

LBJ JOURNAL OF PUBLIC AFFAIRS

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“Come now, and let us reason together.” (Is. 1:18 KJV)

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LBJ JOURNAL OF PUBLIC AFFAIRS

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FROM THE DEAN

CIVIL RIGHTS: FROM BLACK-AND-WHITE TO COLOR

This is the 40th anniversary of one of the most important pieces of legislation passed during the 20th century: the 1964 Civil Rights Act. The law answered a question that had hung over American society since the Civil War Amendments: can people be treated as second-class citizens?

Finally, the answer was clear: black Americans could not be denied a job or a hotel room solely because of their race; and the federal government would use its powers to ensure equal rights for all Americans.

For those who lived during the time of racial segregation and degradation—those of us who are older than 40—the 1964 Civil Rights Act was a momentous step forward. Getting it passed was not easy. Dozens of Americans, black and white, lost their lives in the struggle for racial justice; and dozens of political leaders risked their futures by voting for it.

On March 25-27, 2004, the LBJ School and the LBJ Library/Museum will co-host a symposium to commemorate the 1964 Civil Rights Act. The symposium will be divided into three major parts. On Thursday evening, March 25, we will honor the courage of those who led the movement—people such as Rep. John Lewis, Nashville sit-in leader Diane Nash and Freedom Rider Volma Overton.

On Friday, we will focus on what has happened during the past 40 years. One of the significant changes is that the struggle for civil rights is no longer carried out in black-and-white. This is true in a demographic sense: America is more richly textured today than it was in the 1960s. It also is true in the sense that some of the issues are more complex. To what extent, for example, should economic costs and benefits factor into making schools and workplaces more accessible to the handicapped? The third part of the commemoration, on Saturday, March 27, will focus on cutting edge civil rights issues.

The title of the symposium, “From Black-and-White to Color,” suggests an important social dynamic affecting civil rights: the changing nomenclature and meaning of racial distinctions. For most of American history, most states’ laws required that people be assigned to a specific racial category: one was either black, white, Indian or Asian. In recent decades, the number of categories has grown dramatically.

Recent censuses have asked respondents to identify themselves as members of four “racial” categories—White, Black, American Indian or Asian. There are also a number of sub-categories. Asians, for example, can further define themselves as Japanese, Korean, Vietnamese, Chinese, Filipino, Samoan and so on. On another census question, those who identified themselves as Hispanic were asked to be more specific—Puerto Rican, Cuban, Chicano.

To some, the multiplication of racial categories is a way of rec-

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The Lyndon B. Johnson School of Public Affairs was established in 1970, fulfilling a long-held dream of President Johnson for an academic institution aimed specifically at preparing talented men and women for leadership positions in public service. The school offers a master's degree in public affairs and a Ph.D. degree in public policy. For more information, write to the Office of Student and Alumni Programs, LBJ School of Public Affairs, Drawer Y, University Station, Austin, Texas, 78713-8925, or visit the school's website at <http://www.utexas.edu/lbj>.

In previous years, the LBJ Journal has included a list of professional reports recently completed by LBJ students. Professional reports, a required element of the LBJ School curriculum, are substantial policy papers typically produced by LBJ students in the second year of the program. The LBJ Journal will no longer print a list of these reports as this list can now be found online at <http://www.lib.utexas.edu/pal/2000/index.html>.

ognizing—even celebrating—American diversity. To others, it reifies unnecessary distinctions and fosters disunity.

The 2000 census added a category for those who wanted to denote that they were of “mixed” ancestry. Some seven million people identified themselves as belonging to more than one racial/ethnic category. This new category has given rise to new organizations such as MAVIN, a Seattle nonprofit group dedicated to addressing the mixed race experience.

A completely contrary perspective is represented by Ward Connerly, who led a California ballot initiative that would have eliminated racial identifiers from most of the state’s public records. While the initiative failed, its presence on the ballot suggests that the ideal of “color blindness” has a continuing allure.

On the other hand, Harvard professor Jennifer Hochschild argues that color is very much an issue in virtually every society. Her research validates conventional wisdom about the way skin color affects social status in the African-American community.

Our symposium “Civil Rights: From Black-and-White to Color” is a unique opportunity to consider how America has changed, to learn about the continuing harsh realities of prejudice, and to recommit ourselves to the cause of social justice. It will be open to the public. See our Web site (<http://www.utexas.edu/lbj/civilrights>) for information about attending.

Edwin Dorn
Dean

FROM THE EDITORS-IN-CHIEF

The *LBJ Journal of Public Affairs* has undertaken a number of new challenges in the past six months. The Managing Editors for the 2002-2003 academic year, Elizabeth Kaufman and Sarah Stout, laid the foundation for this year's efforts. They revitalized the historical memory of the *Journal*, developed a mission statement, organized the messy heaps of archival material, and broadened the scope of authors to include all LBJ School alumni. In an effort to set mission into motion, we chose to "enhance the reputation of the LBJ School of Public Affairs" by taking the *Journal* to the next level and publishing biannually. The plans commenced last spring, hastily pulling together an action calendar and garnering the administration's support. Over the summer, we received numerous submissions from authors outside the LBJ community and decided to further enlarge the eligible pool of authors due to the greater need for submissions brought on by the shift to biannual publication. To ensure that the *Journal* maintained its emphasis on publishing the work of the LBJ School community, we reserved a certain number of slots for papers by LBJ students and alumni. Our concern turned out to be unwarranted, however, as papers from the LBJ community were among the best submitted.

The *LBJ Journal* embarked on another new project this year in addition to biannual publication: *The Public Record*. We started this endeavor on the principle that good policymaking requires fair and honest consideration of a variety of opinions. We also felt that LBJ students should keep abreast of current policy debates and participate in them with their own thoughts, opinions, and insights. *The Public Record* is an online forum where LBJ School students can publish professional quality opinion pieces on critical public policy issues dominating the headlines, as well as the classrooms. Updated monthly, *The Public Record* also features a student book review and a faculty opinion piece. This online forum for policy debate filled a gap in the LBJ School community and has been a successful outlet for the thinkers, doers, and achievers.

In response to the demands of biannual publication and *The Public Record*, the *LBJ Journal* Editorial Board required restructuring. Acting on the vision of Eric Gorman, from the 2002-2003 editorial board, the *LBJ Journal* became an organization rather than a publication. We designed three departments: print journal, Web journal, and business/marketing. This structure has been effective and efficient in carrying out the goals and mission of the *LBJ Journal of Public Affairs*.

The 2003-2004 academic year has been a year of firsts for the *LBJ Journal*. Our success this year would have been impossible without the hard work and dedication of Elizabeth Kaufman and Sarah Stout, the vision of Eric Gorman, the web design of Jennifer Eldridge, the expertise and endless assistance of Marilyn Duncan, the confidence of Dr. Warner and Dean Dorn, the support of Betty Sue Flowers, the technical skill of Doug Marshall, the administrative help of Courtney

Submissions to the LBJ Journal should be less than 5,000 words and on a topic relevant to public affairs. Citations and style should conform to the LBJ School Student Publishing Guide (http://www.utexas.edu/lbj/student_res/pubguide/) and/or The Chicago Manual of Style (14th ed. 1993).

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Brown and Joe Youngblood, and the generosity of Don Wallace and GPAC. We would especially like to thank the University Co-Op for their generous support of the *Journal*. We are also indebted to Rachel Glast for her commitment and vision, Alison Garfield for her savvy style-guide, Lonny Stern for his amazing marketing and fundraising skills, and the rest of the Editorial Board for their dedication and outstanding performance.

We sincerely hope that you enjoy the first-ever

Fall edition of the *LBJ Journal of Public Affairs*. The seven articles selected for publication, in addition to the Practitioner and Faculty Corners, represent the diverse policy interests of the LBJ School community and the professionalism with which those interests are communicated.

Vanessa Bouché
Stephen Palmer
Kelly Ward

Some Thoughts about Adjusting U.S. Strategy

**GEN. MONTGOMERY
C. MEIGS (RET.)**

Montgomery C. Meigs, General US Army Retired, is the Distinguished Visiting Tom Slick Professor of World Peace at the LBJ School.

Meigs left active service on January 1, 2003, after more than 35 years in uniform. From October 1998 to December 2002, he commanded all Army forces in the 91-country area of responsibility of the US European Command and served as executive agent for administration and logistics for Army forces in the Balkans. From October 1998 to October 1999 and during ALLIED FORCE, NATO's air campaign against the Former Yugoslavia, Meigs also led the 39-nation Stabilization Force in Bosnia-Herzegovina.

Meigs has a B.S. degree from the U.S. Military Academy and an M.A. and Ph.D. in history from the University of Wisconsin-Madison. He has published a variety of articles in professional journals and a book titled Slide Rules and Submarines (NDU Press, 1990).

Students of national strategy and policy certainly have an exciting game to watch these days, one full of unprecedented opportunity but one fraught with real dangers. Our nation has reached an unprecedented position on the world stage, one of unparalleled power and influence. Yet in spite of our economic and military preeminence, in many ways our position seems precarious. We have arrived at our position of leadership at a time of great change in the strategic environment. These changes negate some of our national advantages and threaten our economic status. In many respects this era will challenge our political leaders more profoundly than did the Cold War. The challenges are more abstract and impinge on traditional American blind spots. They involve the war on terror, our campaigns in Iraq and Afghanistan, and our ability to sustain the effort politically and fiscally over the long term. They require policies that focus on the social roots of terrorism, not just its operational aspects; that increase multinational participation in our effort; and that accept political uncertainty at home in order to make gains abroad.

The war on terror takes center stage in this complex environment. Stretching from Morocco to Indonesia, the Muslim street seethes with alienation and humiliation. Many Muslims express great animosity for Western values, and particularly American values. Fuelled by a sense of economic and social denial, with little to do in the broken economies at home, young Muslims willingly move to al Qaeda and other terrorist organizations. In addition, relatively well-off Muslims, even those educated in the West, have signed up. For instance, Khaled Sheik Mohammed, the recently apprehended operations officer for al Qaeda, graduated from Chowan College in North Carolina. Several of the 9/11 terrorists studied in first rank universities in Germany. Make no mistake about it, not only are the wretched poor in the madrassas in Pakistan and Afghanistan filling the ranks of these unconventional warriors, sons and daughters of the Muslim middle class also enthusiastically join. This phenomenon signals a malaise in the Umma that cannot be addressed by military force alone.

While the U.S. and its allies are making strides in disrupting al Qaeda's operations, we have not adequately begun an effort to help Muslim nations cut off the propensity for their young to become willing recruits. Given al Qaeda's capacity to invent new command and control structures and to reform and reconstitute its compartmented, cellular organization, cutting off the individual snake heads of the Hydra only gives short-term relief. Though vital in this effort, military force offers only a necessary condition in the search for a sufficient solution that attacks the Hydra at the very core of its social and cultural dynamics.

We must find a way to go to the heart of the problem, abating the resentment in the Muslim world for us as a nation and for our values. As a start, we must forge policies and programs that attack poverty and illiteracy in the darkest corners of the Muslim world and that make our values intelligible to people in societies in which honor of family and clan is more important today than individual freedom. We must accept the concept that in pursuit of democratic forms of government, nations like Iraq may not take on institutions of governance similar to ours. They may need more time to reconstitute their governments than we would like. We should support the formation of constituent systems amenable to their own cultures as long as these structures improve economic well-being of peoples and offer basic human rights. Only through addressing the causes of alienation and humiliation can we hope to help host nations cut off the flow of young enthusiasts into the ranks of terrorist organizations.

Our current response in Afghanistan and Iraq may prove helpful, but not if we constrain our effort on the ground solely for domestic political reasons. Operation ENDURING FREEDOM removed the Taliban from power in Afghanistan. It also damaged al Qaeda's cadre of leaders and forced it to move its command and control structure, most likely to Pakistan's currently ungovernable tribal areas. But in the wake of ENDURING FREEDOM, the U.S. elected to conduct an economy of force operation in Afghanistan. We have only a part of a division task force on the ground searching the border areas of Afghanistan for al Qaeda and Taliban. Now some NGOs report that security in Afghanistan is more problematic than in Iraq. If more units are needed to keep the Taliban at bay and run down al Qaeda operators, we should send them while we train Afghan military personnel and incorporate them into our formations.

We have also not ensured the provision of adequate aid to support Hamid Karzai. His writ only extends over the capital region. NATO's peacekeeping force operates only in a similar area. Warlords continue to dominate the affairs of the country. Heroin production and violence increase. Can we afford to keep Afghanistan on a starvation diet of assistance given that the Taliban are making something of a comeback in the South and Southeast of the country? Given the importance of Pakistan's role in countering al Qaeda and its long-term animosity toward India, can we risk a return of anarchy in Afghanistan that could potentially destabilize the government of Pervez Musharraf in Pakistan, risking the emergence of a truly fundamentalist and Islamist government there? To allow a more unified effort on the ground, should we not integrate the NATO peacekeeping force with our own forces in that country?

