisis and the Great Recession, Congress passed a series of laws intended to prevent similar problems in the future. One of the most notable was the Dodd-Frank Wall Street Reform and Consumer Act, which was the biggest overhaul of banking laws since the Glass-Steagall Act of 1933. It was intended to protect consumers and increase oversight of banks. Dodd-Frank also created the Consumer Finance Protection Bureau (CFPB).

After small banks objected to the cost of complying with the same stress test and lending regulations as larger banks, Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, Pub. L. No. 115-174, which loosened the grip of Dodd-Frank regulations on main street banks and small businesses.[174] As the economy continues to recover from the COVID-19 pandemic, Congress should closely examine additional changes in banking laws that would speed up this process and provide more relief from stifling regulations.

That effort should start with the reintroduction and passage of the Jobs and Investor Confidence Act of 2018 (JOBS 3.0). During the 115th Congress, JOBS 3.0 passed the House by a vote of 406-4, including that of House Financial Services Committee Chair Maxine Waters (D-Calif.), but failed to receive a vote in the Senate.[175]

This bipartisan legislation would spur small business, venture capital, and entrepreneurship by streamlining regulatory compliance for initial public offerings and emerging growth companies, expanding the definition of "accredited investors," and providing startups with legal clarity when interacting with potential investors.[176] By supporting small business investment and opportunity, JOBS 3.0 will help the U.S. maintain its competitive edge in the global economy.

Consumer Finance Protection Bureau

The CFPB was created to implement and enforce "federal consumer financial laws to ensure that all consumers have access to markets for consumer financial products and services that are fair, transparent, and competitive."[177] However, all has not been rosy since its inception.

On October 11, 2016, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decided, in *PHH Corporation v. CFPB,*[178] that the bureau's structure was unconstitutional.[179] Among other reasons for the decision is that the agency is funded by the Federal Reserve, not Congress (and therefore not subject to congressional oversight), and the director cannot be fired by the president.

The court found that, "At the same time, the Director of the CFPB possesses enormous power over American business, American consumers, and the overall U.S. economy. The Director unilaterally enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices. The Director alone decides what rules to issue; how to enforce, when to enforce, and

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174 Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 (2017), https://www.congress.gov/bill/115th-congress/senate-bill/2155.

175 JOBS and Investor Confidence Act of 2018, S. 488, 115th Congress (2018), https://www.congress.gov/bill/115th-congress/senate-bill/488.

176 Jeb Hensarling, "To Restore U.S. Competitiveness, Pass the JOBS Act 3.0," *The Wall Street Journal,* July 15, 2018, https://www.wsj.com/articles/to-restore-u-s-competitiveness-pass-the-jobs-act-3-0-1531680369.

177 Consumer Financial Protection Bureau, "Rules and policy," https://www.consumerfinance.gov/rules-policy/.

178 United States Court of Appeals for the District of Columbia Circuit, *PHH Corporation, Et Al., v. Consumer Financial Protection Bureau,* Case No. 15-1177, Decided October 11, 2016, https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/$-file/15-1177-1640101.pdf.

179 Andrew Rudalvige, "Is the Consumer Financial Protection Bureau constitutional? The D.C. Circuit says no. Here's Why," *The Washington Post*, October 19, 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/19/is-the-consumer-financial-protection-bureau-constitutional-the-d-c-circuit-says-no-heres-why/.

against whom to enforce the law; and what sanctions and penalties to impose on violators of the law. … That combination of power that is massive in scope, concentrated in a single person, and unaccountable to the President triggers the important constitutional question at issue today."[180]

On June 29, 2020, the Supreme Court in *Seila Law, LLC v. Consumer Financial Protection Bureau* agreed with the D.C. Circuit that the restrictions on the removal of the CFPB director are unconstitutional.[181] However, the court rejected a request to strike down the remaining part of the Dodd-Frank Act that created the CFPB.

Among other objectives, the CFPB "is authorized to exercise its authorities under Federal consumer financial law for the purpose of ensuring unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens," and "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[182]

This broad authority enabled the CFBP to become engaged in promulgating regulations regarding payday loans. On May 14, 2019, CAGW offered comments to the CFPB requesting the rescission of the agency's rules governing payday loans, vehicle title and certain high-cost installment loans.[183] The comments stated that, "Payday loans are by their nature high-cost, small-dollar loans to low-income, low-credit borrowers with short-term tracking of a borrower's pay cycle and a repayment system. Under the payday loan rules as adopted, the bureau deems it an 'unfair' and 'abusive' practice to make payday loans without determining a borrower's ability to repay. This essentially creates a ban on consumer choice and access to credit through payday loans. As a result, borrowers will be forced to use more harmful alternatives, like unregulated lenders or loan sharks, when they need unanticipated or emergency credit."[184]

This is but one example of an agency that could easily "go rogue" if given the opportunity. For example, in March 2013, the agency issued guidance holding automobile finance lenders accountable for alleged discriminatory loan pricing occurring through a practice known as dealer reserve.[185] On May 21, 2018, President Trump signed a joint resolution disapproving this guidance.[186]

It is easy for an agency with little congressional oversight or review to take advantage of taxpayers in the name of consumer benefits. Congress must pull in the reins on the CFPB and hold its director and employees accountable for their actions that harm, not help, consumers seeking financial assistance. The best way to do this is to make the agency subject to the appropriations process and hold oversight hearings to ensure that taxpayers and consumers are properly protected.

Postal Banking Proposals

From 2007-2020, the United States Postal Service (USPS) lost $87 billion, including a net loss of $9.2 billion in FY 2020, and now has $149 billion in unfunded and underfunded liabilities.[187] This financial performance should give most individuals pause when considering expansion of the USPS mission to include non-core

[180] Ibid., *PHH Corporation v. Consumer Financial Protection Bureau*.
[181] *Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7, June 29, 2020, https://casetext.com/case/seila-law-llc-v-consumer-financial-protection-bureau.
[182] Legal Information Institute, "12 U.S. CODE § 5511. Purpose, objectives, and functions," https://www.law.cornell.edu/uscode/text/12/5511.
[183] Citizens Against Government Waste, "Letter to Consumer Financial Protection Bureau Director Kathy Kraninger," May 14, 2019, https://www.cagw.org/legislative-affairs/agency-comments/cagw-submits-comments-bureau-consumer-financial-protection.
[184] Ibid.
[185] Consumer Financial Protection Board, "CFPB to Hold Auto Lenders Accountable for Illegal Discriminatory Markup," March 21, 2013, https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-hold-auto-lenders-accountable-for-illegal-discriminatory-markup/.
[186] Ibid.
[187] United States Postal Regulatory Commission, "Form 10-K, For the fiscal year ended September 30, 2020," pp. 14, 68, https://about.usps.com/what/financials/10k-reports/fy2020.pdf.

activities like banking. Yet some members of Congress, including Sens. Kirsten Gillibrand (D-N.Y.), Bernie Sanders (I-Vt.), and Elizabeth Warren (D-Mass.) and even President Biden during his campaign, support expanding the scope and mission of the USPS to include banking services.

It makes no sense for an agency that is so mired in debt to be given the responsibility to handle anyone else's money. Several reports and comments from federal agencies, including the USPS itself, have rejected the idea of postal banking. The Department of Treasury Task Force on the U.S. Postal System concluded in its December 2018 report that an agency with limited capital and expertise should not expand into any new business, including banking, where it lacks competence or where there could be financial risk.[188] When the USPS OIG suggested[189] in January 2014 that the agency could provide financial services, the USPS countered with a statement noting that its "core function is delivery, not banking."[190]

One of the arguments most frequently used by proponents of postal banking is that it would help the "unserved" market. However, the 6.5 percent of U.S. households that are underbanked or unbanked do not lack access to banking institutions, since there are tens of thousands of private sector entities that have the ability and competence to reach all Americans.[191] The number and scope of these institutions dispels the idea that the USPS can provide greater geographical reach. There are 31,322 USPS branches,[192] which is one-third of the 88,646 retail bank branches.[193] These retail bank branches, and their ATMs, provide the same services as would a postal bank, and many of them serve low-income areas that would be considered unserved or underserved.

The USPS has repeatedly been called a "broken business model" by the GAO, and the agency has repeatedly been included in GAO's High-Risk List.[194] GAO's May 2020 report, "Congressional Action is Essential to Enable a Sustainable Business Model," did not include a recommendation to expand the USPS into postal banking.[195] Such a decision "would hurt consumers and taxpayers by undercutting well-regulated, private financial institutions and undermining the fundamental role of the postal service. A failing federal agency should not enter and disrupt a private industry that is already competitive and efficient. The national market-driven, merit-based banking system operates much differently and yields far fairer results than would a politically driven operation."[196] And if the USPS is not held to the same financial standards as banks, lending by the agency could be politicized and credit standards could be weakened.

Congress should focus its efforts on repairing the USPS's longstanding structural problems and modernizing its broken business model. Postal banking is a concept whose time should never come.

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[188] Task Force on the United States Postal System, "United States Postal Service: A Sustainable Path Forward," Department of the Treasury, December 4, 2018, https://home.treasury.gov/system/files/136/USPS_A_Sustainable_Path_Forward_report_12-04-2018.pdf.
[189] U.S. Postal Service Office of Inspector General, "Providing Non-Bank Financial Services for the Underserved," January 27, 2014, https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-14-007_0.pdf.
[190] U.S. Postal Service, "Postal Service responds to calls for postal banking," July 29, 2016, https://about.usps.com/news/statements/072916.htm.
[191] Federal Deposit Insurance Corporation, "How America Banks: Household Use of Banking and Financial Services," October 19, 2020, https://www.fdic.gov/analysis/household-survey/.
[192] U.S. Postal Service, "Sizing It Up," January 28, 2021, https://facts.usps.com/size-and-scope/.
[193] U.S. Bank Locations, "Banks Ranked by Number of Branches," September 30, 2020, https://www.usbanklocations.com/bank-rank/number-of-branches.html.
[194] Government Accountability Office, "HIGH-RISK SERIES: Substantial Efforts Needed to Achieve Greater Progress in High-Risk Areas," GAO-19-157SP, March 2019, https://www.gao.gov/assets/700/697245.pdf.
[195] Government Accountability Office, "U.S. Postal Service: Congressional Action is Essential to Enable a Sustainable Business Model," GAO-20-385, May 7, 2020, https://www.gao.gov/assets/710/706729.pdf.
[196] Rep. Ted Budd and Tom Schatz, "Postal banking: an idea whose time should never come," *The Washington Times*, July 2, 2019,https://www.washingtonexaminer.com/opinion/op-eds/postal-banking-an-idea-whose-time-should-never-come.

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HEALTHCARE

On March 23, 2010, the ACA was signed into law to provide "quality, affordable, health care for all Americans." It did not, as millions of people lost their doctors and health plans that President Obama promised they could keep,[197] and instead of premiums decreasing by $2,500 per family per year, they skyrocketed and especially hurt those with pre-existing conditions who earned too much money to qualify for government subsidies.[198] State ACA health insurance exchanges, the online marketplaces, suffered massive failures and cost overruns, and the federal government became more intertwined in healthcare rulemaking and coverage.

Almost immediately after it became law, Republicans ran for Congress in 2012 on the promise they would "repeal and replace" Obamacare, yet more than 10 years later it still exists because the Republicans could not come to an agreement. Either some members thought proposed legislation did not go far enough, others were too timid to make bold and necessary changes, and still others were simply obstinate.