Our campaign in Iraq poses both difficulty and opportunity for the campaign against terror. The U.S. forces executed the conventional, military phase of the campaign with spectacular competence and skill. To highlight new relationships between air and ground power, our civilian leaders in the Department of Defense required commanders in the field to accept operational risk in the amount of ground forces employed in the campaign. There is no question that IRAQI FREEDOM demonstrated that with air supremacy, networked command and control, and ubiquitous precision fires, the ratios formerly used for the relation between ground and air forces in a conventional campaign have changed. Yet in forcing a "just in time" operational strategy and limiting the ground

forces available to USCENTCOM, the administration denied its commanders in the field critical flexibility in the transition from conventional combat operations to the last phase of the campaign.

As the Iraqi Army collapsed, the Combined Forces Land Component Commander did not have enough units to complete all the necessary tasks at hand. There was no theater reserve remaining. So as the V Corps and I MEF consolidated control of Baghdad and ensured the destruction of the Iraqi Army, no forces were available to follow special operations units of the security services and the Republican Guard as they melted into the souks and towns of the Sunni Triangle. Nor could ground commanders disperse formations to establish a safe and secure environment in vital communities all across Iraq, a condition that would have made transition to reconstruction far easier. Finally, the administration did not have a program for reconstruction.

General Jay Garner's organization arrived on the scene with no fully resourced plan, no communications, and an organization with no capacity to establish itself in the bare bones environment of a wrecked country. By stressing the technological and organizational aspects of the campaign, treating it as an experimental effort in "transformation," and by losing sight of our experience with the difficulty of peace enforcement operations, most recently in the Balkans, the administration allowed a lapse between the conventional and unconventional phases of the war. Ambassador Jerry Bremer's organization has belatedly begun addressing reconstruction, but the foothold gained by Baathist hardliners, itinerant Islamic fighters, and elements of al Qaeda create a strategic challenge more difficult than what our soldiers would have encountered with better planning and organization for this final and most difficult phase. Months ago Defense officials argued that liberating Iraq would be similar to liberating France in 1944. Now Secretary Donald Rumsfeld opines in a private memo leaked to the press that we are in for a "long hard slog." Coming to this understanding almost a year after the crucial decisions for war were made indicates a startling miscalculation of the strategic problem inherent in removing Saddam and reconstructing and fostering democracy in Iraq. As a result of that error, our campaign will now be longer and harder.

As a rationale for preemptive war, the administration's equation of proximate threat to the U.S. stemming from Iraqi weapons of mass destruction and active links between Iraqi intelligence services and al Qaeda has not so far held water. The

weapons programs have not been documented unequivocally, nor have we recovered the weapons materials. The administration's voice is vital to fostering support for a difficult, long campaign. Without the smoking gun, administration credibility is in question, an unfortunate disadvantage. One could argue that a strategy of containing Saddam's actions and a concerted effort over time to create a more expansive international coalition in support of regime change prior to launching a campaign to unseat the Iraqi ruler might have been a better course. But the game is now on, a game from which we can not withdraw precipitously.

A hasty departure from an unstable Iraq would create a failed state in a vital region of the world, damage our influence internationally, and further encourage Islamist terrorism by validating Osama Bin Laden's predictions of U.S. lack of will, making him even more of a seer to the masses on the Muslim street. The administration is on the right track in moving as quickly as possible to put Iraqis in the forefront of the security effort in Iraq and helping them to assume political control of their own institutions. One hopes that recent decisions to change course and to accelerate the effort to invest the temporary government with sovereignty do not indicate haste driven by impatience due solely to domestic political considerations. Putting the Iraqis in the driver's seat before consensus and compromise have provided solid ground for governance could lead to embarrassment.

Ironically, the fate of a new Iraq and our ability to check transnational terror are linked to the dynamics of the Israeli-Palestinian problem. The perception of Israeli subjugation of its Palestinian neighbors and citizens inflames the sentiment on the Muslim street against Israel's main supporter and guardian, the U.S. Progress in Iraq undermines the propensity for states like Syria and Iran to support HAMAS and Hezbollah. Progress in forming a Palestinian homeland buffers the anger in the Muslim world on which al Qaeda's support and recruitment depend. As a supporting effort to the war against terror and the campaign to reconstruct Iraq, the administration must also show progress in the Middle East peace process. Despite the spoiling role played by Yassir Arafat and in the face of halting cooperation between Israel and the Palestinians, the ability of Hamas and Hezbollah to attack and goad Israeli governments into violent reaction, movement in the peace process has two vital results. It offers a rationale for Arab governments threatened by their own internal jihadist movements to crack down on citizens that provide financial and other

support to transnational terrorists. It helps the U.S. convince important elements in the Muslim world that our objectives are not solely self centered and hegemonic; that Israel is not an entering wedge of sorts for an imperialist design. Despite the government's difficulty in managing simultaneous crises, we have no option but to push forward on all three fronts: Afghanistan, Iraq, and Israel-Palestine.

In addition to forming and executing a strategy for this effort, the administration must create a means over the long term of paying for it. Initially in a process begun in the Quadraennial Defense Review, the new leadership in the Office of the Secretary of Defense conceived of a resourcing strategy focused on capital intensive technological innovation in space, anti-ballistic missile, and other high tech systems. The new defense philosophy of transformation posited increased investments in six areas: protecting critical bases, protecting and sustaining U.S. forces, denying sanctuary to our enemies, leveraging information technology, assuring information systems, and enhancing space systems. It also called for a change in leadership culture that focused on creative thinking and intelligent risk taking. In addition the administration declared a strong dislike for nation building. But the rubric of defense transformation gives no sense of the threshold between normal innovation and the degree to which possible changes in capability offer new operational paradigms. Without such a theoretical basis, military and civilian leaders alike must follow an expensive "know it when we see it" approach.

One can argue that after almost three years, the report card shows little in defense transformation that accrues to the work of this administration. The capabilities displayed with such skill by the military in Afghanistan and Iraq originated in previous administrations. The leaders who conducted the campaigns earned their spurs over the last three decades. Granted Secretary Donald Rumsfeld's leadership team forced the combatant commanders to conduct the operations on a "just in time" basis that highlighted new directions in joint warfare, but this kind of "intelligent risk taking" has us waging an economy of force effort in Afghanistan that is seeing a resurgence of the Taliban. And by denying ground commanders in Iraq the forces needed to transition from the combat to the reconstruction phase and not ensuring the planning and resourcing of the reconstruction effort, this "creative thinking and intelligent risk taking" now has us fighting a "long, hard slog" of unconventional warfare in the Sunni Triangle. The inescapable messiness and casualties of this phase of the campaign and the reac-

tion of American voters not prepared for it by administration spokesmen who underestimated the difficulty of the effort, force the President to use significant political capital to maintain support for what is now correctly seen as a long, hard effort.

Long and hard will not pose the only challenge; the effort promises to be expensive at a time when long-term prospects for government spending are not promising. This year in addition to the \$87 billion supplemental already approved, we will probably see passage of a defense appropriations bill of up to \$370 billion. Defense spending is growing at around 27 percent annually. Continued campaigns in Iraq and Afghanistan and the demands of investments in leap-ahead systems as well continue to drive defense budgets higher. In addition non-defense discretionary spending is growing at a 21 percent rate. These increases confront a U.S. Treasury less able to fund them because of loss of revenues due to tax cuts. In its November 6, 2003 issue, the *Economist* cites these facts and highlights the increasing flow of red ink and its long-term negative impact on national debt, interest rates, and the long-term value of the dollar. How are we going to pay our way in support of a unilateralist strategy that attempts nation building in two countries and encourages peace in the Middle East, while maintaining deterrent activities in other parts of the world, continues the war on terror and invests in homeland security, while transforming defense capability in six high priority areas? Do we need F22s stealthily to patrol a sky in which there is no equivalent air threat and when we are buying Joint Strike Fighters and Super Hornets? Do we need V22s when an upgraded CH47 helicopter offers almost the same capability at much less cost and development risk? To pay for Comanche, which truly is a leap ahead system, should we not cut obsolescent AH64 attack helicopters from the force as quickly as possible? If we do not meter our defense expenditures, as we increase discretionary spending and our debt grows to unprecedented levels as a percent of GDP, will allies and friends continue to invest in American debt instruments at a rate that will sustain current interest rates?

In short, to support its current strategy, the administration must adopt some new initiatives. We cannot accomplish the current list of strategic tasks alone. Support and funding from European and other allies and participation by NATO in operations and the good offices of the UN are necessary adjuncts of American leadership at this strategic tempo. We must make our policy more inclusive and our consultation with Allies more thorough and

meaningful. In addition we must do a better job of communicating with the Muslim street. Not only should we improve our information programs, we must back up declaratory policy with specific acts visible and credible to Muslims alienated by the situation in the Middle East. While assuring its survival, this aspect of policy entails forceful pressure on Israel to allow a reasonable homeland on the West Bank and Gaza, one not bifurcated by what looks like an Iron Curtain. While continuing the administration's effort to compel Syria and Iran to stop support of Hamas and Hezbollah, we must continue to augment our capabilities to relentlessly track down and attack terrorist leaders and cells.

The campaigns in Iraq and Afghanistan require assumption of some domestic political uncertainty. An augmented strategy also requires a continued effort to make the new Iraqi and Afghani states political and social successes. That effort will require patience, money, and time. It will develop most effectively if political hypersensitivity about casualties and force ceilings that only give the appearance of progress do not tie the hands of commanders in the field. Americans respond to challenges, especially when they understand the benefits as well as the uncertainties at hand. Politi-

cal polls do indicate short-term sentiment, but one can expect that over the long term as tangible results are put on the table, our citizens will support the effort. If success on the ground requires sustained unit presence, we must pay the bill.

In addition the administration should review its planned strategy for defense modernization. In our theory of defense transformation should we not develop a set of metrics that offer the armed services and the combatant commanders a sense of what combinations of technological promise offer the most significant enhancements in operational capability for Joint commanders? Should we not do a better job of cutting expensive systems derived from traditional assessments of need and not from the requirements of this new strategic environment?

Strategic success will require derivation of the campaign plan from the operational insights of commanders in the field, gaining greater support from our allies, making a concerted effort to address the issues that have made the Muslim street such a fertile breeding place for anti-American sentiment, and gearing politically and fiscally for the long haul. But given the support that may come from this readjustment of our effort, the change will be well worth it.

LBJ

Health Insurance for the Uninsured: Time for Action?

Americans can be proud of the many accomplishments of our health care system. The United States is the world leader in basic medical research and technology. Life expectancies continue to increase, in part due to medical advances. Most Americans have access to some of the most sophisticated medical care available in the world, and almost all Americans have access to some form of health care. For most Americans, a major illness no longer translates into a catastrophic financial setback for the family.

While the United States has much to be proud of in the health care area, it also faces real challenges. Health costs continue to sky-rocket, and our public health infrastructure is inadequate in many areas. Perhaps the most daunting challenge that the U.S. faces is the growing number of persons with little or no health insurance. Without access to insurance, individuals face major financial risks and limited access to care.

In 2002, almost 44 million Americans—15 percent of the population—went without health insurance for the entire year, and millions more were underinsured or had lengthy gaps in coverage. While a majority of American families have been adequately and often generously covered by their employers, and most elderly and very low-income people have been covered by Medicare and Medicaid, the uninsured, for the most part, have paid for health care out of their own pockets or at critical times through available charity care. Many of the uninsured are at significant financial and health risk, and the growth in the number of uninsured places growing pressures on our methods of financing health care.

KENNETH S. APFEL

Kenneth S. Apfel, who holds the Sid Richardson Chair in Public Affairs, joined the faculty of the LBJ School of Public Affairs in January 2001. His major teaching and research interests are in the areas of social policy and public leadership and management, with a particular focus on aging, health care, and retirement issues.

Prior to his academic appointment, Apfel served as Commissioner of the Social Security Administration (SSA) from 1997 until his term ended in January 2001. Before becoming Social Security Commissioner, Apfel worked in the Office of Management and Budget (OMB) in the Executive Office of the President, where he served from 1995 to 1997 as the Associate Director for Human Resources. Prior to that appointment he served as Assistant Secretary for Management and Budget at the U.S. Department of Health and Human Services. Apfel is a 1978 graduate of the LBJ School.

About a half dozen times in the 20th century, the federal government considered major legislative action to provide coverage for the uninsured. Several modest expansions have been adopted over the years, but only once—in 1965—did the U.S. take a dramatic step in addressing this issue. LBJ's Great Society provided health insurance for the elderly, the disabled and some of the nation's poor. Since 1965, only a few incremental steps have been taken to address this problem.

Are we getting closer to real reform in this area? It is likely that the issue will receive considerable attention in the upcoming Presidential elections, and public interest is growing as the number of persons without health insurance continues to grow. Most of the major candidates have staked out positions on the issues, and no candidate in either party calls for a continuation of the status quo. The options differ sharply in approach and outcomes, and no plan is without significant trade-offs. The hard reality is that the U.S. faces a difficult set of choices regarding the future of health insurance in America.

RECENT TRENDS IN HEALTH INSURANCE COVERAGE

Among the 248 million non-elderly individuals in the United States in 2001, 65 percent obtained health insurance through an employer, 14 percent were covered by Medicaid or another public program, and 6 percent purchased private insurance on their own. The remaining 15 percent were uninsured. Although fewer children than adults were covered by private insurance, Medicaid and other public programs more than offset this difference. As a result, while 19 percent of adults went without coverage in 2001, only 12 percent of children were uninsured.¹

The percentages of people with and without health coverage have fluctuated for different reasons at different points in time (see Figure 1). For example, between 1987 and 1993, growth in the number of uninsured individuals can be attributed to the erosion of employer-based health benefits. Although public programs were covering an increasing percentage of Americans during this period, their growth was not enough to offset declines in employer coverage. In contrast, from 1994 to 1998, while the percentage of Americans with employer-based health insurance increased, so did the percentage of uninsured individuals. During this period, declines in public and individually-purchased coverage were large enough to offset gains

in employer sponsored insurance.² Since 2001, the percentage of Americans without health insurance has increased. Public coverage increased from 14.1 percent to 15.3 percent, but this growth was not enough to offset the decline seen in employer-sponsored insurance.³

1. EMPLOYER-BASED INSURANCE COVERAGE

Employer-based health insurance has been the cornerstone of the U.S. system for the past half century. Most Americans under the age of 65 obtain health insurance through their employer or a family member with employer-based insurance. However, work does not guarantee access to this type of coverage.

Overall, nearly 40 percent of America's 108 million workers (excluding the self-employed) did not have health insurance through their own job in 1997. Among these individuals, 45 percent were employed at a firm that did not provide health insurance to any of its workers, 33 percent were offered coverage but declined it, and 22 percent were employed at a firm that sponsored a health plan but did not offer it to the worker.⁴

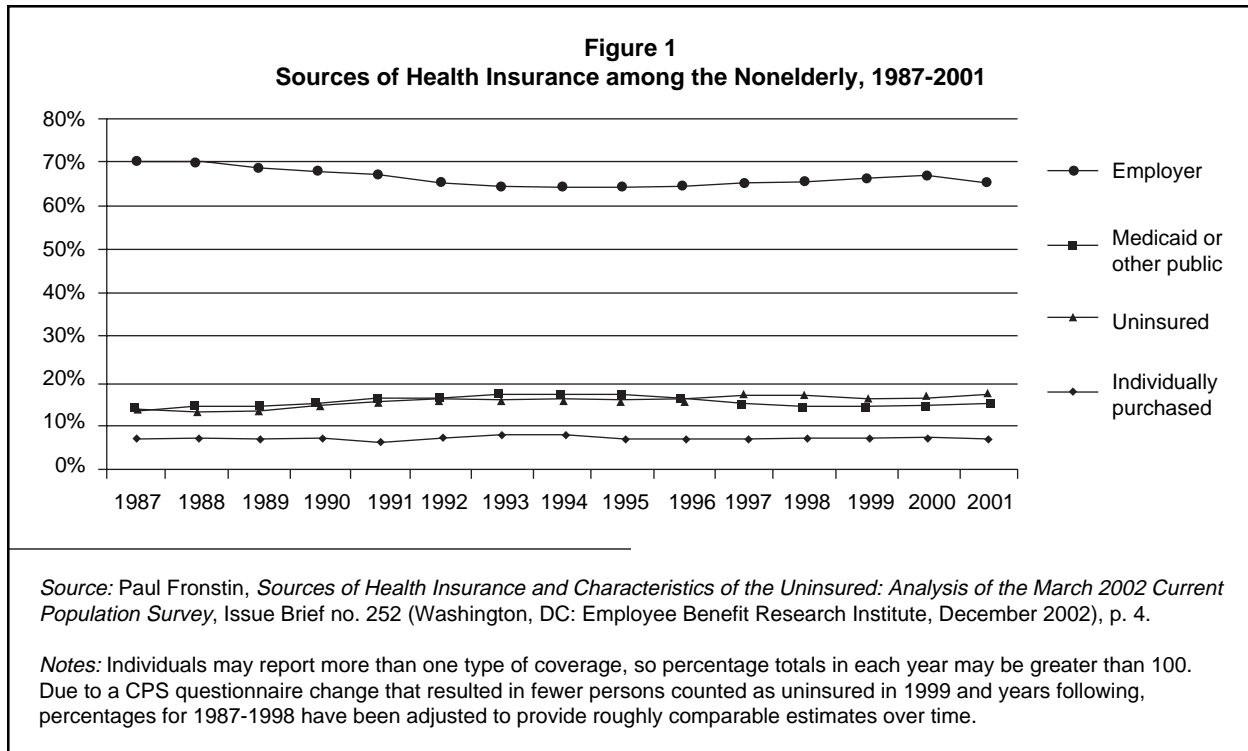
There have been recent signs of erosion in employer-provided health insurance coverage, particularly among small firms. For firms with between 3-199 employees, the percentage offering health benefits declined from 67% in 2000 to 61% in 2002.⁵ And in the last three years more firms are reporting that they have reduced their health benefits packages. Though most workers experienced no change in their employee benefits in 2002, 17 percent reported a reduction in their benefits in comparison with seven percent of workers who experienced an increase in their health benefits.⁶

2. INDIVIDUAL-BASED INSURANCE COVERAGE

In 2001, 16 million non-elderly Americans (6.6% of this population) were covered by an insurance policy they or a family member purchased on their own. Unlike employer-provided insurance, the cost, availability and comprehensiveness of insurance purchased in the individual market depends on a person's age, health status and coverage history. A lengthy underwriting process (i.e. a review of all of the factors above) determines how much the policy will cost, what will and will not be covered or whether coverage will be offered at all. Younger and healthier workers are clearly advantaged in this market, compared to older persons or individuals with significant health risks.⁷

3. PUBLIC INSURANCE COVERAGE

While nearly all Americans are eligible for health



coverage through the Medicare program when they reach age 65, most non-elderly individuals qualify for public coverage on the basis of income, disability, or military service. In 2001, 96.6 percent of people age 65 and older obtained coverage from Medicare or another government program, and less than 1 percent were uninsured.⁸ In contrast, *only about half of the non-elderly uninsured population is covered by public programs.*⁹

Two joint federal-state programs, Medicaid and the State Children's Health Insurance Program (SCHIP), are the sources of public coverage among those under age 65, serving more than 28.3 million non-elderly people (mostly disabled individuals and people in families with children) in 2001.¹⁰ Rates of private insurance coverage among the non-elderly vary considerably from state to state.

There are also recent signs of erosion in public program benefits. In the past two years, at least a dozen states have enacted legislation or obtained permission from the federal government to drop Medicaid coverage for hundreds of thousands of optional beneficiaries (individuals who are eligible under the states' Medicaid plans, but who the federal government does not require states to cover).¹¹ For example, Tennessee dropped 200,000 beneficiaries, Michigan eliminated 38,000 beneficiaries, and Massachusetts cut 36,000 childless adult beneficiaries.¹² In Texas, recent legislative changes will

mean that SCHIP will enroll 169,000 fewer children and Medicaid will enroll about 300,000 fewer beneficiaries by 2005.¹³ If state budget pressures continue in the future, cut-backs in public programs will likely continue.

FUTURE PROJECTIONS OF HEALTH INSURANCE COVERAGE

The number of Americans without health insurance is likely to grow in the future, absent major changes in policy. A 2001 study published in *Health Affairs* found that the non-elderly uninsured population could decrease slightly by 2009 under "extremely optimistic" assumptions, increase to about 44 million under moderate assumptions, or increase to about 52 million under pessimistic assumptions.¹⁴ A 2000 study commissioned by the Health Insurance Association of America estimated that the number of non-elderly uninsured could range from 48 million to 61 million in 2009.¹⁵ Similarly, a 1999 study by the National Coalition on Health Care estimated that the non-elderly uninsured population could constitute between 52 million and 61 million individuals in 2009.¹⁶

POLICY ALTERNATIVES

As the number of persons without health insurance continues to grow, so has interest in addressing the issue. There is a very wide range of proposals to provide access to health insurance to the millions of Americans who are uninsured. Though the proposals share a common goal of increasing access to health insurance, they vary significantly in approach and scope.

The range of proposals to increase access to health insurance can be grouped into three broad categories: 1) proposals to assist individuals to purchase individual insurance; 2) proposals to strengthen the employer-based system of health insurance; 3) proposals to expand public programs or even replace most of the current health insurance system with a national health insurance system.

1. INCENTIVES TO ASSIST INDIVIDUALS TO PURCHASE INSURANCE

One approach to increasing access to insurance is to help individuals to obtain insurance through the individual health insurance market. Approximately 6.6 percent of Americans now purchase health coverage on their own.¹⁷ The affordability and availability of coverage in the individual market depends greatly on the person's age, health status, place of residence, and other factors.¹⁸ For young and healthy individuals, purchasing health insurance in the individual market can be a viable option for obtaining temporary or long-term coverage. However, for older and sicker individuals, the cost of such coverage is often prohibitive.

For those purchasing their own insurance, President Bush has proposed a tax credit of up to \$1,000 for individuals and up to \$3,000 for families, targeted to individuals and families with incomes below about 300% of the poverty level.¹⁹ According to the Administration, the credit would cost about \$10 billion a year and would provide coverage to 6 million of the uninsured—about 15% of the uninsured population.²⁰ Other participation estimates of the Bush proposal are considerably smaller. The US Joint Tax Committee assumes costs and participation rates about 30% lower,²¹ and a recent estimate provided in Congressional testimony assumed participation rates of about 65% lower than Administration estimates, thereby leading to a reduction of about 2 million uninsured persons—a 4% reduction in the total number on the uninsured. While the numbers of individuals affected are modest relative to the options discussed below, it is important to

point out that larger individual tax credits would certainly benefit more people.

There is serious debate over the long term impact of such a change. Proponents argue that the individual tax credit approach helps individuals to purchase individual insurance and thus will make up for some of the continued erosion of employer-based and public health insurance. In addition, tax credits may promote individual choice and help to control health care costs by empowering people to make cost-conscious decisions about their own health care. Opponents argue that the credits would not be large enough for most low and moderate income individuals to purchase health insurance and that insurance policies would provide only very limited benefits to low and moderate income people. In addition, opponents argue that individual tax credits would further weaken the employer-based insurance system, because younger and healthier workers would opt out of employer coverage, leaving older and less healthy workers in employer plans, thereby driving up costs and encouraging more employers to drop health insurance coverage.²²

2. EXPANDING EMPLOYER-BASED COVERAGE

Employer-based health insurance is currently the foundation of coverage for non-elderly Americans. While some point to signals of decline in employer-based coverage as a sign of the eventual erosion of job-based health insurance, others believe that the best way to expand access to insurance is by strengthening and expanding this form of insurance. A number of health policy reform proposals are designed to increase access to the employer-based system of coverage. Proposals in this category include employer mandates (requiring employers to offer health insurance to their employees), and/or expanded employer tax subsidies for health insurance. The most notable proposal in this area in recent years was the Clinton health care proposal, which coupled employer mandates with new employer subsidies.

Recently, Representative Dick Gephardt unveiled a proposal that provides a 60% refundable tax credit to employers, coupled with an additional 25% credit to lower wage workers to pay for insurance. The proposal, which more than doubles the relative value of current law tax incentives for the purchase of employer-provided insurance, would likely ensure coverage for the vast majority of the working uninsured. The costs of such an approach are considerable; according to one analysis, the annual costs after full implementation would be about \$100 billion a year.²³

Moving toward universal coverage by requiring or greatly expanding employer-based health insurance is also very contentious. Some proponents argue that the provision of health insurance should be part of the social contract for employers, with health insurance as a legally mandated employee benefit, similar to Social Security or unemployment insurance. Opponents argue that significant expansions in this area would lead to cuts in wages, non-health benefits and overall employment levels, particularly for low wage workers. Supporters counter that expanded tax incentives would ameliorate these concerns, but opponents argue that major new tax subsidies would be very expensive and lead to significantly higher levels of health care inflation.