Fortunately, several odious parts of the law have been removed. In 2017, the Tax Cuts and Jobs Act (JOBS Act) was passed by Congress and reduced the individual mandate tax to zero dollars. Prior to this action, individuals either had to have health insurance or pay a shared responsibility tax. Purchasing insurance is once again a voluntary decision, just as it was before Obamacare was signed into law.[199]

In February 2018, Congress repealed the Independent Payment Advisory Board (IPAB) as part of the Bipartisan Budget Act, with strong bipartisan support. IPAB was often called the "death panel" because of the unprecedented power it gave to bureaucrats to control Medicare spending should it go beyond a certain limit and if Congress did not pass an alternative plan. IPAB was so unpopular that no one was ever appointed to serve and there was no need for it after all, as Medicare spending never reached the amount needed to trigger IPAB to be created.[200]

In 2019, three additional taxes were repealed as part of the Further Consolidated Appropriations Act: the Cadillac Tax, the medical device tax, and the health insurance tax. The repeal of both the Cadillac Tax, which was a 40 percent excise tax on generous employer-sponsored plans, and the 2.3 percent excise tax on medical devices took effect in December 2019. The repeal of the health insurance tax, which helped to increase premiums, will take effect in January 2021. The taxes amounted to $373.3 billion over 10 years.[201]

The repeal of the individual mandate tax in 2017 led to a constitutional challenge to the entire ACA. The Supreme Court heard oral arguments in the case of *California v. Texas* on November 10, 2020.[202] It appears likely that the Court will declare the now zero-dollar and defanged individual mandate unconstitutional and allow the rest of ACA to stand. A decision is likely sometime in June or July 2021.[203]

No matter what the Supreme Court decides, the argument over the ACA will continue. Even Democrats admit it does not work as intended. While it is unlikely Republicans will be able to repeal or replace Obamacare, a significant number of Democrats are pushing hard to achieve that objective in a completely different way.

Their primary alternative to the ACA is Medicare for All, a federal government-controlled, single-payer healthcare system.

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197 Angie Holan, "Lie of the Year: 'If you like your health care plan, you can keep it," *Politifact,* December 12, 2013, https://www.politifact.com/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it.

198 CMS Administrator Seema Verma, "Obamacare's Illusion of Preexisting Condition Protections," *National Review*, October 19, 2020, https://www.nationalreview.com/2020/10/obamacares-illusion-of-pre-existing-condition-protections.

199 Tax Cuts and Jobs Act, Pub. L. No. 115-97, H.R. 1, 115th Congress (2017), https://www.congress.gov/bill/115th-congress/house-bill/1.

200 Ian Spatz, "IPAB RIP," *HealthAffairs*, February 22, 2018, https://www.healthaffairs.org/do/10.1377/hblog20180221.484846/full.

201 Katie Keith, "ACA Provisions in New Budget Bill," *Health Affairs*, December 20, 2019, https://www.healthaffairs.org/do/10.1377/hblog20191220.115975/full.

202 *California* v. *Texas,* ___ U. S. ___ (20__), November 10, 2020, https://www.scotusblog.com/case-files/cases/california-v-texas.

203 Amu Howe, "Argument Analysis: ACA Seems Likely to Survive, but on What Ground?", SCOTUS BLOG, November 10, 2020, https://www.scotusblog.com/2020/11/argument-analysis-aca-seems-likely-to-survive-but-on-what-ground.

In the 116th Congress, S. 1129[204] and H.R. 1384[205] were introduced, respectively, by Sen. Bernie Sanders (I-Vt.) and Rep. Jaypal Pramila (D-Wash.) The Senate bill had 14 cosponsors, including four former presidential candidates and Vice President Kamala Harris. The house bill had 118 cosponsors, half of the Democratic caucus. If this legislation should become law, private health insurance would be taken away from at least 176,730,000 citizens.[206]

The Urban Institute estimated that Medicare for All would also cost $34 trillion in additional federal spending over 10 years.[207] Charles Blahous of the Mercatus Institute found it would cost $32.6 trillion over 10 years and equal approximately 10.7 percent of GDP in its first year, rise to 12.7 percent of GDP 10 years later, and continue to increase thereafter. The legislation would, "dramatically expand the demand for healthcare services, consistent with economics research findings that the more of an individual's health costs are covered by insurance, the more services they tend to buy, irrespective of the services' efficacy and value."[208] At the same time, payments would be cut to providers by 40 percent and it "cannot be known how much providers will react to these losses by reducing the availability of existing health services, the quality of such services, or both."[209]

But if past is prologue, the outcome is clear. Taxes will be raised, rationing will occur, and people will have long waits, especially for elective procedures. Socialistic healthcare systems are known for their detrimental and sometimes deadly wait times.[210]

President Biden claims he does not support Medicare for All and instead has offered a public option, which would be allowed in the Obamacare exchanges, as a reasonable compromise. It is not. Now called "Bidencare," this option would be a direct line to socialized medicine.

The deemed father of the public option, Yale Political Science Professor Jacob Hacker, admitted as much in 2008 when speaking before a meeting of the Tides Foundation.[211] He said, "someone once said to me this is a Trojan Horse for single-payer. I said well it's not a Trojan Horse, right? It's right there, I'm telling you. We're going to get there over time, slowly, but we'll move away from reliance on employment-based health insurance, as we should, but we'll do it in a way that we're not going to frame people into thinking they're going to lose their private insurance, we're going to give them a choice of public and private insurance when they're in the pool and we're going to let them keep their private, employment-based insurance if their employer continues to provide it."[212]

In 2008, the Lewin Group prepared a cost analysis for the "Health Care for America" proposal, which is essentially Bidencare, that explained how the public option would lead to the elimination of private healthcare plans. The plan would have required employers to provide health insurance coverage or pay a tax to have their workers covered under a newly created national health insurance pool. The proposal would be like offering a public option in the ACA exchanges.[213]

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204 Medicare for All Act of 2019, S. 1129, 116th Congress (2019), https://www.congress.gov/bill/116th-congress/senate-bill/1129.

205 Medicare for All Act of 2019, H.R. 1384, 116th Congress (2019), https://www.congress.gov/bill/116th-congress/house-bill/1384.

206 Kaiser Family Foundation, "Health Insurance Coverage of the Total Population 2019 (Data View Number)," https://www.kff.org/other/state-indicator/total-population.

207 Linda Blumberg et al, "From Incremental to Comprehensive Health Reform: How Various Reform Options Compare on Coverage and Costs," Urban Institute, October 16, 2019, https://www.urban.org/research/publication/incremental-comprehensive-health-reform-how-various-reform-options-compare-coverage-and-costs.

208 Charles Blahous, "The Costs of a National Single-Payer Healthcare System," The Mercatus Center, July 30, 2018, https://www.mercatus.org/publications/government-spending/costs-national-single-payer-healthcare-system.

209 Ibid.

210 OECD (2020), *Waiting Times for Health Services: Next in Line*, OECD Health Policy Studies, OECD Publishing, Paris, https://doi.org/10.1787/242e3c8c-en.

211 Moyers on Democracy, "Jacob Hacker-Political Scientist," https://billmoyers.com/guest/jacob-hacker.

212 "Hacker Admits Public Option is Trojan Horse for Single Payer," YouTube, August 11, 2009, https://youtu.be/3sTfZJBYo1I.

213 The Lewin Group, "Cost Impact Analysis for the 'Health Care for America' Proposal – Final Report," February 15, 2008, http://www.sharedprosperity.org/hcfa/lewin.pdf.

They stated, “Private employers who currently offer coverage would save $65.6 billion by discontinuing their insurance and enroll their workers in HCA [Health Care for America] by paying the tax” and “[P]rivate employers that currently do not offer coverage would spend $55.6 billion more due to the requirement that they either provide coverage or enroll their workers in HCA by paying the payroll tax.”[214] In other words, it would be less expensive and less hassle to pay the tax than to provide health insurance.

In 2010, the public option was seriously considered and rejected during the ACA debate, but it is now making a comeback with “Bidencare.” The result would be the same as projected by the Lewin Group for the HCA. Employees would move to the ACA because employers would find it less expensive. Private insurers would find it difficult to compete because the public option would have access to tax dollars and utilize price controls to artificially lower costs.

Americans do not need more federal government interference in healthcare by having “Bidencare” or any similar proposal being enacted into law.

Return Power to the People

The best way to reform healthcare is to return most of the regulatory and financial control back to the states and individuals. Two of the proposals that have been offered with free-market solutions that empower individuals and provides more flexibility to the states that will encourage innovation and drive down costs are the “Health Care Choices 2020: A Vision for the Future” and the RSC’s “A Framework for Personalized, Affordable Care.”

The Health Policy Consensus Group, which includes medical professionals, federal and state healthcare policy experts, taxpayer, and free-market organizations, produced “Health Care Choices 2020: A Vision for the Future.” The designers stated, “the nation faces a clear choice between two paths for America’s health care future: One is largely controlled by the government and strewn with empty promises. The other is controlled by you and doctors, leading to more choices, lower costs, and improved quality and access.” The plan discusses 10 ways to help improve healthcare, like empowering individuals and families to keep their health coverage and doctors upon a change or loss of a job; eliminates the risk of surprise medical bills; provides more options to get access to a wide variety of insurance tailored to an individual needs; and delivers better opportunities for states to reform their health insurance markets to drive down costs and protect those with pre-existing conditions.[215]

An example of how this proposal would work can be found in a successful policy implemented by the Trump administration to reform health insurance markets in the states and protect individuals with preexisting conditions. The administration expanded the use of ACA Section 1332, State Innovation Waivers, and 15 states have taken advantage of the changes. By implementing state-based reinsurance programs, the states have been able to redirect ACA funding and use it to finance reinsurance programs that covers the care of people with pre-existing conditions and at the same time, lower premiums. For example, in the first year after implementing their waivers, Alaska saw up to a 20 percent average premium reduction, Colorado saw a 16 percent reduction, Maryland saw a 30 percent reduction, and Oregon saw an 8 percent reduction.[216]

Rather than undermining these Trump administration policies, Congress should adopt proposals in the Health Care Choices plan that build on this success and codify in law the CMS regulations and guidance that allowed the states to use federal money to fund their reinsurance programs.

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214 Ibid., p. 2.

215 Galen Institute, Health Policy Consensus Group, “Health Care Choices 2020: A Vision for the Future,” October 20, 2020, https://galen.org/assets/HEALTH-CARE-CHOICES-2020_A-Vision-for-the-Future_FINAL-002-1.pdf.

216 CMS.gov, CCIIO, “Section 1332: State Innovation Waivers, Data Brief on State Relief and Empowerment Waivers: State-based Reinsurance Programs,” https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-Data-Brief-June2020.pdf.

The RSC proposal, "A Framework for Personalized, Affordable Care," was released in October 2019. Their proposal includes many of the concepts in the Health Care Choices plan, like protecting individuals with pre-existing conditions by redirecting ACA funds to support state-administered guarantee coverage pools; reforming the tax code to provide equal treatment of employer and individual health insurance markets; increasing tax contributions to expand the use of health savings accounts (HSA) by allowing them to be used to pay for insurance premiums, directing primary care, and health sharing ministries; eliminating ACA's mandates that force Americans to buy insurance coverage they do not need; and, removing barriers to allow the increased use of telemedicine, direct primary care and association health plans.[217]

The RSC plan would cease Medicaid expansion and take existing ACA funding for premium subsidies and Medicaid expansion and use it to fund state-administered flex grants that would subsidize private health insurance for low-income individuals. Since Medicaid is notorious for providing poor care and many of its beneficiaries have difficulty finding physicians, particularly specialists, this would improve healthcare for these individuals. Expansion of Medicaid has only made these matters worse as the original beneficiaries of the program, including poor pregnant women, the blind and disabled, and low-income elderly, are now competing with abled-bodied individuals for care.[218]

Implementing the ACA proved that Washington-controlled healthcare is not the answer. But the problems that existed implementing Obamacare would be microscopic compared to adopting "Medicare for All" as a replacement.

The VA runs a single-payer plan that has proven to be unresponsive, and even deadly to the people it is supposed to serve. The VA healthcare scandal, which gained notoriety after an investigation of the Carl T. Hayden VA Medical Center in Phoenix, Arizona, was not unique to that facility.[219] It is not surprising that problems continue. For example, a July VA OIG report found that the Hunter Holmes McGuire VA Medical Center in Richmond, Virginia rehired a pathologist that had been previously fired for misdiagnosing cancer in at least a dozen patients.[220] In the same time frame, another OIG report found a VA hospital in Washington, D.C. took nine months to fire an emergency room physician that harassed and did not treat a veteran that was suicidal and seeking assistance. The patient committed suicide days later.[221]

Both the Health Care Choices Proposal and the RSC's Framework for Personalized, Affordable Care provide opportunities for Democrats and Republicans to work together and return power over healthcare back to the people and states they represent. This would allow everyone to choose the healthcare they want, provide the conditions for competition and a robust, innovative health market to grow, and be able to best protect the most vulnerable, including the poor and those with pre-existing conditions.