3. PUBLIC PROGRAM EXPANSION

A third category of proposals to increase access to insurance is public program expansion. The most common sources of public health insurance coverage for the non-elderly are the Medicaid and CHIP programs, which together insured more than 28 million non-elderly individuals (mostly women, children, and disabled adults) in 2001.²⁴ A variety of options have been discussed to greatly expand these programs to cover more of the uninsured. In addition, there are proposals to expand public insurance by establishing a national health insurance program. Under most national health insurance plans, health care would be financed by taxpayers and administered by government at the federal, regional, or state levels. All Americans would be eligible for the program—insurance would no longer be tied to jobs—and private insurance would be eliminated or significantly scaled back.

A number of Presidential candidates have proposed expansions in public programs to reduce the number of uninsured. For example, former Governor Howard Dean has proposed to extend health coverage to all children and young adults and other adults with incomes below 185% of the poverty level through expansions in Medicaid and SCHIP, which would expand coverage to roughly 12 million of the uninsured. Senator Joe Lieberman has proposed a similar plan, but with more expansive Medicaid changes to cover more families. Former Senator Carole Mosley Brown and Representative Dennis Kucinich have both proposed variants of the single-payer national health insurance plan. For example the Kucinich plan calls for “Medicare for All”, a single payer system that over time would remove private insurance companies from the system, to be financed by a 7.7% employer tax.

The strongest argument for expanding public pro-

grams is the capacity to target limited additional resources to persons most in financial need. More than half of uninsured non-elderly Americans (23 million) are in families with incomes below 200% of the poverty line, and 12 million live below the poverty level. Public programs such as Medicaid and SCHIP can effectively target support to these families and individuals.²⁵ Opponents counter that dramatic expansions of public programs would be prohibitively expensive and that the employer-based system will be further eroded if public programs are expanded to take in more working families.

The key advantage of a national health insurance system is that it would guarantee health insurance to all Americans. It could potentially reduce the overall costs of the American health insurance system because it would reduce system complexity. But national health insurance is strongly opposed by many due to the magnitude of the disruption to the current system and whether such a drastic change would be acceptable to many Americans. Most Americans support few if any limits on the use of health services or choice of providers. There are serious questions regarding quality of care as well as the form, nature and effect of regulatory cost containment mechanisms.

ISSUES AND CHOICES

The options described above may all deal with the same issue, but the approaches are profoundly different, and raise a number of enormously important and complex questions. One key issue relates to the relationship of the reform to the existing system. Any major reform to substantially reduce the number of uninsured will have implications for how the overall system is structured. Strengthening one part of the system—individual insurance, employer coverage or public programs—could potentially reduce the role now played by the other parts of our insurance system. What part of our current system do we wish to build on in the future?

In addition, the various options likely lead to very different outcomes for the uninsured population. For example, should policies provide comprehensive health insurance benefits and/or minimum cost-sharing or should they have limited benefits and/or require substantial contributions from the individual? Public programs historically have provided the most comprehensive set of benefits, with individually purchased policies the least comprehensive in nature. The comprehensiveness of insurance and the level of cost-sharing have implications

for who would most likely benefit. Less comprehensive insurance plans or plans that have substantial cost-sharing may benefit people who are young and healthy because their need for health services is relatively low, but they may not be as beneficial to heavier users of the system. And less comprehensive coverage might make the public more prudent in their daily health care decisions, thereby potentially lowering health care inflation.

Perhaps most important, what are the values and principles underlying the various reform proposals and where they would lead us as a society in the future? The core values question underlying this overall issue seems clear: who ultimately should have primary responsibility for Americans' access to health insurance—the public, employers or individuals? What do we want our society to provide to its citizens in this area, and what are the values inherent in those choices?

It is clear that we face major choices in this area—choices that will lead to very different outcomes. How close are we to actually making these choices?

WILL WE TAKE ACTION SOON?

Over the course of its history, the United States has taken several dramatic steps to address important social policy issues. Two such examples in the 20th century were the creation of Social Security and the enactment of sweeping civil rights protections. What were the conditions that existed at the time that enabled the nation to tackle those longstanding issues? And to what extent do these conditions exist today?

At a very basic level, two key elements had been present in the 1930s and the 1960s that provided sufficient alignment for major reforms to be adopted. First, there was a deep and growing public concern that something major had to be done, even if it necessitated real sacrifice. And second, assertive Presidential leadership was needed, coupled with a strong governing coalition that was in general agreement with the direction of reform proposed by the President.

Will these conditions exist in 2004?

It is clear that public pressures continue to mount on the issue of health insurance for the uninsured. The number of persons without health insurance continues to grow. Many middle class families are without coverage or are concerned about insurance coverage cut-backs. Health care providers have growing concerns about their capacity to provide quality care. Health care costs continue to grow

unabated, and employers and states are increasingly reluctant to maintain current levels of insurance coverage.

But real questions remain. Are the uninsured in a position to place sufficient political pressure on the system to force action? And for the average voter, are there other concerns that have higher priority? And in an area as complex as health care, is there anything approaching a public consensus on the public versus private role in the provision of health insurance? To some extent, it is not surprising that there are profoundly different approaches to address this issue, because today's public is not united on how to proceed.

What about Presidential leadership? The role of presidents is not simply to ride an emerging public consensus; presidents lead efforts to bring about public consensus as well as consensus in Congress. Would a President Bush or a President Gephardt or a President Dean be in a position to lead efforts to secure passage of major reforms? Given the absence of national consensus, the polarization of the electorate and a deeply divided Congress, any President faces an uphill climb on this issue. Absent stronger public pressure or a major political realignment that gives one national party strong control of government, major action in the short term appears unlikely.

So what is the likely outcome in the short term? We will likely see modest and incremental changes to the public, employer *and* individual insurance systems, with continued high numbers of persons without health insurance and continued public unease. Only when public unease turns to real pressure on our elected officials to act—and our leaders are willing to lead—will we see real action. And any major action on this issue will necessitate real sacrifices from the American people.

LBJ

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THE EFFECTS OF THE NO CHILD LEFT BEHIND ACT ON THE BALANCE OF POWER AMONG LOCAL, STATE, AND FEDERAL EDUCATIONAL AUTHORITIES

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As has long been observed by American courts, “local autonomy of school districts is a vital national tradition.”¹

According to the United States Constitution, the federal government is a government of enumerated powers. Any powers not explicitly granted to the federal government in the Constitution are reserved to the states.² Education of the nation’s children is thus left to the states. Most states provide for a system of public schools in their constitutions and delegate much of the authority over that system to local school districts. States delegate authority partly for practical reasons—maintaining control over the

day-to-day operations of every public school in the state is a difficult task. More importantly, states vest authority in local governments because local governments are closest to their constituencies and are in the best position to develop appropriate policies on behalf of constituents. Since the founding of the United States based on a system of federalism, a previously limited federal government has, over time, usurped authority in many areas that were once exclusively the domain of the states. This shift in power—from state to federal—has forced state governments to co-opt much of what had originally been assigned to local governments.

The recently passed No Child Left Behind Act serves as an example of the increasing usurpation of power by the federal government.³ The No Child Left Behind Act is the most recent reauthorization of the Elementary and Secondary Education Act (ESEA) of 1965 and is the most sweeping federal education legislation to date, enacted for the purpose of raising overall student achievement in the United States and eliminating the performance gap among students of different backgrounds.⁴ To achieve these goals, the federal government has proposed rigorous guidelines to hold states accountable for schools that are unable to improve student achievement levels.⁵ In addition, the legislation seeks to assure that each child will be taught by a “highly qualified teacher.”⁶ This article will examine the effect of the No Child Left Behind Act on the relationship between state and local governments from both the legal and public policy perspectives.⁷ A key finding is that increased federal funding and federal mandates further the need by the state to assert full control over education at the state level, divesting local governments of much of their autonomy. The advantages and disadvantages of this phenomenon are examined and the recommendation put forth that, even in the face of increased federal control of education, states should resist the temptation to exert ever-increasing control over the day-to-day operations of local school districts.⁸

More importantly, states vest authority in local governments because local governments are closest to their constituencies and are in the best position to develop appropriate policies on behalf of constituents.

BACKGROUND: FEDERAL EDUCATION LEGISLATION AND THE NO CHILD LEFT BEHIND ACT

FEDERAL LEGISLATION LEADING TO ACT

The federal government has only recently become significantly involved in education. The beginning of substantial federal government involvement in education was the passage of the ESEA in 1965, which strengthened 1964 civil rights legislation by allocating large amounts of federal funds to schools conditioned on their compliance with federal educational standards.⁹ The underlying purpose of the ESEA was to foster equality in the schools, a task at which the states had, according to federal policymakers, failed.¹⁰ When ESEA was initially enacted in 1965, the federal role in education was marginal, state education agencies were small and had little authority, and local school districts resisted additional federal aid, fearing that it would mean more federal control.¹¹ The concerns of local school districts were well-founded. Since 1965, both state and federal governments have greatly increased their roles in

education, and federal requirements as a condition of federal funding are tolerated and even accepted.¹² The federal government now seeks to regulate “every public school student” and “all teachers of core subjects,” rather than just those students who directly participate in federally funded programs or those teachers who are paid directly with federal funds.¹³ Congress reauthorized the ESEA several times, including the passage of additional federal rules and regulations. The allocation of funds to states for education is not, per se, unconstitutional, since states decide whether to accept or reject federal monies.¹⁴ In practice, however, most states cannot afford to reject federal funding. The provision of funds by the federal government thus acts as a coercive mechanism that, while not explicitly unconstitutional, forces states to comply with federal educational policies.¹⁵

THE NO CHILD LEFT BEHIND ACT

The No Child Left Behind Act of 2001 is the most recent reauthorization of the ESEA. The purpose of the No Child Left Behind Act is to close the achieve-

ment gap between disadvantaged and minority students and their peers and is based on four basic principles: stronger accountability, increased flexibility for local governments, more options for parents, and an emphasis on proven teaching methods.¹⁶ Stronger accountability, for example, means developing state-wide systems based on challenging standards for reading and mathematics, accompanied by annual testing.¹⁷ To ensure that no group is “left behind,” assessment results are disaggregated according to race, ethnicity, disability, and limited English proficiency.¹⁸ Schools must make adequate yearly progress, as determined by the federal government.¹⁹ If a school consistently fails to meet these federal standards, it must either improve or be subject to corrective action or restructuring.²⁰ Furthermore, children attending these “failing” schools will have the opportunity to choose to transfer to different schools.²¹ In addition, to achieve the established goals of the No Child Left Behind Act, the legislation covers such wide-ranging subjects as academic standards, testing, racial desegregation, teacher training, math and science equipment, libraries, school prayer, sex education, gay rights, gun control, people with disabilities, English as a second language, home schooling, drugs, and smoking.²² The No Child Left Behind Act includes references to almost every area of school policy subject to government regulation over its thousands of pages of legislation.²³

This type of detailed legislation concerning the day-to-day operations of schools and classrooms is inconsistent with Congress’ promise not to usurp the powers of the state over education.²⁴ In addition, the detailed requirements of No Child Left Behind are at odds with decisions of federal courts, which, while consenting to interfere in local affairs to remedy constitutional violations—as in the context of racial discrimination—justify this interference by recognizing that, “necessary concern for the important values of local control of public school systems dictates that a federal court’s regulatory control of such systems does not extend beyond the time required to remedy the effects of past intentional discrimination.”²⁵ States that have decentralized education systems are forced, by congressional mandate, to recentralize their education systems to receive much-needed federal funding.²⁶

PREDICTED EFFECTS AND PROBLEMS OF THE NO CHILD LEFT BEHIND ACT

SHIFTS POWER FROM LOCAL TO STATE GOVERNMENTS

The empirical evidence available concerning the effects of the ESEA of 1965 does not bode well for the future of local autonomy under the No Child Left Behind Act, which expects more results and allows even less flexibility. In the years following the ESEA’s implementation, administration of the program became “too highly regulated and perfunctory.”²⁷ Although the mere existence of such legislation caused a substantial shift in power from local to state governments and from state to federal governments, the more inflexible the administration of the program becomes, the more significant this shift in power. The first year of the implementation of No Child Left Behind indicates that similar results are to be expected.²⁸ The impact on the distribution of power might be even greater than it was under ESEA, given that a major dif-

By drafting detailed legislation on any given policy issue, the federal government renders local school districts unable to use their unique positions to best address the needs of their students.

ference between ESEA in 1965 and the No Child Left Behind Act today is that No Child Left Behind requires “strict accountability.”²⁹ Accountability measures will be rigidly enforced, resulting in significantly weaker local control of education as local school districts are forced to implement federal mandates administered by state governments.³⁰

Under the No Child Left Behind Act, if a state chooses to participate, as most will given the constant need for additional education funding, local school districts must comply with the legislation. The implementation of other federally funded programs reveals that state participation in such programs leads to a substantial shift of budgetary control from the local level to the state level. For instance, for one school district in Texas, the state’s decision to participate in a federally funded breakfast program meant spending an additional \$140,000 annually to support the program.³¹ Because of the existence of the federal program, the state was forced to usurp budgetary, and thus policymaking, authority from the local school districts by requiring the expenditure of scarce funds on implementation of the program. Even though local officials certainly agreed with the assertion that students from low-income households require

additional assistance, local officials might have preferred spending the funds on alternative programs that would have better assisted these students. Being better attuned to the needs of their own students, local officials should have been given the flexibility to determine the best way to provide additional assistance to their low-income students. Because the federal government created incentives for states to spend funds on a school breakfast program rather than alternative programs, however, local authorities were required to implement the school breakfast program, sacrificing other programs that may have been more beneficial to the individual students in their school districts.³²

Local decision-making is essential in determining how best to meet the needs of low-income students, as local taxpayers have a vested interest in ensuring that these low-income children are educated. Programs that are developed by taxpayers can be tailored according to the unique needs of students in the locality. Locally developed solutions are more likely to be innovative and creative.³³ By drafting detailed legislation on any given policy issue, the federal government renders local school districts unable to use their unique positions to best address the needs of their students.

REQUIRES UNNECESSARY FEDERAL INTERVENTION

Regardless of how much money the federal government decides to distribute to the states and how many conditions the federal government places on the receipt of these funds, the responsibility for education still rests with the states, and the states are accountable to their own citizens. Short of amending the Constitution, such legislation as the No Child Left Behind Act does nothing to change the basic system of accountability. Micromanagement by the federal government is, at best, unnecessary and, at worst, both inefficient and ineffective.

Supporters of federal legislation such as the No Child Left Behind Act argue that states are not fulfilling their responsibility to educate their citizens. While generally acknowledging that the responsibility for establishing education goals and policies belongs to the states, proponents of federal education legislation measure the states' failures to do so against federally established standards. Federal policymakers first impose federal standards on the states and then force state and local governments to

meet these standards through federally mandated processes. The federal government, thus, has established control over all facets of education policy—the end goal and the means for reaching this goal. If education is truly a matter for the states, as implied by the Constitution and upheld in the courts, then states should retain wide latitude in establishing their own educational goals and implementing programs to ensure that these goals are met. Absent violation of a constitutional principle—and there is certainly no provision in the Constitution mandating high-achieving schools and the absence of a performance gap—states should be left to establish educational systems as they see fit.

The federal government has begun to treat education reform as it did the constitutional violations of the 1960s. Because state and local governments have not gotten the job done—in this case, their schools have not reached the levels of achievement desired by the federal government—the federal government has intervened.

Unlike the courts, Congress and the President can intervene only by conditioning the receipt of federal funds on compliance with federal mandates.³⁴ Past experience confirms that the threat of federal funding cutoffs is a powerful incentive, often amounting to coercion.³⁵ In 1964, Congress passed the Civil Rights Act, which tied federal funding to compliance with desegregation and integration mandates. The following year, Congress passed the ESEA, potentially allocating substantial resources to states, provided that the states complied with desegregation mandates. In the 1960s, resistance to desegregation was still strong, sometimes even violent. Nevertheless, the possibility of losing substantial federal funding for failure to comply with these mandates was enough to overcome the massive resistance.

Although there is no opposition to improving overall school achievement and lowering the performance gap among children from different backgrounds, the No Child Left Behind Act was not written to redress constitutional violations. States complied with federal mandates when compliance was required for federal funding, even when they strongly opposed federal policy. Now, when there is no opposition to federal policy except that it shifts the balance of power in education from local governments to state and federal governments, no state can afford to refuse the money on the basis of pre-

Micromanagement by the federal government is, at best, unnecessary and, at worst, both inefficient and ineffective.

serving principles of federalism. Therefore, the argument that states “choose” to accept federal funding has little weight.

Consistent with this approach—treating education reform like the constitutionally necessary violations of the 1960s—President Bush has called “literacy the new civil right.”³⁶ Bush’s statement seems especially strange in light of the Court’s decision in *San Antonio v. Rodriguez*, which explicitly states that, even though education is an important issue, it is not a fundamental right either explicitly or implicitly guaranteed under the United States Constitution.³⁷ Even if education were a fundamental right, the No Child Left Behind Act goes beyond reinstating a denied right, as the legislation is more than a temporary interference in the affairs of local school districts. Even in cases of egregious constitutional violations, such as segregation, the importance of local control of school districts requires that federal “regulatory control [by the courts] of such systems not extend beyond the time” necessary to implement the remedy.³⁸ Lacking a constitutional violation, continued intrusion by the federal government through the No Child Left Behind Act seems particularly indefensible.

ENCOURAGES STATES TO LOWER STANDARDS

Based on recent comments by Secretary of Education Roderick Paige, the federal government’s attempt to impose the detailed requirements of the No Child Left Behind Act may be destined to fail. On October 22, 2002, Paige issued a letter to “State School Chiefs on Implementing No Child Left Behind Act.”³⁹ Conspicuously defensive, Paige voiced his concerns about attempts by states to beat the system by lowering expectations for schools and students.⁴⁰ He noted that several states had lowered their expectations for their students to hide low performance schools or even to reduce proficiency standards.⁴¹ Attempting to appeal to parents, he continued: “Thus, it is nothing less than shameful that some defenders of the status quo are trying to hide the performance of underachieving schools in order to shield parents from reality.”⁴² Paige’s words seem to indicate that the federal government is at war with some of the states: “Those who play semantic games or try to tinker with state numbers to lock out parents and the public stand in the way of progress and reform. They are the enemies of equal justice and equal opportunity. They are apologists for failure. And they will not succeed.”⁴³ Again, the blatant paternalism asserted here is flatly inconsistent with a “vital national tradition” of local control of education and with the deference tra-

ditionally afforded to local decision makers, who are uniquely situated to best address the needs of their constituents.⁴⁴

DESTROYS COMPETITIVE FEDERALISM

Critics of the No Child Left Behind Act recognize that the legislation will destroy the current system of competitive federalism, in which governmental units compete to attract residents and businesses through superior government services or tax systems.⁴⁵ According to Michael Greve, competitive federalism gives residents and businesses the ability to “vote with their feet.”⁴⁶ This “vote” is so powerful that constituents are able to:

discipline government in the same way in which consumer choice . . . disciplines producers. By harnessing competition among jurisdictions, federalism secures in the political arena the advantages of economic markets—consumer choice and satisfaction, innovation, superior products at lower prices.⁴⁷

Furthermore, smaller units of government have unique incentives to attract residents and businesses, themselves taxpayers, thus reducing the total overhead cost of government for each individual taxpayer.⁴⁸ That each individual governmental unit has a strong incentive to make things better for its present and future constituents is one of the most important features of decentralized government.⁴⁹ The smaller the unit of government, the greater will be the incentive for individual taxpayers to make things better for themselves and for future taxpayers under the jurisdiction of their governmental units.

Competitive federalism is especially important in considering the autonomy that should be granted to local school districts. Many families choose to live in a certain area solely for the quality of schools.⁵⁰ As more families move into the area, development increases, the tax base increases, and schools become better and more attractive. Businesses, in particular, are attracted to communities with good schools. The chairman of Xerox once said, “Education is a bigger factor in productivity growth rates than increased capital, economies of scale, or better allocation of resources.”⁵¹ Likewise, it must be true that localities from which people move are given a strong incentive to improve or risk extinction. In his 1982 State of the Union address, President Ronald Reagan stated:

Our citizens feel they have lost control of even

the most basic decisions made about the essential services of government, such as schools, welfare, roads, and even garbage collection. They are right. A maze of interlocking jurisdictions and levels of government confronts the average citizen in trying to solve even the simplest of problems. They do not know where to turn for answers, who to hold accountable, who to praise, who to blame, who to vote for or against.⁵²

Reagan goes on to assert that this situation has arisen mainly because of large federal grant programs.⁵³ The No Child Left Behind Act is certainly such a program, establishing some of the most lengthy and detailed rules and regulations of any past federal legislation.

Thus, although education is very important to the nation, the federal government has no right to tell local governments how to spend scarce education funds.

IS THERE A VIABLE ALTERNATIVE?

FEDERAL BLOCK GRANTS

The alternative to legislation such as the No Child Left Behind Act is federal funding of education through block grants through which schools receive federal funding but are not required to comply with detailed rules and regulations as a condition for receipt of these funds.

The No Child Left Behind Act certainly has its supporters, who are generally in favor of federal legislation that imposes detailed conditions on the receipt of federal funds. Admitting that detailed rules and regulations pose certain problems, supporters of such legislation assert that the alternative—federal block grants, or federal funding free of stringent conditions—is less effective. According to supporters of legislation requiring compliance with detailed rules and regulations, an examination of past federal funding of the desegregation effort shows that unconditional federal block grants have not worked in the past and are destined to fail if used for the present purposes of improving educational performance and narrowing the achievement gap.

As it has with the problem of low education performance, the federal government has addressed the problem of segregation through various avenues, including through Congress and through the federal courts.⁵⁴ After courts had issued powerful decisions requiring desegregation in the 1960s and

1970s, the Emergency School Aid Act (ESAA) was passed to grant more than \$2 billion in federal aid to support desegregation efforts.⁵⁵ By the 1980s, however, funding earmarked for desegregation had been virtually eliminated.⁵⁶ Even though federal block grants continued under a system of “new federalism,” these funds were rarely used by local school districts for desegregation. Thus, critics of block grants argue that this new system has destroyed any chance for equal educational opportunity.⁵⁷ Critics argue that states will not spend scarce resources on desegregation unless forced by explicit

federal government mandates. Although the purpose of the block grants is to implement desegregation, states cannot necessarily be trusted to utilize the funds for this purpose. One critic laments that, “spending for school desegregation is treated as no more important than spending

for instructional materials or for programs in metric education or consumer education, all of which are approved for spending in the block grant.”⁵⁸

Although this critique of federal block grant programs may have been a valid argument during the fight over equal protection and desegregation, the problem of low educational performance presents a different type of problem. Segregation is a violation of the Equal Protection Clause of the 14th Amendment. Because segregation concerns a constitutional right, the federal government is justified in conditioning the receipt of federal funding on compliance with constitutional mandates. Federal courts are, likewise, justified to intervene until remedial efforts have been successful. As the courts have determined, however, education is not a fundamental right.⁵⁹ Thus, although education is very important to the nation, the federal government has no right to tell local governments how to spend scarce education funds. If policymakers truly support the tradition of local government control of education, they must be willing to trust that these local authorities know what is best for their own constituents, even if federal policymakers do not agree with or even understand these decisions.

CONCLUSION

To reiterate the Supreme Court’s reminder in

Milliken v. Bradley, "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."⁶⁰ Local control of education encourages participation in the decision-making process, allows programs to be tailored to unique local needs, and promotes "experimentation, innovation, and a healthy competition for educational excellence."⁶¹ For a nation that has such a strong tradition of and deep respect for a system of local control of education, the No Child Left Behind Act seems to be an anomaly. As education is not a fundamental right, federal intervention in the educational arena is an assault on local autonomy. Even if constitutional rights had been violated, continued federal interference in local affairs, as required by the No Child Left Behind Act, goes well beyond the scope of any temporary federal involvement for remedial purposes. Although participation in the No Child Left Behind program is optional at the state level, local school districts are forced to participate if the state chooses to participate. Furthermore, state participation is essentially forced, as states cannot afford to lose federal funding.

Considering these factors, it seems unusual that a nation interested in accountability and participation would enact legislation that creates a system of greater bureaucracy and decreased accountability and participation. Given the nation's established system of government, including its history of court decisions, it is unclear whether or not the No Child Left Behind Act could withstand a constitutional challenge. At the very least, such legislation is simply bad policy since it promises considerable costs with very limited benefits. If the United States is truly committed to the principles of local control, why not trust Americans enough to expect and challenge them to "get the job done" without the constant interference from and supervision by Washington? School administrators have expressed strong support for the goals of No Child Left Behind, indicating that the overall goal of improving student achievement and student learning is "the right one."⁶² If we simply allow local school districts to meet the challenge of addressing the problem of low education performance in the manner in which they deem best, we might be pleasantly surprised by the results.