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217 Republican Study Committee, "A Framework for Personalized, Affordable Care - Part One," October 22, 2019, https://rsc-banks.house.gov/sites/republicanstudycommittee.house.gov/files/FINAL%20RSC%20Health%20Care%20Report.pdf.

218 Ibid., pp. 43-44.

219 Curtis Kalin, "The VA Scandal Refuses to End," *The WasteWatcher*, Citizens Against Government Waste, March 9, 2018, https://www.cagw.org/thewastewatcher/va-scandal-refuses-end.

220 Department of Veterans Affairs Office of Inspector General, "Facility Oversight and Leaders' Responses Related to the Deficient Practice of a Pathologist at the Hunter Holmes McGuire VA Medical Center in Richmond, Virginia," July 29, 2020, https://www.va.gov/oig/pubs/VAOIG-19-07600-215.pdf.

221 Department of Veterans Affairs Office of Inspector General, "Inadequate Emergency Department Care and Physician Misconduct at the Washington, D.C. VA Medical Center," July 28, 2020, https://www.va.gov/oig/pubs/VAOIG-19-07507-214.pdf.

HOUSING

The federal government has long been involved in housing programs with the objective of helping Americans achieve their dream of homeownership and helping others keep a roof over their heads in rental properties. Like other well-intended programs, they have grown to the point where there is so much duplication and overlap, the delivery of services is inefficient and fails to solve the problem, as then-Senate Budget Committee Chairman Michael Enzi (R-Wyo.) noted in his October 22, 2020 report, "Housing Programs: The Need for One Roof."[222]

Sen. Enzi wrote, "last year, Washington spent over $50 billion on housing, guaranteed about $2 trillion in home loans and provided billions more through the tax code, yet more than half a million people were homeless on a single night in 2019."[223] The report suggested that this "byzantine system" should be consolidated under one roof.

The report is the latest in a series of revealing investigations into the significant number of redundant housing programs. In August 2012, the GAO found that there were 160 federal housing programs and activities across 20 agencies.[224] Overlap existed for products, services, and geographic areas served by programs within the Department of Agriculture's (USDA) Rural Housing Service, the Department of Housing and Urban Development's (HUD) Federal Housing Administration (FHA), and the VA. These programs all provide mortgage guarantee loans to homeowners, but GAO suggested that better coordination of activities could provide improved assistance outcomes across the three agencies.

The GAO recommended that, "To enhance evaluation of coordination or consolidation of single-family programs, HUD, the Office of Management and Budget (OMB), USDA, and VA should adopt a more rigorous approach for their task force that incorporates collaborative practices. To further improve initiatives to consolidate and align requirements in multifamily programs, HUD, USDA, and Treasury should document their efforts in annual and strategic plans. As part of these collaborative effort, these agencies also should identify specific programs for consolidation, including those requiring statutory changes."[225] The Senate Budget Committee report noted that there is no current figure for the programs currently available for housing assistance, which makes it difficult, if not impossible, to determine which programs need to be consolidated.

Congress should insist that GAO develop an updated comprehensive list of all existing housing programs and their effectiveness. After the new list of programs is created, Congress should determine which are the most effective at delivering the most bang for the buck and eliminate those that do not deliver to those who most need the taxpayers' money, and then consolidate them into as few agencies as possible.

Fannie Mae and Freddie Mac

Among the housing policy challenges cited by both the Senate Budget Committee report and the GAO are the two government-sponsored enterprises (GSEs) Fannie Mae (Fannie) and Freddie Mac (Freddie), which are now entering their twelfth year of conservatorship.

Fannie Mae and Freddie Mac have become the primary buyers in the secondary mortgage market, financing nearly 90 percent of all U.S. mortgages. Since being placed into conservatorship in 2008, the GSEs have received more than $190 billion from taxpayers, including a $3.7 billion request on February 15, 2018. An August 7, 2018 Federal Housing Finance Agency (FHFA) stress test report found that the GSEs could require

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[222] Senate Budget Committee, Majority Staff, "Housing Programs: The Need for One Roof," United States Senate, October 20, 2020, https://www.budget.senate.gov/imo/media/doc/FINAL.Housing%20Report%20FINAL.pdf.
[223] Sen. Michael B. Enzi, "Under one roof – Reforming America's federal housing programs," *Roll Call*, October 22, 2020, https://www.rollcall.com/2020/10/22/under-one-roof-reforming-americas-federal-housing-programs/.
[224] Government Accountability Office, "Housing Assistance: Opportunities Exist to Increase Collaboration and Consider Consolidation," GAO-12-554, August 16, 2012, https://www.gao.gov/assets/600/593752.pdf.
[225] Ibid.

up to $78 billion in new bailout money if there is another severe global recession.[226] What was supposed to be a temporary patch to the 2008 financial crisis has transformed into more than a decade of inaction toward a long-term solution, abusive GSE expansion, and a constant threat of another massive taxpayer-funded bailout.

During a September 6, 2018, House Financial Services Committee hearing, Chairman Jeb Hensarling (R-Texas) asserted that the failure to enact GSE reform poses a growing systemic risk to both mortgage markets and taxpayers.[227] Fannie Mae and Freddie Mac "remain in conservatorship very much alive and very much unreformed, as they quietly return to their pre-crisis market dominance. That is bad news for competition, innovation, and, most of all, taxpayers, since the Congressional Budget Office has said their $5.1 trillion of mortgage obligations are, quote, 'effectively guaranteed by the Federal Government,' unquote."[228] Edward DeMarco, former FHFA acting director and president of the Housing Policy Council, agreed that there is a concerning growth in "the systemic reliance we are placing on Fannie Mae and Freddie Mac," eerily similar to the early days of the 2008 financial crisis.[229]

CAGW President Tom Schatz wrote in a 2016 op-ed that, "In the early 2000s, members of Congress from both sides of the aisle put blinders on when skeptics sounded Cassandra-like warnings about the GSEs. They were told that the size and market concentration of the GSEs made them too big to fail, even though Fannie and Freddie claimed that they were private companies, independent of the government. Members of Congress were admonished many times that taxpayers would be on the hook if anything went wrong with the GSEs, yet nothing was done. The housing market finally collapsed in 2007, and the financial crisis from which the U.S. economy still struggles to emerge ensued shortly thereafter in 2008. The resulting … taxpayer bailout is the largest in American history."[230]

In 2019, the FHFA drastically curtailed unnecessary GSE expansion by ordering the GSEs to limit base salary for any employee to less than $600,000. While this cap was enacted by Congress in 2015, Fannie and Freddie skirted it by splitting one combined position of chief executive officer (CEO) and president into two, then claiming the law only applied to the CEO.[231] This meant that other executives, like the newly created position of president, could continue to reap huge paydays. Following the slick change in title, annual compensation[232] for the newly-created position of president at Fannie increased to $3.6 million and at Freddie to $3.25 million.[233]

On September 30, 2019, FHFA released its agreement with the Department of the Treasury to increase capital retention for Fannie and Freddie.[234]

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226 Federal Housing Financing Agency, "Dodd-Frank Act Stress Tests Results: Severely Adverse Scenario – Summary of Severely Adverse Scenario Results," August 7, 2018, https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2018_DFAST_Severely-Adverse-Scenario.pdf#page=4.

227 Financial Services Committee, "A Failure to Act: How a Decade without GSE Reform Has Once Again Put Taxpayers at Risk," U.S. House of Representatives, September 6, 2018, https://republicans-financialservices.house.gov/calendar/eventsingle.aspx?EventID=403851.

228 Ibid., p. 1.

229 Ibid., p. 5.

230 Tom Schatz, "Reform of Fannie Mae and Freddie Mac is long overdue," *The Hill*, July 13, 2016, https://thehill.com/blogs/pundits-blog/finance/287508-reform-of-fannie-mae-and-freddie-mac-is-long-overdue.

231 Renae Merle, "How Fannie Mae, Freddie Mac dodged a $600,000 cap on CEO pay," *The Washington Post*, April 22, 2019, https://www.washingtonpost.com/business/2019/04/22/how-fannie-mae-freddie-mac-dodged-cap-ceo-pay/.

232 Securities and Exchange Commission, "Form 8-K, Federal National Mortgage Association, Fannie Mae: Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers," August 23, 2019, https://fanniemae.gcs-web.com/static-files/edb245d0-05cf-42ee-8b4b-fdfd5d0bd708.

233 Federal Housing Finance Agency Office of Inspector General, "Executive Succession Planning at Fannie Mae Acted to Circumvent the Congressionally Mandated Cap on CEO Compensation," EVL-2019-001, March 26, 2019, https://www.fhfaoig.gov/Content/Files/EVL-2019-001_0.pdf.

234 Federal Housing Finance Agency, "Statement from FHFA Director Mark Calabria on Letter Agreement with Treasury to Increase Fannie, Freddie Capital Retention," September 30, 2019, https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-from-FHFA-Director-Mark-Calabria-on-Letter-Agreement-with-Treasury-to-Increase-Fannie-Freddie-Capital-Retention.aspx.

The GSEs had been required to send all profits to the Treasury until a decision in 2017 allowed Fannie and Freddie to retain $3 billion in capital each.[235] But, for two mortgage giants that provide $6.3 trillion in funding for the housing market, this buffer is completely inadequate. The new agreement allows Fannie to keep $25 billion and Freddie $20 billion in capital reserves, a significant step toward practical reform.

Both the Treasury Department and the HUD have released plans for housing finance reform. Now is the time to press forward with a measured but ambitious program to rein in the GSEs, require them to accumulate more private capital in order to protect taxpayers, and ultimately, unwind the government's dominant role in the nation's mortgage markets.[236]

One option is to reintroduce the Protecting American Taxpayers and Homeowners Act, or PATH Act, which would end taxpayer-funded bailouts of Fannie and Freddie entirely and phase out the GSEs within five years.[237] This bill would provide a viable legislative solution to creating a sustainable housing finance system for the future.

Federal Housing Administration

The FHA runs a more than $1.3 trillion mortgage insurance program that was originally designed to assist low and moderate-income people to purchase houses if they cannot provide a 20 percent down payment. Since that time, the FHA has become the largest single provider or mortgage insurance and has a 100 percent guarantee of payment to lenders, should the homeowner default.

During the 1990s, the FHA had control over about 10 percent of the home mortgage market. Since that time, between world finance uncertainty and the 2008 financial crisis, the FHA's share or purchase lending increased to nearly a third of the market by 2010, with maximum income eligibility rising from $120,000 to $230,000. In other words, people with about twice the income as before are eligible for FHA insurance. As eligibility exploded, the FHA faced serious solvency problems which culminated in a $1.7 billion bailout from the Treasury at the end of 2013. CBO estimated that FHA insurance cost $15 billion from 2009 to 2012.[238]

Even after the bailout, the FHA was seriously undercapitalized until 2015 when the agency reached its 2 percent cash-on-hand threshold. Chairman Hensarling reacted by saying, "After breaking the law for seven years, it's good to see that the FHA is finally in compliance but it's sad that merely following the law is what passes for 'victory.' … Hardworking taxpayers remain exposed to more than $1 trillion in FHA insured mortgage credit risk, and the FHA capital reserve remains woefully inefficient."[239]

Instead of making the dream of home buying affordable for first-time buyers, FHA's loose lending policies are driving up the cost of starter homes to prices that are impractical for large numbers of Americans. That is why the FHA should return to its original mission: insure loans for those of modest means, by either using an income test or limiting the size of the mortgage. The private sector and private capital are perfectly capable of taking care of everything else.

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[235] Andrea Riquier, "Fannie, Freddie can hold more capital, per Treasury-FHFA agreement," *MarketWatch*, September 30, 2019, https://www.marketwatch.com/story/fannie-freddie-can-hold-more-capital-per-treasury-fhfa-agreement-2019-09-30.

[236] Department of the Treasury, "Housing Reform Plan, Pursuant to the Presidential Memorandum Issued March 27, 2019," September 2019, https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf.

[237] Protecting American Taxpayers and Homeowners Act of 2018, H.R. 6746, 115th Congress (2018), https://www.congress.gov/bill/115th-congress/house-bill/6746.

[238] Chad Cirico and Susanne Mehlman, "FHA's Single-Family Mortgage Guarantee Program: Budgetary Cost of Savings?" Congressional Budget Office, October 21, 2013, https://www.cbo.gov/publication/44628.