LBJ

NOTES

1. *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).
2. U.S. CONST. amend. X.
3. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.
4. *CTR. ON EDUC. POLICY, FROM CAPITAL TO THE CLASSROOM v* (2003), available at <http://www.ctredpol.org/>.
5. *Id.*
6. *Id.*
7. This paper relies heavily on Texas as a case study, because President Bush's No Child Left Behind Act is modeled on the accountability system already in place in Texas. See T. Vance McMahon & Don R. Willett, *Hope from Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, 10 STAN. L. & POL'Y REV. 163, 171 (1999) (praising Texas's nationally acclaimed accountability system, which focuses on outcomes rather than processes, further noting that, "Texas is the vanguard of an accountability movement sweeping the states.").
8. An underlying assumption of this paper is that school districts operate rationally, and it is beyond the scope of this paper to examine the possibility that school districts sometimes act irrationally. Likewise, this paper does not address the underlying factors that might cause an individual school district to deviate from the assumed model of rationality. Finally, school choice and vouchers are important components of No Child Left Behind, but examination of these issues is beyond the scope of this paper.
9. The Elementary and Secondary Education Act, 20 U.S.C. § 6301 (1965).
10. *Id.*
11. *CTR. ON EDUC. POLICY, FROM CAPITAL TO THE CLASSROOM: STATE AND FEDERAL EFFORTS TO IMPLEMENT THE NO CHILD LEFT BEHIND ACT vi* (2003), available at <http://www.ctredpol.org/>.
12. *Id.*
13. *Id.* at 3, 76.
14. See *South Dakota v. Dole*, 107 S.Ct. 2793 (1987) (holding that Congress is within the bounds of its constitutional authority when it uses its spending power to indirectly encourage states to adopt or comply with certain policy objectives, even if Congress would not be permitted to directly impose such policy priorities upon the states).
15. Despite the Court's decision in *Dole*, Congress is no longer engaging in a constitutional exercise of its spending power if the conditions that have been placed on the receipt of federal funds "leave the state with no practical alternative but to comply with federal restrictions." *State of Nev. v. Skinner*, 884 F.2d 445 (9th Cir. 1989); *Dole*, 107 S.Ct. at 2798.

16. U.S. Department of Education Web site, Executive Summary of No Child Left Behind, at <http://www.ed.gov/nclb/overview/intro/execsumm.html>.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. Martha Derthick, *American Federalism: Half-full or Half-empty?*, BROOKINGS REV., Winter 2000, at 24, available at <http://www.brook.edu/dybdocroot/press/review/winter2000/derthick.htm>.
23. CTR. ON EDUC. POLICY, FROM CAPITAL TO THE CLASSROOM 3 (2003), available at <http://www.ctredpol.org/>.
24. The Department of Education Organization Act § 103(b), 20 U.S.C. § 3043(b) (1979).
25. Board of Educ. of Oklahoma City Public Sch. v. Dowell, 498 U.S. 237, 248 (1991).
26. Federal legislation requires that the state co-opt a certain amount of authority originally granted to local school districts. See *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987) (holding that a state cannot completely delegate the responsibility for compliance with the Equal Education Opportunity Act of 1974 to local school districts); *Dowell*, 498 U.S. 237 (granting permission to state and federal authorities to assume control of local school districts for the purpose of remedying a constitutional violation).
27. CTR. ON EDUC. POLICY, FROM CAPITAL TO THE CLASSROOM vi (2003).
28. *Id.*
29. *Id.*
30. *Id.* at 8-9.
31. *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979). Following the passage of a voluntary federally subsidized school breakfast program in 1966, the Texas Legislature required that if 10 percent of the kids in a school district were eligible for free or reduced breakfasts under the national program, the school district must provide these benefits to all the kids in the school district. TEX. EDUC. CODE ANN. tit. 2, § 33.901 (1995); *Rogers*, 588 F.2d at 1059. Garland Independent School District (GISD), qualifying for the program but not wishing to participate, sued the State of Texas. *Id.* at 1060.
32. The alternative here would be for the federal government to distribute federal funds through block grants. To meet general policy priorities, the federal government might specify that the funds should be used to aid low-income students. Such general requirements would allow states to accept federal educational funding while leaving the balance of power among federal, state, and local governments virtually untouched.
33. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 50 (1973) (supporting the proposition that local control of education encourages participation in the decision-making process, allows programs to be tailored to unique local needs, and promotes “experimentation, innovation, and a healthy competition for educational excellence”).
34. See *supra* note 14.
35. See *supra* note 15.
36. Roderick Paige, Remarks at the NAACP Daisy Bates Education Summit—Alexandria, Virginia (May 18, 2001) (transcript available at <http://www.ed.gov/news/speeches/2001/05/010518.html>).
37. *Rodriguez*, 411 U.S. at 33.
38. *Dowell*, 498 U.S. at 248.
39. Press Release, Dan Langan, Letter Released from U.S. Education Secretary Paige to State School Chiefs on Implementing *No Child Left Behind Act* (Oct. 23, 2002) (available at <http://www.ed.gov/news/pressreleases/2002/10/10232002a.html>).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* Paige failed to address the problem that No Child Left Behind actually creates incentives to lower standards, as the legislation allows states to set their own proficiency standards, emphasizing the goal of 100 percent proficiency rather than high standards. CTR. ON EDUC. POLICY, FROM CAPITAL TO THE CLASSROOM 32-34 (2003), available at <http://www.ctredpol.org/>. He also failed to address the fact that states enter the world of No Child Left Behind in dramatically uneven playing fields, in which standards of proficiency vary greatly among states. *Id.*
44. See *supra* note 1.
45. William H. Pryor Jr., *Madison’s Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV., 1167, 1173 (2002) (citing Michael S. Greve, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 1-3 (1999)).
46. *Id.*
47. *Id.* at 1174.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1175.
52. Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J., 557, 557 (2000). (citing President Ronald W. Reagan, State of the Union address (Jan. 26, 1982) (transcript available at <http://www.nationalcenter.org/ReaganStateofUnion82.html>)).
53. *Id.*

54. Neal Devins and James B. Stedman, *New Federalism in Education: The Meaning of the Chicago Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1257 (1984).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 1287.
59. *Rodriguez*, 411 U.S. at 33.
60. *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974).
61. *Rodriguez*, 411 U.S. at 50.
62. CTR. ON EDUC. POLICY, FROM CAPITAL TO THE CLASSROOM 10 (2003), available at <http://www.ctredpol.org/>.

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- U.S. Const. amend. X.

CONTROLLING NUCLEAR WARHEADS AND MATERIALS: PRIORITY ACTIONS TO PREVENT NUCLEAR TERRORISM

INTRODUCTION

There should be no higher priority for homeland security in the United States than preventing catastrophic terrorist attacks using weapons of mass destruction (WMD). Of all types of weapons of mass destruction, the massive, instantaneous, and comprehensive destruction of life and property resulting from a nuclear attack may make nuclear weapons a priority for terrorists. To get a sense of what terrorists could accomplish with a crude nuclear bomb—potentially comparable in explosive power to the bomb that obliterated Hiroshima almost sixty years ago—imagine the scenes of absolute devastation and chaos at Ground Zero of the World Trade Center stretched to cover most of lower Manhattan.

Fortunately, conducting a nuclear attack is more difficult for terrorists than any other type of WMD attack, because producing the necessary primary ingredients—plutonium or highly enriched uranium (HEU)—is beyond the plausible capabilities of terrorist groups. Therefore, if the existing stockpiles of nuclear weapons and weapons-usable materials can be prevented from falling into terrorist hands, nuclear terrorism can be prevented: no nuclear material, no nuclear bomb.¹

Given the horrifying consequences of a successful nuclear terrorist attack and the real opportunity to prevent such an attack, cooperative efforts designed to secure, monitor, and reduce nuclear weapons and materials should be treated as one of the highest priorities of U.S. homeland security policy and the war on terrorism. Indeed, as Chairman of the Senate Foreign Relations Committee Richard Lugar has said, the war on terrorism cannot be considered won

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until all the world's stockpiles of WMD and their essential ingredients are secured and accounted for, to stringent standards.²

Recent years have seen notable progress in ensuring that stockpiles of the essential ingredients of nuclear weapons around the world are secured from theft and transfer to terrorists, but there remains a dangerous gap between the pace of progress and the scope and urgency of the threat. That gap, left unfilled, could lead to unparalleled catastrophe. Terrorists appear to be undertaking an intensive effort to acquire nuclear bombs or the materials and expertise necessary for their construction. They must be stopped before they succeed.

This paper summarizes the ongoing threat of nuclear terrorism by describing the demand for nuclear materials on the part of al Qaeda and other terrorists, and by detailing specific concerns about how inadequate security of current nuclear material stockpiles could potentially increase the supply of such materials to terrorists. It then provides a theoretical framework for thinking about the key measures that should be taken to keep nuclear weapons and materials from falling into the hands of terrorists and hostile states. The paper follows with an assessment of current efforts by evaluating the inputs being supplied to current programs and the outputs being shown by current policies. Finally, it recommends several urgently needed actions by the United States and other governments.³

A CONTINUING THREAT

The threat of terrorists acquiring and using a nuclear weapon in a major U.S. city is real and urgent. First, terrorists have demonstrated a clear intention to acquire nuclear weapons and materials. If they got the materials, it is likely that they could construct a workable weapon. Also, there are many locations around the world, and especially in the nuclear infrastructure left over from the former Soviet Union, where the security of the nuclear weapons and material held in those facilities cannot be guaranteed.

There is a "demand" among terrorist groups for illicit nuclear materials. For instance, for at least a

decade, Osama bin Laden and his al Qaeda terrorist network have been attempting to get stolen nuclear weapons or materials and the expertise to make a bomb. Detailed analysis of documents recovered in Afghanistan and other evidence suggests that, had al Qaeda not been deprived of their Afghan sanctuary, their quest for a nuclear weapon might have succeeded within a few years. The danger that it could succeed elsewhere still remains.⁴ Other terrorist groups have shown similar intentions: Russian official sources, for example confirm four incidents of Chechen terrorists carrying out reconnaissance on storage sites or transport trains for Russian nuclear warheads in 2001–2002.⁵

Unfortunately, there is potentially ample supply to meet this terrorist demand. Tens of thousands of nuclear weapons and many hundreds of tons of weapons-usable material exist around the world, with security standards that range from excellent to appalling.⁶ The huge stockpiles in Russia—where much of the security system for nuclear weapons and materials collapsed along with the So-

viet Union—pose a particular problem.⁷ But Russian trends are leading in the right direction. The Russian economy and government have stabilized such that nuclear workers are paid a regular living wage (reducing the desperation that can lead to theft), and security upgrades are slowly proceeding (as a result of both Russia's own efforts and U.S.-Russian cooperation). However, corruption and theft continue to be deep-rooted problems throughout the former Soviet states' military and nuclear sectors. In August 2003, for example, Alexander Tyulyakov, deputy director of Atomflot, the state-owned firm that maintains Russia's nuclear-powered icebreakers, was arrested and 1.1 kilograms (about 2.4 pounds) of stolen uranium and radium was seized. While there has been no suggestion that this material could have been used to make a nuclear bomb, Atomflot handles tons of weapons-usable HEU. This first documented case of theft involving the senior management of a facility handling such material is particularly worrisome, as thefts involving senior managers are among the hardest for any security system to prevent.⁸

The problem of potential theft of weapons-usable nuclear material is a global concern, extending beyond the former Soviet Union. For example, many

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of the more than 130 HEU-fueled research reactors around the world have little more security than a night watchman and a chain-link fence, and many more could not protect against a large, coordinated attack like September 2001 or the Moscow theater seizure of October 2002.

Particular countries where the threat is high pose special grounds for concern. In Pakistan, for example, there is widespread sympathy for the Taliban and extreme Islamic causes even within the nuclear weapons establishment—as evidenced by the case of two nuclear weapon scientists who traveled to Afghanistan, met with bin Laden, and discussed nuclear weapons.⁹ At the same time, with large armed remnants of al Qaeda operating in Pakistan, the possibility of a large terrorist attack on a Pakistani nuclear weapons site, possibly with help from insiders, cannot be ruled out.