[239] Vicki Needham, "FHA's balance sheet rebounds after bailout," *The Hill*, November 16, 2015, https://thehill.com/policy/finance/260278-fhas-balance-sheet-continues-strong-rebound.

INTELLECTUAL PROPERTY RIGHTS

The protection and promotion of intellectual property (IP) is the only property right included in the Constitution, found in the General Welfare Clause, Article 1, Section 8:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[240]

The Founding Fathers understood that the best way to encourage creation and dissemination of new inventions and artistic works to the benefit of both the public good and individual liberty is to protect IP rights. In his January 8, 1790 State of the Union Address to Congress, President George Washington stated, "nothing … can better deserve your patronage than the promotion of science and literature."[241] The Senate responded on January 11, 1790, noting, "Literature and science are essential to the preservation of a free constitution; the measures of government should, therefore, be calculated to strengthen the confidence that is due to that important truth." On January 12, 1790, the House of Representatives issued its concurrence with the President as well by stating, "the promotion of science and literature will contribute to the security of a free Government; in the progress of our deliberations we shall not lose sight of objects so worthy of our regard." Congress then moved forward and passed H.R. 43, the Copyright Act of 1790, which was signed into law on May 31, 1790.[242]

The Act established both the U.S. Copyright Office and the U.S. Patent and Trademark Office (PTO). These agencies are tasked with cataloguing, analyzing, and protecting IP rights.

While most Americans think of property as something they own, meaning personal and real property, they are likely unaware that someone came up with an idea or an invention to create and build those possessions. IP is not always seen or heard directly, and its value is therefore not as visible as other forms of property.

According to a September 26, 2016 Economics and Statistics Administration and PTO report, IP-intensive industries supported nearly 28 million jobs in the U.S.[243] The International Intellectual Property Alliance found that in 2019, core copyright industries alone contributed $1.5 trillion to the U.S. economy, and directly employed nearly 5.7 million Americans accounting for 38 percent of the entire U.S. workforce.[244] However, the economic impact of these copyright industries extend beyond the industry's workforce. According to the Motion Picture Association (MPA), when the movie *Black Panther* was filmed in 2018, more than 3,100 local workers in Georgia received more than $26.5 million in wages supporting the local economy.[245] The industry paid a total of "$49 billion to more than 280,000 businesses in cities and small towns across the country."[246]

In February 2020, the Global Innovation Policy Center (GIPC) released its 8th annual U.S. Chamber International IP Index report, which evaluated IP protections around the world.[247] Of the 53 countries evaluated by the GIPC, the U.S. ranked first with a protection score of 95.28 percent, followed respectively

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240 U.S. Constitution, Article 1, Section 8, National Archives, https://www.archives.gov/founding-docs/constitution-transcript.
241 William F. Patry, *Copyright Law and Practice*, Bureau of National Affairs, 1994, 2000, http://digital-law-online.info/patry/patry5.html.
242 Ibid.
243 Justin Antonipillai and Michelle K. Lee, "Intellectual Property and the U.S. Economy: 2016 Update," Economics and Statistics Administration and the U.S. Patent and Trademark Office, September 26, 2016, https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf.
244 Robert Stoner and Jessica Dutra, "Copyright Industries in the U.S. Economy: The 2020 Report," International Intellectual Property Alliance, December 2020, https://iipa.org/files/uploads/2020/12/2020-IIPA-Report-FINAL-web.pdf.
245 Motion Picture Association, "What We Do: Driving Economic Growth," February 25, 2020, https://www.motionpictures.org/what-we-do/driving-economic-growth/.
246 Ibid.
247 Meir Pugatch and David Torstenssen, "Art of the Possible, U.S. Chamber International IP Index," 8th ed., Global Innovation Policy Center, U.S. Chamber of Commerce, February 2019, https://www.theglobalipcenter.com/wp-content/uploads/2020/02/023881_GIPC_IP_Index_2020_FullReport_A_04b.pdf.

by the United Kingdom (93.92 percent), France (91.5 percent), Germany (91.08 percent), and Sweden (90.56 percent). The countries with the least IP protections were Venezuela (14.22 percent), Algeria (24.06 percent), Pakistan (26.5 percent), Nigeria (27.62 percent), and Kuwait (28.02 percent).[248]

In their 2014 book, *Intellectual Property: Making It Personal*, CAGW President Tom Schatz and Director of Technology and Telecommunications Policy Deborah Collier cited four myths and realities surrounding IP that remain valid today:

1. Myth: The price of information and ideas should be zero because products should be priced at marginal cost.
   Reality: Economists reject marginal cost pricing because such policies destroy investment.

2. Myth: Intellectual property rights result in information and ideas being 'locked down' by their owners.
   Reality: The creators of art, books, movies, and inventions want their creations to reach as many people as possible, so long as they are compensated.

3. Myth: Intellectual property rights are monopolies that give their owners too much economic power.
   Reality: Patents or copyrights support competition by encouraging inventors and creators to enter new markets; IP gives its owners no more economic power than any other asset.

4. Myth: Intellectual property rights benefit big firms at the expense of 'the little guy.'
   Reality: Patents are often the best protection that a small inventor has against large firms; copyright benefits creative ventures of many sizes, from solo musicians to big studios.[249]

Promoting IP in Trade Agreements

The protection of IP should be a key consideration in all trade negotiations. Although the U.S. has a strong history of IP protection, other countries do not value IP as highly and often seek to diminish its protections.

The Office of the U.S. Trade Representative releases an annual Special 301 Report identifying trading partners that "do not adequately or effectively protect and enforce intellectual property (IP) rights or otherwise deny market access to U.S. innovators and creators that rely on protection of their IP rights." The April 2020 edition identified 33 countries on its Priority Watch List and its Watch List.[250] The Priority Watch List includes Algeria, Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela. The Watch List includes Barbados, Bolivia, Brazil, Canada, Colombia, Dominican Republic, Ecuador, Egypt, Guatemala, Kuwait, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Thailand, Trinidad & Tobago, Turkey, Turkmenistan, the United Arab Emirates, Uzbekistan, and Vietnam.[251]

Ensuring that U.S. IP rights receive adequate protections through trade agreements is a critical component to the negotiation process. During the 116th Congress, the United States–Mexico–Canada Agreement (USMCA)

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[248] Ibid.
[249] Thomas Schatz and Deborah Collier, *Intellectual Property: Making It Personal*, Citizens Against Government Waste, November 2014, https://www.cagw.org/Intellectual_Property.
[250] Office of the United States Trade Representative, "USTR Releases Annual Special 301 Report on Intellectual Property Protection and Review of Notorious Markets for Counterfeiting and Piracy," April 29, 2020, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/ustr-releases-annual-special-301-report-intellectual-property-protection-and-review-notorious.
[251] Ibid.

was ratified. The USMCA includes new protections for U.S. IP, including a chapter covering digital trade that will provide much-needed protection for cross-border data flow, which is increasingly important as more information is stored using cloud computing services. Similar language should be considered in future trade negotiations to protect U.S. IP globally.

In addition, as other trade agreements are negotiated or renegotiated in the coming years, the U.S. should evaluate every nation's track record on IP using tools provided by the Special 301 report and through other sources like the GIPC's Global IP index, to ensure that America's creativity, innovation, and technology are protected.

The Battle Against Counterfeits and Piracy

In 2016, the Trade Facilitation and Trade Enforcement Act was signed into law, strengthening the ability of federal officials to interdict and seize suspected infringing goods at the border.[252] According to the Department of Homeland Security, the number of IP rights seizures decreased from 34,143 in FY 2017 to 33,810 in FY 2018.[253] Based on the estimated manufacturer's suggested retail price, had the seized goods been genuine, they were worth $1.4 billion.[254] In FY 2019, there were 27,599 seizures, with an estimated value of more than $1.5 billion.[255]

However, the value does not reflect the full economic impact. A February 2017 Commission on the Theft of American Intellectual Property report estimated the economic loss of IP due to counterfeits, trade secret theft, and pirated software is between $225 billion to $600 billion annually.[256] The report found that 87 percent of the counterfeit goods came from China.[257]

In addition to counterfeit goods, there is an ongoing threat from counterfeit and pirated content online. According to the GIPC, there are now "more video streaming subscribers than paid-TV subscribers worldwide, accessing over 500 licensed online video portals."[258] This has led to a creative industry employing up to 2.6 million workers in the U.S. and providing $229 billion in annual economic benefits to the economy.[259] As legal streaming has increased, so has piracy of digital movies, music, and software applications, which is not only anticompetitive but also often a harbinger of malware and other virtual attacks on unsuspecting businesses and consumers.

According to the MPA, in 2018 there were an estimated 32.5 billion visits to streaming piracy sites worldwide, with one out of four content theft sites exposing consumers to malicious content.[260] This number is staggering when one considers the number of legitimate sites now available to obtain digital content.

The movie industry has filed several piracy lawsuits against set-top box manufacturers to reduce the availability of pirated digital goods being downloaded by unsuspecting consumers. One such suit resulted in a $90 million settlement on October 24, 2018, paid to DISH Network by SET TV for damages stemming

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252 Meir Pugatch, Rachel Chu, and David Torstensson, "Create: U.S. Chamber International IP Index, 6th edition," Global Innovation Policy Center, U.S. Chamber of Commerce, February 2018, http://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC_IP_Index_2018.pdf.
253 Department of Homeland Security, "Intellectual Property Rights Seizure Statistics, Fiscal Year 2018," August 9, 2019, https://www.cbp.gov/sites/default/files/assets/documents/2019-Aug/IPR_Annual-Report-FY-2018.pdf.
254 Ibid.
255 Department of Homeland Security, "Intellectual Property Rights Fiscal Year 2019 Seizure Statistics," September 2, 2020, https://www.cbp.gov/sites/default/files/assets/documents/2020-Sep/FY%202019%20IPR%20Statistics%20Book%20%28Final%29.pdf.
256 The Commission on the Theft of American Intellectual Property, "The Theft of American Intellectual Property: Reassessments of the Challenge and United States Policy, Update to the IP Commission Report," National Bureau of Asian Research, February 2017, http://www.ipcommission.org/report/IP_Commission_Report_Update_2017.pdf.
257 Ibid.
258 David Blackburn, Jeffrey A. Eisenach, and David Harrison, "Impacts of Digital Video Piracy on the U.S. Economy," Global Innovation Policy Center, U.S. Chamber of Commerce, June 2019, https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf.
259 Ibid.
260 Motion Picture Association, "Safeguarding Creativity," https://www.motionpictures.org/what-we-do/safeguarding-creativity/.

from allegations that SET TV was using DISH channels and retransmitting them without permission.[261] The industry has also implemented various voluntary initiatives to prevent illegal theft and distribution of pirated content.

During the 116th Congress, legislation was enacted to further combat illegal distribution of pirated content when language from the Protecting Lawful Streaming Act was included in the Consolidated Appropriations Act, 2021.[262] This legislation eliminates the streaming loophole in criminal copyright law by making criminal penalties for illegal streaming consistent with those for illegal downloading and distribution of pirated content by large criminal enterprises.[263]

When content is widely distributed without the consent of, or compensation to, the creator, IP is being stolen. Until it is reined in, this industrial-scale theft will continue to rob the U.S. economy and consumers of jobs, investment, innovation, and creativity. Songwriters are among those hit hardest by IP infringement. Because of the high cost of litigating copyright infringement cases in federal courts, many creators are disenfranchised by the current copyright system.

To provide these creators with a remedy, the legislation creates a Copyright Claims Board within the U.S. Copyright Office to decide copyright infringement disputes from individual creators and small businesses that would otherwise not be able to afford to defend themselves in federal court. Awards for damages are capped at $30,000, and participation in the board's proceedings is voluntary with an opt-out procedure for defendants, and parties are still able to have their dispute heard in court. On December 22, 2020, the CASE Act was also included in the final Consolidated Appropriations Act, 2021, which will help to protect copyright owners during dispute resolution proceedings.[264]

IP rights have been paramount since the Republic was established. As James Madison noted in *Federalist Paper* No. 43, referring to the authority to promote science and the arts by providing exclusive rights to authors' and inventors' writings and discoveries (which led to Article 1, Section 8 of the Constitution):

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.[265]

Everyone benefits from IP. If the Founding Fathers had not recognized its importance, the light bulb, the telephone, the cell phone, and the microchip might never have been invented. Strong IP protection in both domestic policy and ongoing trade discussions is fundamental to keeping the American engine of ingenuity on track and ahead of the rest of the world for generations to come.

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261 *DISH Network L.L.C. and NagraStar LLC v. Nelson Johnson, Jason Labossiere, Set Broadcast LLC, Streaming Entertainment Technology LLC, Doe 1, as Trustee for Chateau Living Revocable Trust and Doe 2, as Trustee for Macromint Trust, individually and collectively d/b/a www.setvnow.com*, Civil Case No. 8:18-cv-1332-T-33AAS, Final Judgment and Permanent Injunction, October 24, 2018, https://torrentfreak.com/images/DISH-v-SET-judgment.pdf.

262 Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 116th Congress, (2020), https://www.congress.gov/bill/116th-congress/house-bill/133.

263 Sen. Tom Tillis, "Protecting Lawful Streaming Act," *Congressional Record*, Volume 166, Number 218, U.S. Senate, December 21, 2020, https://www.congress.gov/congressional-record/2020/12/21/senate-section/article/s7931-1?q=%7B%22search%22%3A%5B%22Protecting+Lawful+Streaming%22%5D%7D&s=2&r=1.

264 Ibid., Pub. L. No. 116-260.

265 James Madison, "Federalist Papers: Primary Documents in American History, Federalist Paper No. 43, The Same Subject Continued: The Powers Conferred by the Constitution Further Considered," For the *Independent Journal*, The Library of Congress, last updated August 13, 2019, https://guides.loc.gov/federalist-papers.

LABOR LAW AND PENSION REFORM

A major development in U.S. labor law occurred in June 2018, when the Supreme Court ruled in *Janus v. AFSCME* that public-sector employees cannot be required to pay fees to unions to cover the costs of collective bargaining, as such payments "violate the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."[266] The decision laid the basis for right-to-work for public-sector workers in all states. Alaska[267] and Michigan,[268] among other states, have gone beyond the parameters of the *Janus* decision.

But in other states, labor unions and the politicians they support have attempted to undermine the *Janus* ruling by allowing workers to opt out only during small windows of time; collecting the personal information of all new public-sector employees;[269] and, worst of all, using taxpayer dollars to pay unions directly to compensate for any decline in revenue that results from the *Janus* decision.[270] Lawmakers across the country should support, not undermine, the *Janus* decision, and protect the rights of employees who do not wish to support a union.

The most significant change in labor law at the state level in many years occurred when California Governor Gavin Newsom (D) signed Assembly Bill 5 (AB 5) into law in 2019.[271] The law redefined how workers would be classified as independent contractors or employees, including app-based workers, freelance writers, tutors, music teachers, court reporters, musicians, event planners, translators, transcribers, and truckers. While these lower-paying jobs were covered, AB 5 exempted higher-paying professions like doctors, lawyers, real estate agents, architects, and accountants. The supposed purpose of the legislation was to protect workers by guaranteeing a minimum wage, sick leave, workers' compensation, and unemployment benefits.[272]

The most vocal opponents of AB 5 were app-based gig economy workers for companies like DoorDash, Instacart, Lyft and Uber. During the November 2020 elections, Californians voted 59 percent to 41 percent to approve Proposition 22, which exempts app-based drivers from AB 5.[273] There have been efforts to repeal AB 5 in its entirety or provide other exemptions, but they have not succeeded.[274]

Legislation similar to AB 5 has been considered in Congress. The House passed the Protecting the Right to Organize (PRO) Act on February 6, 2020 by a vote of 224-194.[275] Along with significant changes to the labor laws that enhance union activity and membership, the PRO Act included language similar to AB 5. President Joe Biden has endorsed AB 5 and the PRO Act, and wants these pro-union and anti-independent contractor policies to apply nationally.[276] According to his campaign website, he also wants to "aggressively pursue employers" who violate labor laws, including misclassifying employers to independent contractors.

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266 *Janus v. State, County, and Municipal Employees*, 585 U. S. ___ (2018), https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf.
267 Office of Governor Mike Dunleavy, "Governor brings Alaska into compliance with US Supreme Court's Janus ruling," September 26, 2019, https://gov.alaska.gov/newsroom/2019/09/26/governor-brings-alaska-into-compliance-with-us-supreme-courts-janus-ruling/.
268 Anna Claire Rowlands, "Efforts to Implement Janus Decision Met With Union Pushback," Mackinac Center for Public Policy, August 12, 2020, https://www.mackinac.org/efforts-to-implement-janus-decision-met-with-union-pushback.
269 Trey Kovacs, "In Aftermath of 'Janus' Decision, Blue States Push Pro-Union Bills," Competitive Enterprise Institute, January 22, 2019 https://cei.org/blog/in-aftermath-of-janus-decision-blue-states-push-pro-union-bills.
270 Spencer Chretien, "Hawaii Bill Would Use Tax Dollars to Pay Unions," *The WasteWatcher*, Citizens Against Government Waste, March 14, 2018, https://www.cagw.org/thewastewatcher/hawaii-bill-would-use-tax-dollars-pay-unions.
271 Worker status: employees and independent contractors, AB 5, California General Assembly (2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.
272 Ibid.
273 Secretary of State Alex Padilla, "Proposition 22: App-Based Drivers and Employee Benefits," November 3, 2020, https://electionresults.sos.ca.gov/returns/ballot-measures.
274 Frances Floresca, "AB 5 is a Lose-Lose Situation for Gig Economy Workers and Independent Contractors," *The WasteWatcher*, Citizens Against Government Waste, August 26, 2020, https://www.cagw.org/thewastewatcher/ab-5-lose-lose-situation-gig-economy-workers-and-independent-contractors.
275 Protecting the Right to Organize Act, H.R. 2474, 116th Congress (2019), https://www.congress.gov/bill/116th-congress/house-bill/2474.
276 Joe Biden, "The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions," Biden-Harris Campaign, https://joebiden.com/empowerworkers/?fbclid=IwAR2HGRlgIw8Xu-E7MHl2R2NFNJDINwvjkRhtFQc61cKd0t1R-WZ92m6zSxI.

Instead of voting for the PRO Act and similar legislation, members of Congress should support legislation like the Helping Gig Economy Workers Act of 2020, sponsored by Sens. Mike Braun (R-Ind.), Bill Cassidy (R-La.), Tim Scott (R-S.C.), and Kelly Loeffler (R-Ga.).[277] The bill would allow gig economy workers to obtain financial assistance and protective equipment from platform companies like DoorDash, Instacart, Lyft, and Uber without being responsible for legal liability during the duration of the COVID-19 emergency.[278]

The nation continues to face a pension crisis at all levels of government. States and localities suffer from massive unfunded pension liabilities that pose a threat to their long-term financial solvency.[279] The main factors in this crisis are the failure of legislators to fund pension systems fully and the use of unrealistic assumed rates of return. Funds meant to support state and local pension systems are instead wasted on other projects, and the projected return on investment is made using outdated and overly rosy assumptions. The failure to fund pensions adequately adds up year after year, leading to gaping revenue shortfalls.[280]

States and localities must reform their pension systems to ensure that benefits will be paid to future retirees. Federal lawmakers must avoid the temptation to bail them out, which would put all taxpayers on the hook for the state and local politicians' reckless behavior.

The issue of multiemployer pension reform commanded significant attention during the 116th Congress. Like many public-sector pension plans, these plans promised beneficiaries significantly more than they are able to pay. On July 24, 2019, the House of Representatives passed H.R. 397, the Rehabilitation for Multiemployer Pensions Act of 2019,[281] by a vote of 264-169. The bill was intended to address the $638 billion in outstanding, unfunded pension obligations.[282]

CAGW wrote in a July 12, 2019 blog post that H.R. 397 bailed out union pensions rather than providing needed reforms for the Pension Benefit Guaranty Corporation, which is "in charge of insuring these pension benefits, faces a $54 billion deficit for such plans and is projected to be depleted by fiscal year 2025. While the PBGC is currently funded by insurance premiums rather than taxpayer dollars, the deteriorating fiscal situation could force Congress to fall back on taxpayers to pay for the bailout of failing pensions."[283]

H.R. 397 or similar legislation is not the answer to the multiemployer pension issue. A solution will need to be found that will prevent underfunding and minimize pension losses, with more contributions from companies and changes in benefits rather than a bailout from taxpayers.

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[277] Helping Gig Economy Workers Act of 2020, S. 3773, 116th Congress (2020), https://www.congress.gov/bill/116th-congress/senate-bill/3773.
[278] Ibid.
[279] Janella Cammenga, "How Well-Funded Are Pension Plans in Your State?" Tax Foundation, April 15, 2020, https://taxfoundation.org/state-public-pension-plan-funding-coronavirus/.
[280] Ibid.
[281] Rehabilitation for Multiemployer Pensions Act of 2019, H.R. 397, 116th Congress (2019), https://www.congress.gov/bill/116-congress/house-bill/397.
[282] Ibid.
[283] Peter Klensch, "The Multiemployer Pensions Crisis Needs Reform, not a Bailout," *The WasteWatcher*, Citizens Against Government Waste, July 12, 2019, https://www.cagw.org/thewastewatcher/multiemployer-pensions-crisis-needs-reform-not-bailout.

PRIVACY

Americans have become increasingly concerned about the amount of personal information held by banking institutions, e-commerce sites, internet service providers, online platforms, retailers, and many others, and how such information is being used for data analytics, online advertising, and targeted messaging without adequate transparency or consumer choice. This concern was underscored following the 2016 elections when it was revealed that Cambridge Analytica used ill-gotten personal data from Facebook for targeted political ads. While companies have since then been working to strengthen data security and consumer privacy, a national framework defining how consumers should be protected would ensure that businesses and individuals alike understand what their rights and responsibilities are for protecting data and privacy when using online services.

The U.S. has enacted several laws that contain provisions governing how personal information should be protected using an industry-by-industry approach, including the Communications Act of 1934, the Electronic Communications Privacy Act (ECPA), the Children's Online Privacy Protection Act, the Driver's Privacy Protection Act, the Family Educational Rights and Privacy Act, the Fair Credit Reporting Act, the Gramm-Leach-Bliley Act, the Health Insurance Portability and Accountability Act, the Wire Act, and the Video Privacy Protection Act. There is no single law or federal agency for protecting consumer privacy. The most prominent agency entrusted with protecting consumer privacy is the Federal Trade Commission (FTC).

On April 14, 2016, the European Parliament adopted the General Data Protection Regulation (GDPR). The GDPR entered into force on May 24, 2016, and its provisions became directly applicable to all European Union (EU) member states on May 25, 2018. The GDPR imposes onerous and costly requirements for data protection by businesses or other entities that process the personal data of individuals in the member states of the EU, regardless of where the data processing takes place.[284] This includes U.S. companies conducting business in the EU.

On June 28, 2018, the California Consumer Privacy Act (CCPA) was signed into law by Gov. Jerry Brown (D).[285] The bill, which was rushed through the legislature in a few days, echoes the GPDR and also imposes extremely burdensome requirements on how companies must store and provide access to consumers' personal information, as well as harsh restrictions on the types of product and service options and discounts companies may offer to their customers.

On November 4, 2020, California voters approved a ballot measure to adopt the California Privacy Rights Act (CPRA).[286] CPRA amends the CCPA to extend employee and business to business exemptions for personal information; create a higher threshold for the definition of a business effective January 1, 2023; create a new definition for "sharing" personal information for "cross-context behavioral advertising," and includes the right to op-out and a requirement to include a "Do Not Sell or Share My Personal Information" link. CPRA also imposes limits on the use of sensitive personal information similar to that imposed by the GDPR; creates new notice requirements at the point of data collection; imposes new requirements on service provider agreements; expands private rights of action; improves exemptions for clinical trials; and creates a new state agency dedicated to privacy enforcement, funded with $5 million for 2020-2021 and $10 million each following year.[287]

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[284] Roslyn Layton, "The GDPR: What It Really Does and How the U.S. Can Chart a Better Course," *Federalist Society Review*, Volume 19, October 29, 2018, https://fedsoc.org/commentary/publications/the-gdpr-what-it-really-does-and-how-the-u-s-can-chart-a-better-course.

[285] California Consumer Privacy Act of 2018, SB-1121 (2017-2018), Title 1.81.5 added by Stats. 2018, Ch. 55, Sec. 3), http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5.