BLOCKING THE TERRORIST PATHWAY TO THE BOMB

With such terrorist interest in using a nuclear weapon and with the security of nuclear weapons and materials in question in so many places around the world, it is clear that the potential for a terrorist organization to acquire a nuclear weapon or the materials to make one is significant. But a strategy to stop a terrorist group from successfully navigating the pathway (that leads from the willingness to use nuclear weapons all the way to the detonation of a nuclear weapon in the United States) must involve more than just the current global war on terrorism and the massive investment in and reorganization of homeland security efforts.¹⁰

The terrorist pathway to successfully launch a nuclear attack consists of several discrete steps. First, a terrorist group must decide to pursue the acquisition of nuclear weapons. Then it must achieve the size and sophistication to undertake a nuclear operation. Most importantly, a terrorist organization must obtain sufficient quantities of plutonium or HEU. Acquisition of nuclear material requires stealing the material itself or a whole weapon, buying it from someone else who stole it, or receiving it from a state actively supporting the

group. Production of nuclear material by non-state groups is generally not considered possible due to the prohibitively high expense and complexity. With enough HEU, a simple “gun-type” bomb of the kind that destroyed Hiroshima—a bomb that involves little more than slamming two pieces of HEU together fast enough—could be within the capabilities of a large and sophisticated group such as al Qaeda. Even a more technically challenging implosion device (required to make a bomb from plutonium) cannot be ruled out¹¹—particularly if

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terrorists succeed in recruiting nuclear expertise, as al Qaeda has repeatedly attempted to do.¹² After building the weapon, the terrorist group would simply have to smuggle it into the country, putting the weapon in a shipping container, small ship, moving van, or conceivably even a private air-

craft to get into the United States and to the targeted city.

Clearly, the most effective way to prevent terrorists from obtaining nuclear weapons and materials will be to prevent them from being stolen in the first place. Every step after getting the material is easier for the terrorist, and harder for those trying to stop them. In the event that they are stolen, cooperation with and assistance to other countries to interdict nuclear smuggling into, out of, and across borders is the “second line of defense.” A third policy to prevent the theft of nuclear weapons and materials is to ensure that the scientists, engineers, and guards with access to nuclear weapons, material and expertise are not so financially desperate that they are tempted to steal stockpiles or sell knowledge. This challenge requires eliminating unsustainable and unnecessary nuclear facilities and redirecting their employees to stable and sustainable employment.

While taking these urgent short-term steps, long-term measures are also needed. For instance, joint efforts should be undertaken to place existing nuclear stockpiles under bilateral or international monitoring, which would build mutual confidence by assuring each participant that nuclear stockpiles are secure and accounted for, agreed reductions are being implemented, and assistance funds are being spent appropriately. Moreover, if current stockpiles cannot be adequately protected, then it makes no sense to continue adding to the problem by creat-

ing more weapons-usable material—so programs to end production of these materials (for example by replacing the heat and power now provided to certain cities by Russia's remaining plutonium production reactors) also have a role to play. Finally, given the size of the problem, it makes sense to reduce the massive excess stockpiles of nuclear weapons and render unfit for weapons use as much nuclear material as possible.

The cooperative nuclear threat reduction efforts outlined above should stand alongside the global war on terrorism and homeland security policies in preventing nuclear terrorism. Certainly, a global war on terrorism that disrupts and destroys terrorist groups and keeps terrorists from finding comfortable safe havens would make it much more difficult for a terrorist group to carry out the sophisticated operation required for a nuclear attack; but the war on terrorism alone cannot be counted on to eliminate this risk, since assembling a crude bomb is a job potentially too small and too easy to hide. A robust homeland security effort coordinated with that war on terrorism offers some hope of reducing the terrorists' odds of success in bringing their nuclear materials or crude bomb into the United States, but the sheer physics of finding soda-can-sized chunks of difficult-to-detect nuclear material among the millions of containers, cars, trucks, planes, and bags that cross U.S. borders every year makes it clear that the United States cannot rely solely on this last, desperate line of defense. While the United States needs a multilayered defense, securing nuclear weapons and materials at their source is by far the most critical layer—where actions that can be taken now will do the most to reduce the risk of terrorists acquiring nuclear weapons and materials, at the least cost.

ASSESSING PROGRESS

If the previous section laid out what the United States and other countries interested in preventing nuclear terrorism should be doing, then the next

question is what exactly are they doing? Assessing the progress of programs designed to prevent nuclear terrorism requires examining both the inputs to current programs and the outputs. Inputs include the time and energy of senior political leaders and the requested and appropriated budgets. Outputs can be measured by evaluating how long different goals involving the control of nuclear warheads, materials, and expertise will take to be achieved at the current rates. While notable successes have been achieved on both sides of the policy evaluation ledger, a substantial gap remains between the urgency of the threat and the pace and scope of the current response.

Since the failure by senior political leaders to support a particular policy will prevent its adoption, regardless of other merits, the first critical input in assessing nuclear prevention programs is high-level political support and leadership. President George W. Bush has been both eloquent and forceful in outlining the danger posed by terrorist acquisition and use of WMD, stating "we will do everything in our power" to keep that from happening.¹³ In his address to the UN General

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Assembly in September 2003, President Bush declared that securing nuclear material at the source was a "crucial step," and called for a new UN Security Council resolution that would, among other things, call on all members "to secure any and all sensitive materials within their own borders."¹⁴ While President Bush's messages have been clear, his administration, like President Clinton's before him, has only intermittently seized the opportunities for presidential action to secure the world's nuclear stockpiles.

In the past year, for example, President Bush and other world leaders have missed opportunities that could have strengthened the nonproliferation policy efforts. For example, the 2003 G-8 summit, representing the one year anniversary of the "G-8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction"—originally announced at the 2002 summit—came and went with very little relevant action. Participants in the

Global Partnership had pledged some \$18 billion toward the \$20 billion target decided on in 2002, and the partnership has been making progress on programs to dismantle aging submarines and destroy chemical weapons stockpiles. But there is little sign as yet of funding or priority from any of the non-U.S. participants to secure nuclear stockpiles around the world, and President Bush proposed no new efforts toward that end.¹⁵

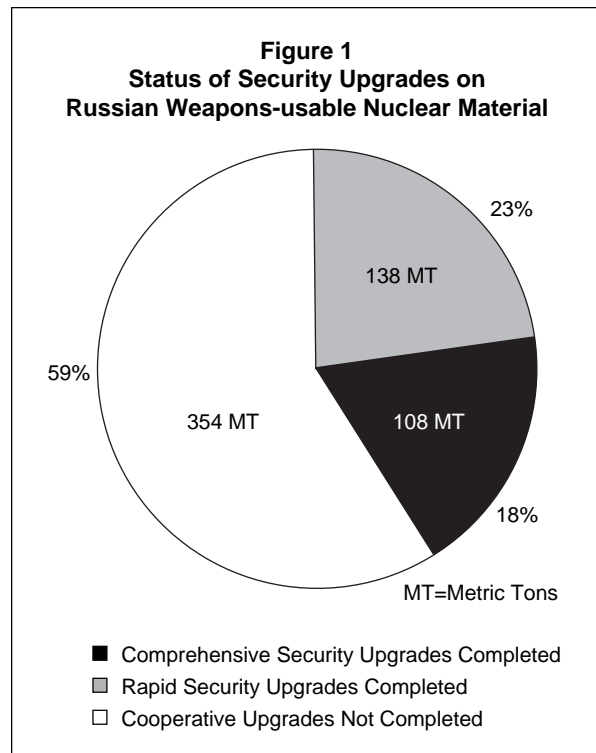
Another example came at the September 2003 summit of President Bush and Russian President Vladimir Putin. While the two leaders laid out a specific agenda for U.S.-Russian cooperation, they did not include any action on nuclear materials security.¹⁶

Finally, the President's most visible new initiative on nonproliferation, the Proliferation Security Initiative, focused on blocking shipments that might contain WMD or missiles on the high seas or in the air. While valuable for large identifiable shipments such as missiles or chemical weapons factories, this initiative is unlikely to have an impact on the prevention of global nuclear smuggling.¹⁷

It should be noted that Secretary of Energy Spencer Abraham and senior officials of his department have worked hard to move forward a force reduction agenda. Abraham and Russian Minister of Atomic Energy Alexander Rumiantsev agreed shortly after September 11th to accelerate cooperation in securing nuclear warheads and materials. They established a group of American and Russian senior officials to meet regularly and design a specific strategy to achieve that objective. Abraham and Rumiantsev meet frequently, and report speaking by telephone every two weeks between meetings.¹⁸ They have made progress in breaking down some of the barriers to accelerated cooperation, but because many are interagency problems within each country, U.S. and Russian presidential action is urgently needed to sweep aside the obstacles that continue to delay progress. In sum, it does not appear that the administration as a whole has in fact done "everything in its power" to provide the necessary leadership to prevent nuclear terrorism.

A second input to assess nuclear proliferation policy efforts is the requested and appropriated budget to achieve a successful nonproliferation solution. Although information about financial resources does not necessarily provide evidence about how well a policy is working, it can serve as a leading indicator regarding the overall level of priority assigned to a particular mission.

If the Bush administration's funding requests for fiscal years (FY) 2002-2004 had been approved with-



out change, total new funding for programs specifically focused on working with other countries to control their nuclear warheads, material, and expertise would have been over \$100 million *less* than the spending of the last year of the Clinton administration.¹⁹ The FY 2004 budget of \$650 million for these programs represents only 0.2 percent of the defense budget.²⁰ While the combined budget for these cooperative nuclear security programs is about 8 percent higher in FY 2004 than in FY 2001 (the last budget approved by Clinton administration), discretionary funding for all non-defense, non-homeland security related federal programs will be approximately 15 percent higher over the same period.²¹ In other words, funding for cooperative nuclear security programs has not kept pace with funding for the parts of the federal government whose budgets the Bush administration has been fighting to restrain.

Senior Department of Energy (DOE) officials have correctly pointed out that budgets for all types of nonproliferation programs throughout the entire department is up 70 percent in the administration's FY 2004 request compared to the levels that existed when the Bush team came to office. This represents an important financial commitment to nonproliferation programs. It is important to note, however, that of the \$551.7 million increase in DOE's "Defense Nuclear Nonproliferation" account since FY 2001,

78 percent is for disposition of the United States' own excess weapons-grade plutonium.²² While this is an important effort, it does not directly reduce the nuclear terrorist threat posed by insecure material elsewhere in the world. Thus, as with the leadership provided for programs to control nuclear warheads, material, and expertise around the world, the budgets for these efforts have been less than fully adequate.

While examination of the inputs is important, the actual outputs of programs should also be examined to assess the overall effort. Given the scope of the threat, the outputs of U.S. efforts focused on preventing nuclear terrorism have shown mixed results.²³

There has been significant collaboration between the United States and Russia to secure nuclear materials and warheads in Russia, which has the largest undersecured stockpile of nuclear material in the world. Because this collaboration is one of the centerpiece programs of the overall U.S. effort, the amount of nuclear weapons-usable material in Russia secured through cooperative U.S.-Russian efforts is a particularly useful measure. In FY 2003, U.S. and Russian experts successfully installed comprehensive security and accounting upgrades for facilities containing an additional 35 tons of nuclear material in Russia of an estimated 600 tons of vulnerable nuclear material.²⁴ This is three times the pace at which such upgrades were installed the previous year, and as shown in Figure 1, this brought total nuclear material protection by comprehensive upgrades to 23 percent of the vulnerable stockpile.²⁵

Before comprehensive upgrades are installed, "rapid" upgrades, which involve actions such as hardening doors, bricking windows, and installing nuclear material detectors at doorways, usually are put in place. U.S.-Russian joint efforts have succeeded in implementing "rapid" upgrades for 18 percent of this vulnerable nuclear material stockpile.²⁶

As positive as these accomplishments appear to be for this program, at a 35-ton-per-year pace, it will take 13 years to complete. The two countries need to dramatically accelerate this process in order to meet the goal DOE has set for itself of providing comprehensive security upgrades for all of the material by the end of 2008.²⁷

In addition to successful joint efforts to secure nuclear material, the U.S. and Russia have also undertaken joint efforts to secure nuclear warheads. The Department of Defense made a breakthrough agreement with the Russian Ministry of Defense in early 2003 to allow the United States access to 10 of more than 100 sites in order to help with security upgrades at nuclear warhead storage sites. While work is underway, actual security upgrades have not yet been installed. The Department of Energy has installed upgrades at Russian naval warhead sites and over half of them are projected to receive comprehensive security upgrades by the end of 2003. Additionally, a small number of sites housing Russian Strategic Rocket Forces warheads will receive comprehensive security upgrades through joint efforts.²⁸

Again, however, this apparent success is tempered by unfortunate realities. While joint efforts to secure nuclear warheads in Russia represent significant political and national security accomplishments, the Bush administration has insisted on not providing assistance to improve security at tactical nuclear warhead sites in Russia, some of the sites most vulnerable to theft of a nuclear weapon.²⁹ Thus,

while cooperative efforts have shown some success where they have been allowed to, the security of facilities that may contain thousands of nuclear warheads cannot be guaranteed, because of this decision by the administration.