[286] Secretary of State Alex Padillo, "California General Election Results," Tuesday, November 3, 2020, https://electionresults.sos.ca.gov/returns/ballot-measures.

[287] Steven A. Hengeli, Jr., "California Privacy Rights Act: Latest Update, Impact and Next Steps," *The National Law Review*, July 2, 2020, https://www.natlawreview.com/article/california-privacy-rights-act-latest-update-impact-and-next-steps.

Other states have enacted or are reviewing laws that would protect personal information, including children's online privacy, website privacy policies, and monitoring employee e-mail communications. Without the adoption of a consistent national privacy protection regime that preempts state and local laws, more states will continue to enact their own rules, some of which could be as strict as California's, further complicating the privacy regulatory environment with which companies and individuals must comply.

On July 27, 2017, Sens. Mike Lee (R-Utah), and Patrick Leahy (D-Vt.) introduced S. 1657, the ECPA Modernization Act of 2017. Documents and other digital "papers" are stored in the cloud or online in other ways unthought of when the ECPA law was originally enacted. As a result, courts have struggled to apply the Fourth Amendment's protections against unreasonable searches and seizures to those documents. The Lee-Leahy bill would alleviate this problem by providing the same legal protections for data stored locally in one's home or office as information stored online. The process for obtaining a warrant would apply equally to all government agencies seeking access to content, which creates certainty for both businesses and individuals that may be subject to such a search for information. This legislation was not passed by either chamber.

During the 116th Congress, several bills to develop a national framework for consumer privacy were introduced in both the House and Senate, including H.R. 2013, the Information Transparency & Personal Data Control Act, introduced on April 1, 2019 by Rep. Suzan K. DelBene (D-Wash.);[288] S. 2968, the Consumer Online Privacy Rights Act,[289] introduced by Sen. Maria Cantwell (D-Wash.) on December 3, 2019; S. 3300, the Data Protection Act of 2020,[290] introduced by Sen. Kirsten Gillibrand (D-N.Y.) on February 13, 2020; S. 3456, the Consumer Data Privacy and Security Act of 2020,[291] introduced by Sen. Jerry Moran (R-Kans.) on March 12, 2020; and S. 4626, the Setting an American Framework to Ensure Data Access, Transparency, and Accountability Act (the SAFE DATA Act),[292] introduced by Sens. Roger Wicker (R-Miss.), John Thune (R-S.D.), Marsha Blackburn (R-Tenn.), and Deb Fischer (R-Neb.) on September 17, 2020.

As Congress fails to update laws like ECPA, some states are taking matters into their own hands. Michigan voters adopted Proposal 2 on November 3, 2020, by a margin of 89 percent to 11 percent. The proposal amends the state constitution by prohibit unreasonable searches and seizures of private electronic data and communications and requiring a search warrant before accessing an individual's electronic data and communications. The amendment therefore gives the same protection to these communications as a person's physical property.[293]

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[288] Information Transparency & Personal Data Control Act, H.R. 2013, 116th Congress (2019), https://www.congress.gov/116th-congress/house-bill/2013.
[289] Consumer Online Privacy Rights Act, S. 2968, 116th Congress (2019), https://www.congress.gov/116th-congress/senate-bill/2968.
[290] Data Protection Act of 2020, S. 3300, 116th Congress (2020), https://www.congress.gov/116th-congress/senate-bill/3300.
[291] Consumer Data Privacy and Security Act of 2020, S. 3456, 116th Congress (2020), https://www.congress.gov/116th-congress/senate-bill/3456.
[292] SAFE DATA Act, S. 4626, 116th Congress (2020), https://www.congress.gov/116th-congress/senate-bill/4626.
[293] Jocelyn Benson, Secretary of State, Department of State, State of Michigan, "Proposal 20-2, A proposed constitutional amendment to require a search warrant in order to access a person's electronic data or electronic communications," November 3, 2020, https://www.michigan.gov/documents/sos/Prop_2020-2_701313_7.pdf.

On November 8, 2018, CAGW offered the following recommendations for consumer-based privacy to the National Telecommunications and Information Administration, which can also serve as a guide for any legislative initiative undertaken by Congress:

1. National Privacy Framework: Because of the unique nature of the internet ecosystem and its presence beyond state borders, a clear and concise national data privacy framework is necessary to provide consistency and certainty for businesses and consumers alike.

2. Consumer Choice and Control: Businesses should provide consumers with easy-to-understand privacy choices based on the sensitivity of their personal data and how it will be used or disclosed, consistent with the FTC's privacy enforcement guidance. Businesses should provide consumers with an opt-out choice to use their non-sensitive customer information for personalized third-party marketing. Businesses should be able to continue to rely on implied consent to use customer information for activities such as service fulfillment and support, fraud prevention, market research, product development, network management and security, compliance with the law, and first-party marketing.

3. Transparency: Consumers should be provided with clear, comprehensible, accurate, and continuously available privacy notices by businesses collecting, using, or sharing consumer data that describe in detail the information being collected, how that information will be used, and whether the information will be sold or shared with third parties. Should customer information be sold or shared with a third party, customers must be notified about the types of third parties to whom their information has been given and for what purpose.

4. Data Minimization and Contextuality: Consumers should expect reasonable limits on the amount of personal data that organizations will collect, use, and disclose, consistent with the context in which that data is provided. Every effort should be made to de-identify and delete data as promptly as possible when it is no longer necessary.

5. Flexibility: Different types of data require separate methods and standards of protection. For example, sensitive health care data and financial data require a higher level of security than a social media account or a computer's IP address. Therefore, policies must be consistent with the type of data being collected and how it is to be used.

6. Data Security and Breach Notification: Consumers should expect that the personal data they share with other entities is maintained in a secure environment. Information technology systems are under constant attack; breaches have and will continue to occur. In the event of a data breach in which there is a reasonable likelihood of misuse and consumer harm, consumers should expect timely notification of the event, and an offer by the entity breached as to the remedies available to make the consumer as whole as possible, including credit protection services, fraud alerts, and credit monitoring through credit reporting agencies.[294]

These six recommendations provide the groundwork for a national privacy policy going forward, in a technology- and industry-neutral manner, and should be part of the overall privacy framework discussion.

[294] Citizens Against Government Waste, "Comments to NTIA on Developing the Administration's Approach to Consumer Privacy," November 2, 2018, https://www.ccagw.org/legislative-affairs/agency-comments/comments-ntia-developing-administrations-approach-consumer.

One of President Donald Trump's most significant successes was the whirlwind pace at which his administration slashed federal regulations. The deregulatory agenda is even more impressive considering where the federal bureaucracy stood before President Trump took office.

The Obama administration added more than 20,000 new regulations,[295] including 600 major regulations with an economic impact of more than $100 million,[296] and averaged 29 new regulations for every new law passed by Congress.[297] The Department of Labor alone imposed up to $55.7 billion in regulatory costs and added around $70 million in paperwork burden hours.[298]

To chop the regulatory behemoth down to size, President Trump signed an executive order on January 30, 2017, mandating that federal agencies eliminate two regulations before a new one is created.[299] On July 16, 2020, President Trump announced that rolling back the red tape had saved the economy $220 billion.[300] More than 25,000 pages of regulations were removed during his administration.[301] The Brookings Institution created a tracker for deregulations made by the Trump administration, including environmental, transportation, and healthcare.[302]

After President Trump was sworn into office, Congress nullified 14 Obama administration rules through the Congressional Review Act. The American Action Forum estimated that the repeal of these rules "could save the economy millions of hours of paperwork and $3.7 billion in regulatory costs to the federal agencies, and perhaps $35 billion in compliance costs for industry."[303]

The administration's deregulatory efforts included a November 2019 Department of Transportation (DOT) Federal Motor Carrier Safety Administration (FMCSA) proposed rule to cut regulatory costs by $74 million each year by removing the requirement for commercial bus drivers to submit driver-vehicle inspection reports when a driver has not found or is not aware of any vehicle issues.[304] In July 2020, FMCSA published a final ruling to reduce these costs and burdens.[305]

On April 3, 2020, the Federal Highway Administration (FHWA) enabled states to allow food trucks to serve at truck rest stops.[306] Commercial truck drivers, an important part of the U.S. supply chain,[307] have

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[295] James Gattuso and Diane Katz, "20,642 New Regulations Added in the Obama Presidency," *The Daily Signal,* May 23, 2016, https://www.dailysignal.com/2016/05/23/20642-new-regulations-added-in-the-obama-presidency/.

[296] Sam Batkins, "600 Major Regulations," American Action Forum, August 6, 2016, https://www.americanactionforum.org/insight/600-major-regulations/.

[297] Clyde Wayne Crews, "The 2020 Unconstitutionality Index: 28 Federal Rules And Regulations For Every Law Congress Passes," *Forbes*, January 1, 2020, https://www.forbes.com/sites/waynecrews/2020/01/01/the-2020-unconstitutionality-index-28-federal-rules-and-regulations-for-every-law-congress-passes/?sh=1a51e4fb2688.

[298] Trey Kovacs, "Deregulation Coming from Labor Department," Competitive Enterprise Institute, October 9, 2018, https://cei.org/blog/deregulation-coming-from-labor-department/.

[299] The White House, "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs," January 30, 2017, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/.

[300] The White House, "Remarks by President Trump on Rolling Back Regulations to Help All Americans," July 16, 2020, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-rolling-back-regulations-help-americans/.

[301] Ibid.

[302] Brookings Institution, "Tracking deregulation in the Trump era," January 12, 2020, https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/.

[303] Stephen Dinan, "GOP rolled back 14 of 15 Obama rules using Congressional Review Act," *The Washington Times*, May 15, 2017, https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congres/.

[304] Department of Transportation, Federal Motor Carrier Safety Administration, "U.S. Department of Transportation Proposes $74 Million in Cost Savings By Reducing Burdensome Rules on the Commercial Buses," November 4, 2019, https://www.fmcsa.dot.gov/newsroom/us-department-transportation-proposes-74-million-cost-savings-reducing-burdensome-rules.

[305] Department of Transportation, Federal Motor Carrier Safety Administration, "U.S. Department of Transportation Provides $74 Million in Annual Cost Savings by Reducing Burdensome Rules on Commercial Buses," July 15, 2020, https://www.fmcsa.dot.gov/newsroom/us-department-transportation-provides-74-million-annual-cost-savings-reducing-burdensome.

[306] Department of Transportation, Federal Highway Administration, "Operation of Commercial Food Trucks in Federally Funded Interstate Highway Rest Areas During the Public Health Emergency (COVID-19)," April 3, 2020, https://www.fhwa.dot.gov/media/noe.cfm.

[307] The Schneider Guy, "Who are the essential workers? Truck drivers are now and always," Schneider Truck Driving Jobs, April 21, 2020, https://schneiderjobs.com/blog/truck-drivers-essential-workers.

encountered numerous hurdles searching for hot meals on the road. Truck stops have reduced their vendors' operating hours, and drive-through windows are not designed to service large cargo freighters, leaving truckers with few dining options.[308] Because the FHWA's temporary rule mandates that states must terminate the food truck permits once the Emergency Declaration for the pandemic ends, Congress should consider repealing the ban permanently.

The DOT announced in August 2020 that it had cut $90 billion in regulatory costs for consumers and the economy, more than double its initial goal of $40 billion.[309] The department was also the first to codify new procedures for rulemaking including greater public participation and due process protections, as well as clarifying that guidance documents do not have the force of law.[310]

When the Trump administration announced the Governor's Initiative on Regulatory Innovation on October 1, 2019, to reduce regulatory barriers in the workplace, the coronavirus was not on anyone's mind, and few expected that a global pandemic would threaten the United States and shut the nation down, forcing tens of millions of people out of work.[311]

On May 19, 2020, President Trump issued an "Executive Order on Regulatory Relief to Support Economic Recovery."[312] The EO called for federal agencies to "address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility."[313] On his first day in office, President Biden issued a memo to agencies to stop or delay all "midnight regulations" issued by the Trump administration. The memo covers regulations dating back to August 21, 2020, all of which will be subject to review and consultation with the OMB director before they can go forward.[314] Subsequently, President Biden issued 28 executive orders in his first two weeks in office, one of which eliminated the requirement to eliminate two regulations for every new one issued by federal agencies. Now that Democrats control Congress, the CRA can be used to remove regulatory rules that were adopted after August 21, 2020.[315]

Given the flurry of activity indicating a significant increase in rules and regulations across the entire federal government, there will be many obstacles to reduce overregulation. Members of Congress who want to remove these obstacles, should enact legislation like the Regulations from the Executive in Need of Scrutiny (REINS) Act.[316] The REINS Act would require Congress to approve every major rule proposed by the executive branch before it can be imposed on the American people. Once a major rule is drafted, it must be approved by both the House and Senate and signed by the President before it could be implemented. Agencies would be required to classify rules as either major or non-major and justify their classification.[317]

According to CEI, regulations cost taxpayers $1.9 trillion, which is more than $14,615 per year for every household.[318] Congress should ensure that this burden does not grow over the next four years.

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308 Krystel Knowles, "Trucker Dining Options Dwindle as Restaurants Turn to Drive-Thrus," *Spectrum News 13*, March 25, 2020, https://www.mynews13.com/fl/orlando/news/2020/03/25/truck-drivers-drive-thru-restaurants-coronavirus-concerns.
309 Department of Transportation, "U.S. Department of Transportation Announces $90 Billion in Savings Through Regulatory Reforms," July 16, 2020, https://www.transportation.gov/briefing-room/us-department-transportation-announces-90-billion-savings-through-regulatory-reforms.
310 Ibid.
311 The White House, "President Trump's Historic Deregulation Is Benefitting All Americans," October 21, 2019, https://www.whitehouse.gov/briefings-statements/president-trumps-historic-deregulation-benefitting-americans/.
312 The White House, "Executive Order on Regulatory Relief to Support Economic Recovery," May 19, 2020, https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/.
313 Ibid.
314 *Government Executive*, "Biden Seeks to Halt or Delay Trump's 'Midnight Regulations,'" January 20, 2021, https://www.govexec.com/management/2021/01/biden-seeks-halt-or-delay-trumps-midnight-regulations/171510/.
315 Ibid.
316 Senator Rand Paul, "Senators Reintroduce REINS Act," https://www.paul.senate.gov/news/senators-reintroduce-reins-act.
317 Ibid.
318 Clyde Wayne Crews, "Ten Thousand Commandments 2019," Competitive Enterprise Institute, https://cei.org/studies/ten-thousand-commandments-2019/.

TECHNOLOGY MODERNIZATION

The federal government spends more than $90 billion each fiscal year on information technology (IT), including hardware, software, programming, and development.[319]

In FY 2015, more than 90 percent of IT expenditures across 51 federal agencies supported operations and maintenance. Ancient taxpayer-supported legacy systems included two 56-year-old Department of the Treasury Master File systems; a 51-year-old VA system used to track veterans' benefits; and a 53-year-old DOD system used to coordinate the operation function of the nuclear forces, which runs on an IBM Series/1 computer and uses 8-inch floppy disks for storage. Fast forward to 2020, and while some improvements have been made, legacy IT expenditures continue to be a serious problem within the federal budget.[320]

Since 2010, GAO has offered 1,320 IT management-related recommendations and 3,323 security-related recommendations to federal agencies.[321] The agency reported in December 2019 that federal agencies had fully implemented 61 percent of the IT management-related recommendations and 76 percent of its security-related recommendations. As new technology is introduced into the federal environment, including artificial intelligence, data centricity, and additional cloud investments, agencies must be able to nimbly migrate and modernize existing systems, while maintaining a strong cyber-security environment to protect critical information.

On December 26, 2013, the Federal Information Technology Acquisition Reform Act (FITARA) was signed into law as part of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. No. 113-66). This was followed on July 29, 2016, by the Making Electronic Government Accountable By Yielding Tangible Efficiencies Act of 2016 (MEGABYTE Act) (Pub. L. No. 114-210). On December 12, 2017, the Modernizing Government Technology Act (MGT Act) was enacted as part of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. No. 115-91).

These laws provide the tools necessary to streamline federal IT purchases; increase data center consolidation; provide additional incentives to move toward cloud services; give agencies a centralized budgeting authority for IT acquisitions managed by a chief information officer; ensure that software assets are inventoried to avoid costly duplication of software and equipment; and help provide federal agencies with access to funding to modernize outdated IT equipment. However, Congress should provide increased scrutiny and oversight with an eye toward modernizing systems while reducing wasteful spending.

The MGT Act provided for the creation of a Technology Modernization Fund (TMF), which could be used by federal agencies to pay for IT modernization projects.[322] Developed as a revolving capital fund to help to help modernize the government's antiquated IT systems, the program has been an abysmal failure. According to the TMF program website, only seven agencies with 10 distinct projects, including GSA, have taken advantage of the program. Agencies are required to repay the fund for these projects within five years.

An August 2019 GAO report reviewed the use of the TMF and found that while GSA had obligated about $1.2 million to cover TMF operating expenses, the agency had recovered only about 3 percent of those expenses through fee payments.[323] Congress recognized the ineffectiveness of the TMF program, rejecting a

[319] Government Accountability Office, "High-Risk Series: Substantial Efforts Needed to Achieve Greater Progress on High-Risk Areas: Improving the Management of IT Acquisitions and Operations," GAO-19-157SP, March 6, 2019, https://www.gao.gov/highrisk/improving_management_it_acquisitions_operations/why_did_study#t=1.

[320] Office of Management and Budget, "White House Budget Proposal for FY 2020, Chapter 19. Information Technology," https://www.whitehouse.gov/wp-content/uploads/2019/03/ap_19_it-fy2020.pdf.

[321] Government Accountability Office, "Information Technology: Agencies and OMB Need to Continue Implementing Recommendations on Acquisitions Operations and Cybersecurity," GAO-20-311T, December 11, 2019, https://www.gao.gov/assets/710/703114.pdf.

[322] General Services Administration, "Technology Modernization Fund," January 1, 2020, https://www.gsa.gov/technology/government-it-initiatives/technology-modernization-fund.

[323] Government Accountability Office, "Technology Modernization Fund: OMB and GSA Need to Improve Fee Collection and Clarify Cost Estimating Guidance for Awarded Projects," GAO-20-3, December 12, 2019, https://www.gao.gov/assets/710/703211.pdf.

budget request of $150 million for FY 2020 and $228 million in FY 2019, appropriating $25 million for each of those fiscal years.[324]

Another program that should garner closer scrutiny in the 117th Congress is the GSA's Federal Risk and Authorization Management Program (FedRAMP). Created in 2012 to develop standards for companies seeking to receive authorization to provide specific cloud services to federal agencies, the lengthy FedRAMP application process has become very costly for vendors, requiring some companies to undergo a three-to-four-year application process and costing millions of dollars to receive an authorization to operate.

During the 116th Congress, the House included codification of the FedRAMP program into law as part of the FY 2021 NDAA. Fortunately, this provision was not included in the conference report. However, the FedRAMP Act was passed by the House of Representatives under suspension on January 5, 2021. Codifying the FedRAMP program as it currently exists would hinder innovation in cloud service offerings, as each new technology advancement, including those that enhance national security, must undergo the same strenuous certification process as its predecessor. It also would calcify outdated certification policies and requirements and increase the federal government's inability to keep up with the latest technology as well as create an additional barrier for small and minority-owned cloud service providers to provide cloud services to federal agencies due to the high cost of certification.

In addition, codifying FedRAMP would create an anticompetitive environment that would limit the number of cloud service offerings available to federal agencies. Congress should provide GSA with the flexibility to improve the current FedRAMP program without enshrining it into law and provide stringent oversight of the program to ensure it meets the needs of government agencies and allows the appropriate response to rapidly changing technological advances.[325]

FedRAMP is just one of the hinderances to the government accessing commercial cloud systems. The DISA approves cloud service providers to operate cloud systems for the DOD and the military services.[326] However, DISA is also a cloud service provider that sells its own cloud services.[327] This inherent conflict of interest helps explain DISA's slow certification process.

The IT systems used by federal agencies cannot remain outdated. Savings achieved through implementation of FITARA and the MEGABYTE Act should be used to modernize and strengthen IT systems. The resources made available through the MGT Act must also be managed appropriately to ensure that taxpayers receive the best value for their dollar. Federal agencies should be mindful of avoiding duplication and mismanagement of IT services and infrastructure while implementing new and innovative methods of deploying IT across their departments, including the use of agile software development, cross-agency collaborations, and leveraging private-sector practices to reduce costs while streamlining services.

While passage of these laws is useful in modernizing federal IT systems, Congress must conduct stringent oversight of agency implementation of these initiatives, as well as the use of other transaction authority currently provided to 11 agencies to ensure federal procurement processes are not abused and ensure that federal IT contracts are not written in a manner that predetermines the awardee before proposals

[324] Deborah Collier, "Don't tap COVID relief for IT modernization funds," *Federal Computer Week*, September 23, 2020, https://fcw.com/articles/2020/09/23/comment-no-tmf-in-covid-relief-cagw.aspx?m=1.
[325] Deborah Collier, "New Report Offers Solutions to FedRAMP Problems," *The WasteWatcher*, Citizens Against Government Waste, March 4, 2020, https://www.cagw.org/thewastewatcher/new-report-offers-solutions-fedramp-problems.
[326] Lauren C. Williams, "DISA takes on DOD cloud operations," *Government Computer News*, January 11, 2021, https://gcn.com/articles/2021/01/11/disa-cloud.aspx.
[327] Jackson Barnett, "DISA expands cloud services, endpoint security as telework continues," *fedscoop*, August 18, 2020, https://www.fedscoop.com/disa-cloud-endpoint-security-telework-mildrive/.

are even submitted. Sole-source contracting should only be used under transparent and provable exigent circumstances. And every contract should make it clear that there are no preferences for any specific operating system, hardware, or software.

Congress should also prevent the development of software that competes directly with the private sector. For example, the Biden administration has proposed expanding the US Digital Service and GSA's 18F office.[328] When these agencies have developed software, the government provides maintenance, patches, and upgrades to the application, or hires an outside vendor or system integrator to provide these services, which may far surpass the initial development cost. In July 2020, the Small Business Administration (SBA) OIG reported that after USDS spent five years and $30 million building the Certify.SBA.Gov program intended to improve SBA's contracting certification process, the application was determined to be inefficient and was scrapped.[329] Congress must ensure that these entities are only developing applications when there is no commercial alternative. Government should be taking advantage of the commercial market, rather than being in direct competition.

To avoid the wasteful and costly fate of past efforts to modernize IT throughout the federal government, agencies must administer contracts in a fair, open, and truly competitive manner. Congress should direct annual IT funding appropriations to modernization projects that will enhance and improve the taxpayer's experience, while providing much-needed, effective security against cyber threats. Following up with appropriate oversight will ensure that the budgets are being managed properly and allocated for the best possible solutions.

[328] Jason Miller, "Biden proposal calls investments in federal IT 'an urgent national security issue,'" *Federal News Network*, January 15, 2021, https://federalnewsnetwork.com/budget/2021/01/biden-proposal-calls-investments-in-federal-it-an-urgent-national-security-issue/.
[329] Small Business Administration Office of Inspector General, "Evaluation of Certify.SBA.Gov," Report No. 20-17, July 30, 2020, https://www.sba.gov/sites/default/files/2020-07/SBA_OIG_Report_20-17_508.pdf?utm_medium=email&utm_source=govdelivery.

The Federal Communications Commission (FCC) was established by the Communications Act of 1934. The act has been amended through the Cable Act of 1992, the Telecommunications Act of 1996, the Satellite Television and Localism Act Reauthorization (STELAR) Act of 2014, and the RAY BAUM's Act of 2018. However, Congress still needs to do more to clarify and update these laws to ensure the United States continues to lead the world in telecommunications and technology innovation.

During the 113th Congress, the House Energy and Commerce Committee began an effort to modernize telecommunications law, engaging stakeholders through a series of white papers and meetings to discuss the parameters for change. Topics included competition policies; interconnection; internet regulations; Universal Service Fund (USF) reforms; and video transmission issues. However, this effort was for the most part set aside, and a greater focus was placed on spectrum management and agency oversight during the 114th, 115th, and 116th Congresses. The 117th Congress should build on these efforts, keeping at the forefront the success of the FCC's light-touch regulatory approach.

The telecommunications industry is providing services far beyond the scope envisioned by the Communications Act of 1934 and the Telecommunications Act of 1996. Internet service providers continue to expand their broadband offerings to include 10-gigabit networks that will provide symmetrical speeds, lower latencies, enhanced reliability, higher computing capabilities, and improved security. Cable companies provide more than television services, including voice over IP and internet services. Telephone companies provide television services. Mobile communications companies provide mobile broadband solutions. Satellite companies are beginning to provide broadband services through constellation satellites that offer exceptionally low latency upload and download speeds. New uses of spectrum, including TV white space, are also being used to provide broadband to rural Americans where building a cable or fiber network is challenging and expensive. While some of these innovative services were contemplated in 1996, few, if any, were considered viable in 1934.

The success of the U.S. telecommunications industry, with the unfortunate exception of the negative impact of the Open Internet Order (net neutrality) under the Obama-Biden administration, has been achieved through a light-touch regulatory approach. As President Bill Clinton said, "The Internet 'should be a place where government makes every effort ... not to stand in the way, to do no harm.'"[330]

Yet, as the 117th Congress convenes, there are renewed calls for the government to once again impose heavy-handed regulations like net neutrality, rather than maintaining the following four policies adopted on August 5, 2005 by the FCC "to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet: 1) consumers are entitled to access the lawful Internet content of their choice; 2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; 3) consumers are entitled to connect their choice of legal devices that do not harm the network; and 4) consumers are entitled competition among network providers, application and service providers, and content providers."[331] Congress should codify these four essential principles rather than getting in the way and doing harm. A statutory solution based on these principles would allow companies to innovate and develop new technologies and expand their networks without worrying that a new FCC will change direction and again seek to impose damaging heavy-handed regulations on the services they provide.

[330] Sandra Sobieraj, "Clinton Issues 'Hands-Off' Policy on Internet Commerce," *The New York Times*, July 2, 1997, https://archive.nytimes.com/www.nytimes.com/library/cyber/week/070297commerce.html.

[331] Federal Communications Commission, "In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (CC Docket No. 02-33); Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services (CC Docket No. 01-337); Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements (CC Docket Nos. 92-20, 98-10); Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities (GN Docket No. 00-185); Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities (CS Docket No. 02-52)," Policy Statement, Adopted August 5, 2005, https://www.fcc.gov/document/fcc-adopts-policy-statement.

The 117th Congress should ensure that the updated FCC broadband mapping required by the Broadband DATA Act (Pub. L. No. 116-130), signed into law on March 23, 2020 is completed before providing any additional broadband infrastructure funding, and guardrails are put in place to avoid overbuild in areas that already have service as designated by the new broadband maps.[332] On December 27, 2020, President Trump signed into law the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260), which allocated $7 billion for broadband-related programs, including $65 million to support the Broadband DATA Act requirements.[333]

The Broadband DATA Act requires the FCC to develop and disseminate at a granular level maps that demonstrate a true picture of broadband deployment across the country, including whether it is provided from wired, fixed-wireless, satellite, and mobile broadband providers. The bill also requires the GAO to report on identified locations where fixed broadband can be installed. Broadband mapping across the country has been hit or miss at best over the past decade. Maps have indicated a lack of service where it was widely available, and widespread service where it was unserved or underserved. This created a disparity in the distribution of federal funds for broadband deployment. Knowing where the holes in broadband deployment are located through improved mapping will help to allocate the funding more accurately.

If Congress considers broadband projects as part of a comprehensive infrastructure bill, the scarce resources of the federal government should be used through public private partnerships as the first priority. Any such legislation should also prohibit state and local governments from building municipal government-owned networks that operate like a public utility and overbuild on existing networks. CAGW is particularly concerned over the size and scope of proposals like the $100 billion "Accessible, Affordable Internet for All Act," which Rep. James Clyburn (D-S.C.) and Sen. Amy Klobuchar (D-Minn.) are planning to introduce in the 117th Congress, similar to legislation they introduced in the 116th Congress.[334]

In 2014, CAGW published a report on the state of telecommunications, entitled *Telecom Unplugged: Ushering in a New Digital Era*.[335] The report cited numerous examples of wasteful spending under the $831 billion 2009 stimulus bill, including money for government-funded overbuild of networks in areas where it could have been better deployed to unserved communities. Eagle-Net in Colorado received a Broadband Technologies Opportunity Program award of $100.6 million to bring high speed broadband services to all the schools, libraries, and anchor institutions in underserved areas of the state. Instead, the company deployed these new fiber optic lines in locations already served by other fiber optic communications providers, including a school of 11 students in Agate, Colorado, which now has three different fiber optic lines running to the school, including those provided through the stimulus funds by Eagle-Net.[336]

Federal dollars are not the only funding source that is wasted when communities decide to deploy a government-owned network. In his September 25, 2020 *Bloomberg Law* op-ed, Lawrence Spiwak, co-author of a September 2020 report published in the *Federal Communications Law Journal*, wrote that "municipal broadband is in almost all scenarios subsidized entry, covering capital costs and losses with tax dollars and other internal transfers – a point that advocates of municipal broadband generally do not contest."[337] The "Law and Economics of Municipal Broadband" study detailed numerous wasteful attempts to build

[332] Broadband DATA Act, Pub. L. No. 116-113, S. 1822, 116th Congress (2020), https://www.congress.gov/bill/116th-congress/senate-bill/1822.
[333] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, H.R. 133, 116th Congress, (2020), https://www.congress.gov/bill/116th-congress/house-bill/133.
[334] Amy Maclean, "Clyburn Ready to Bring $100 Billion Broadband Bill Back," *Cablefax*, February 10, 2021, https://www.cablefax.com/regulation/take-two-clyburn-ready-to-bring-100-billion-broadband-bill-back.
[335] Deborah S. Collier and Thomas A. Schatz, *Telecom Unplugged: Ushing in a New Digital Era*, Citizens Against Government Waste, November 2014, https://www.cagw.org/telecom-unplugged.
[336] Ibid.
[337] Lawrence J. Spiwak, "Problems with Government-Sponsored Broadband Expansion," *Bloomberg Law*, September 25, 2020, https://news.bloomberglaw.com/us-law-week/problems-with-government-sponsored-broadband-expansion.

government-owned broadband networks, and highlighted the cost to consumers who must ultimately bear the monetary burden through higher taxes or increased fees for their public utilities, even though they may choose to obtain internet access through another provider instead of the government.[338]

Broadband is provided in many ways. Forcing a community to use one or two options, particularly if one of them is a municipal overbuild on existing service, is both costly and anti-competitive. There should be an "all-of-the-above" technology and vendor neutral approach to broadband deployment. What will work in one area of the country may not be appropriate for another.

For the past several years, the FCC and Congress have emphasized bridging the digital divide for rural communities. President Joe Biden has proposed spending $20 billion per year for the next 10 years to help bridge the rural digital divide.[339] According to *Inc.*, this would triple the funding for Community Connect broadband grants and reform the Lifeline program for subsidized internet and telephone services for low-income households. Given past efforts to stimulate the economy by infusing taxpayer dollars and resources into duplicative broadband programs and overbuilds, Congress and the administration must tread carefully and ensure guardrails are put in place to limit any funding to areas of the country that are unserved first. The key to the effectiveness of broadband infrastructure spending is accurate mapping, which will help avoid waste and overbuild on existing networks.

With respect to federally subsidized communications programs, Congress should exercise greater oversight on the Rural Utilities Service (RUS) broadband grant and loan program, and the USF's Lifeline program. While eliminating the RUS would save taxpayers $8.4 billion in one year, and $42 billion over five years,[340] Congress clearly has no intention of eliminating this program. In the 2018 Farm Bill, Congress increased funding by $350 million annually supposedly to help rural unserved communities bridge the digital divide. It is imperative that Congress continue to provide stringent oversight of the program to ensure that the funding is used for truly unserved communities and not for upgrades or overbuilding existing broadband infrastructure.

The universal service program is another area where greater scrutiny should be focused by Congress. The USF is funded by a regressive tax listed as a "fee" on consumer telephone bills, which is adjusted based on the contribution factor charged to telecommunications providers and passed on to consumers. In 2000, when the FCC first began to track the USF contribution factor, the CF was set at 5.66 percent.[341] Yet, as the number of landlines and paging services decrease and the other services provided to Americans increase, so do the revenues and expenses for the USF fund. While it took more than 10 years for the contribution factor to increase from its initial 5.66 percent to 12.9 percent, and then another eight years to increase to 20.1 percent, over the last two years the contribution factor has increased to an all-time high of 31.8 percent for the first quarter of 2021.[342] The USF provides funding for broadband deployment in high-cost areas of the country through the Connect America Fund and the Mobility Fund; access to schools and libraries through the E-Rate program; telehealth initiatives through rural health program, and low-income support through the Lifeline program.

[338] T. Randolph Beard, George S. Ford, Lawrence J. Spiwak, and Michael Stern, "The Law and Economics of Municipal Broadband," *Federal Communications Law Journal*, September 25, 2020, http://www.fclj.org/wp-content/uploads/2020/09/MunicipalBroadbandArticleFINAL.9.2.20.pdf.
[339] Amrita Khalid, "What Biden's Plan for Universal Broadband Means for Your Business," *Inc.,* November 13, 2020, https://www.inc.com/amrita-khalid/biden-broadband-plan.html.
[340] Citizens Against Government Waste, "Prime Cuts 2020 Database," https://www.cagw.org/reporting/prime-cuts/database?title=Rural+Utilities+-Service&field_pc_item_source_value=All&field_agency_value=1.
[341] Federal Communications Commission, "Contribution Factor & Quarterly Filings – Universal Service Fund (USF) Management Support," https://www.fcc.gov/general/contribution-factor-quarterly-filings-universal-service-fund-usf-management-support.
[342] Deborah Collier, "Reforms are Needed for Financing the Universal Service Fund," *The WasteWatcher*, Citizens Against Government Waste, January 25, 2021, https://www.cagw.org/thewastewatcher/reforms-are-needed-financing-universal-service-fund.

Congress should revisit the funding mechanism for the USF and determine whether this is the best method by which to fund broadband support programs going forward. Congress should evaluate each program's effectiveness in helping to deploy broadband in truly unserved areas of the country at reduced rates, with the least possible cost to taxpayers. This process should include an assessment of the effectiveness of private sector programs that provide significant access at reduced rates to these areas of the country.

As the pandemic progressed during 2020, it became clear that meeting the need for an online economy that allows for multiple connections in the home for work, school, telehealth and other activities has become increasingly important, particularly for low-income households. The FCC's Keep America Connected initiative helped consumers stay connected during the pandemic and ensured that access to the internet would not be discontinued if a customer could not pay their bill.[343] More than 800 companies across the country participated in the program, enabling citizens to stay connected during the coronavirus. Broadband internet providers like AT&T, Charter (Spectrum), Comcast, Cox, Sprint, T-Mobile, and US Cellular offered expanded assistance to low-income customers in their individual footprint and several of these companies opened Wi-Fi hotspots to allow for greater connectivity. Smaller companies like All West Communications offered free broadband to low-income K-12 students, and others like Golden West Telecommunications provided internet speed upgrades and added long-distance minutes to certain plans.[344]

The FCC's USF Lifeline program is another option available to low-income Americans that provides a discount of $9.25 per month for either telephone or internet services, but not both.[345] However, this program is also funded through the USF contribution factor, which continues to increase each quarter. The USF fee is a regressive tax burden on consumers. This fee and other regressive taxes on communications services create barriers to adoption that need to be broken down to help more of these low-income households become connected. When a decision must be made to either access the internet or put food on the table, chances are the decision will be made to buy groceries.

Other areas that the 117th Congress should address include reducing the wireless tax burden for consumers using mobile services, creating a standard method for taxation of digital goods, and, ensuring that free market competition be allowed to flourish without additional regulatory burdens.

[343] Federal Communications Commission, "Keep Americans Connected Pledge," June 30, 2020, https://www.fcc.gov/keep-americans-connected.
[344] Federal Communications Commission, "Companies Have Gone Above and Beyond the Call to Keep Americans Connected During Pandemic," January 25, 2021, https://www.fcc.gov/companies-have-gone-above-and-beyond-call-keep-americans-connected-during-pandemic.
[345] Federal Communications Commission, "Lifeline Program for Low-Income Consumers," February 8, 2021, https://www.fcc.gov/general/lifeline-program-low-income-consumers.

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