Beyond U.S.-Russian bilateral efforts to secure nuclear materials and warheads, other national and international initiatives have been pursued to reduce the danger of nuclear terrorism. For example, in September 2003, a multilateral effort led by the United States and Russia airlifted 14 kilograms (over 30 pounds) of HEU from a vulnerable research reactor in Romania to a secure storage area in Russia and then blended into a form that can no longer be used in nuclear weapons.³⁰ This followed a similar operation in 2002 to remove 48 kilograms of HEU from a vulnerable reactor site in Yugoslavia.

Once again, such work has succeeded to a degree to secure nuclear material and warheads, but the pace at which this security process is moving is not rapid enough. The year-long gap between the two actions indicates that if this pace is left unchanged, it will take more than two decades to complete the

Given the crucial importance of this issue to U.S. homeland security, sustained, top-priority attention is required from the White House.

removal of HEU from the 24 sites identified by the State Department as most urgently requiring such elimination.³¹

In general, the outputs shown by programs to secure nuclear warheads and materials in Russia and to remove weapons-usable material from facilities from around the world have demonstrated that effective action is not only possible, but underway. In several areas, there have been steps in the right direction. But as former Senator Sam Nunn once quipped, “a gazelle running from a cheetah is taking a step in the right direction.”³² The question is whether the steps being taken are fast enough to avoid catastrophe. Today, there remains an unacceptably high probability that the answer to the question is “no.” Despite a decade-long effort, most of potentially vulnerable nuclear material and warheads in Russia have not yet had U.S.-funded security upgrades. This means that the world is, in effect, relying on whatever security upgrades Russia has been able to put in place on its own for the remaining material and warheads.³³ The amount of material in facilities not yet equipped with cooperative security upgrades is enough for tens of thousands of nuclear weapons. If even a fraction of one percent of this material went missing, the world could be faced with a calamity beyond measure.

RECOMMENDATIONS

There are many obstacles to showing better results in reducing the threat of nuclear terrorism, but most are political rather than technical. A sustained effort from the highest levels of the United States and other governments can dramatically reduce the risk of nuclear weapons acquisition by terrorist groups. An accelerated and strengthened effort would have many ingredients, but several are essential.³⁴

A TOP-PRIORITY, COMPREHENSIVE, INTEGRATED EFFORT
Given the crucial importance of this issue to U.S. homeland security, sustained, top-priority attention is required from the White House. If a fraction of the effort and resources devoted to Iraq in the last year was devoted to ensuring that all stockpiles of nuclear weapons and weapons-grade nuclear materials around the world were secured and accounted for, the job could be accomplished quickly. If there were intensive, sustained leadership focused from the highest levels of the U.S. government; a single senior leader in the White House with full-time responsibility and accountability for leading the effort; an integrated and prioritized plan to

accomplish the goal; and an effectively functioning global coalition of nations working together to keep nuclear weapons out of terrorist hands, all else that needs to be done—including the application of the resources needed to do the job—would follow. Putting in place those key elements, therefore, is our highest priority recommendation.

ACCELERATE AND STRENGTHEN COOPERATION WITH RUSSIA TO SECURE NUCLEAR STOCKPILES

Between them, President Bush and President Putin have the power to overcome the disputes over access to sensitive facilities and the myriad bureaucratic obstacles that have slowed progress.³⁵ President Bush should use his relationship with President Putin to convince the Russian President of the urgency for action—for Russia’s own security as well as that of the United States. The two Presidents should (1) identify the security of nuclear warhead and material stockpiles as a top priority for both countries’ national security; (2) jointly set target dates of two years for completing “rapid upgrades” or “quick fixes” for facilities containing nuclear weapons and weapons-grade nuclear materials, and four years for completing comprehensive upgrades in addition to putting in place a mechanism for quickly identifying and overcoming obstacles as they arise; (3) agree on an approach for access to sensitive sites including a U.S. offer of reciprocal access to comparable sites in the United States and an arrangement for accomplishing security upgrades at sites too sensitive for joint access; (4) ensure that the security upgrades are designed to provide security in the face of post-September 11 terrorist threats; and (5) put in place the commitments and approaches needed to ensure that high levels of security will be maintained once effective security systems are installed and U.S. assistance phased out. President Bush should make these goals a central element of U.S.-Russian relations, and, despite the failure to address the issue at the September 2003 summit, it should be a high priority at the next Bush-Putin summit.

REMOVE THE MATERIAL ENTIRELY FROM THE WORLD’S MOST VULNERABLE SITES

The surest way to guarantee that nuclear material will not be stolen from a particular site is to remove it. The U.S. government states that it already has a plan in place to remove nuclear materials from some of the most vulnerable sites. In fact, it has several programs that deal with parts of this overall issue, but each has different management approaches and challenges.³⁶ For instance, one pro-

gram has as its goal the conversion of research reactors to the use of fuels that cannot serve as the core of a nuclear bomb, but does not provide incentives for aging, unneeded reactors to shut down rather than convert, and has only limited incentives for conversion. Similarly, a U.S. effort to re-acquire the tons of HEU unwisely provided to foreign research reactors in the past offers limited incentives for such facilities, with the result that enough U.S.-supplied HEU for hundreds of nuclear bombs will remain abroad when the program comes to its planned end in a few years.

In place of this dispersed collection of programs, a single, mission-focused effort with the necessary authority, resources, expertise, and flexibility is needed to provide incentives tailored to the needs of each site and to get these materials removed as rapidly as possible.³⁷ A comprehensive effort, funded at perhaps \$50 million per year, could eliminate many of the most serious nuclear terrorism dangers around the world in a few years. Provisions to fund a scaled-down version of such an effort was included in a recent energy and water appropriation bill.³⁸ Congress and the President now need to act immediately to put a fully equipped, fully funded program in place to work with countries to remove nuclear material from every site where its security cannot be guaranteed.

BUILD A FAST-PACED GLOBAL COALITION TO UPGRADE SECURITY FOR NUCLEAR STOCKPILES IN COUNTRIES AROUND THE WORLD

With nuclear material located in dozens of countries, there is an urgent need to put the "global" back in a Global Partnership that has so far focused almost exclusively on projects in Russia. As Senator Richard Lugar argued, before we can declare victory in the war to prevent catastrophic terrorism, "every nation that has weapons and materials of mass destruction must account for what it has, safely secure what it has (spending its own money or obtaining international technical and financial resources to do so) and pledge that no other nation, cell or cause will be allowed access or use."³⁹ Building such a global effort will not and cannot be a matter of merely duplicating the approach taken by the United States and Russia in their nuclear secu-

urity cooperation. Given the enormous sensitivities surrounding the nuclear activities of states such as Pakistan, India, Israel, and China, building such a coalition will be a serious challenge requiring higher priority and greater creativity than we have seen to date in U.S. efforts to forge partnerships with these states for improved nuclear security.

A NEW INITIATIVE TO SECURE, MONITOR, AND DISMANTLE THE MOST DANGEROUS WARHEADS

More portable, more forward-deployed, and less protected against unauthorized use than strategic warheads, tactical warheads—especially those not equipped with modern, difficult-to-bypass electronic locks—are particularly vulnerable to nuclear theft. Presidents Bush and Putin should commit to unilateral, jointly monitored reductions of thousands of nuclear warheads not needed for their military requirements, including all warheads not equipped with modern electronic locks or equivalent means to prevent unauthorized use. Each country would agree

to put these warheads in secure storage facilities open to monitoring by the other side. They would also develop procedures to verifiably dismantle these warheads and store the leftover weapons-grade nuclear material in secure facilities with joint monitoring. If such a unilateral-reciprocal initiative were accepted, within a matter of months, thousands of Russia's most dangerous warheads might be under jointly monitored lock and key and committed to eventual dismantlement. This would provide an incalculable benefit for U.S. security against the modest cost of giving up a portion of the planned U.S. responsive force.

CONCLUSION

Terrorists have made clear that they want nuclear weapons and are working to get them. The recommendations offered here form the central core of a plan that within the next few years could drastically reduce the danger of terrorists acquiring and using a nuclear bomb. These actions would serve to strengthen the inputs supporting efforts to secure nuclear materials and expertise, while setting ag-

Securing nuclear warheads and materials before they are stolen would serve to greatly enhance the United States' security by working to cut off the most critical steps in the terrorist pathway to the bomb.

gressive goals for actual performance. As part of an integrated strategy to prevent nuclear terrorism, these actions would complement a global war on terrorism and enhanced homeland security. Securing nuclear warheads and materials *before* they are stolen would serve to greatly enhance the United States' security by working to cut off the most critical steps in the terrorist pathway to the bomb. As President Bush has eloquently warned, "history will judge harshly those who saw this coming danger but failed to act."⁴⁰

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NOTES

1. Furthermore, the same measures needed to keep nuclear weapons and materials out of the hands of terrorists would also contribute to keeping them out of the hands of hostile states—whose nuclear weapons ambitions could be achieved far more rapidly if they could get stolen nuclear weapons or the materials to make them.
2. See, for example, Richard Lugar, "Eye on a Worldwide Weapon Cache," *The Washington Post*, December 6, 2001.
3. Given the nature and length of this article, this can only be an abbreviated summary of the issue. The topics of this article are examined in much greater detail in Matthew Bunn, Anthony Wier, and John P. Holdren, *Controlling Nuclear Warheads and Materials: A Report Card and Action Plan* (Washington, D.C.: Nuclear Threat Initiative and Project on Managing the Atom, Harvard University, March 2003). That report is available in its entirety and in individual chapters for download at a companion website to the report, <http://www.nti.org/cnwm>. The website also contains extensive information on each specific U.S. program trying to combat nuclear terrorism overseas, overviews discussing the overall threat, the legislative and budget actions to combat that threat, a customizable database of information about the budgets for these programs, and an extensive technical background to explain some of the concepts of nuclear weapons and materials and how to secure them.
4. While the al Qaeda documents found in Afghanistan focus predominantly on more conventional forms of terrorism, and no nuclear materials have been found at al Qaeda sites, the documents nevertheless reveal a significant nuclear weapons effort. For the best available summary, see David Albright, "Al Qaeda's Nuclear Program: Through the Window of Seized Documents," *Special Forum 47* (Berkeley, Cal.: Nautilus Institute, November 6, 2002; available at http://www.nautilus.org/fora/Special-Policy-Forum/47_Albright.html as of July 11, 2003).
5. Two of these were on storage sites, two on transport trains. See Vladimir Bogdanov, "Propusk K Beogolovkam Nashli U Terrorista (A Pass To Warheads Found on a Terrorist)," *Rossiiskaya Gazeta*, November 1, 2002; Pavel Koryashkin, "Russian Nuclear Ammunition Depots Well Protected—Official," *ITAR-TASS*, October 25, 2001; and "Russia: Terror Groups Scoped Nuke Site," *Associated Press*, October 26, 2001.
6. For a much more detailed discussion on these figures and where the most serious stockpiles concerns exist, see Matthew Bunn, "The Global Threat," available at http://www.nti.org/e_research/cnwm/threat/global.asp as of October 23, 2003.
7. For an unclassified summary of the situation in Russia from 2002, well after the passing of the 1998 financial crisis, see National Intelligence Council, *Annual Report to Congress on the Safety and Security of Russian Nuclear Facilities and Military Forces* (Langley, Virginia: Central Intelligence Agency, February 2002; available at http://www.cia.gov/nic/pubs/other_products/icarusiansecurity.htm as of July 11, 2003).
8. Tyulyakov was arrested in August, and formally charged in September. It is not clear yet whether this material came from Atomflot or some other facility. According to Atomflot's Director, as quoted in *Nezavisimaya Gazeta*, Tyulyakov had no authority over nuclear materials. The same article also noted, though without any reference, that Russian investigators are inclined to conclude that Tyulyakov had "dozens" of accomplices, not only at Atomflot, but also in other places in Russia. For more on this case, see, for example, "Zamdirektora Atomflota prodal atomnyu bombu (Deputy Director of Atomflot Sold Atomic Bomb)," *Kommersant*, October 3, 2003; "Gryaznoe delo (Dirty Business)," *Izvestia*, October 4, 2003; Nadezhda Popoova, "'Yaderny Pogreb' Rossii stal prohodnym dvorom (Russia's 'Nuclear Vault' has become public thoroughfare)," *Nezavisimaya Gazeta*, October 20, 2003; and "Russian Official Arrested for Trying to Sell Radioactive Material," *Agence-France Press*, August 28, 2003. We are grateful to Dmitry Kovchegin for providing English summaries of the *Kommersant* and *Izvestia* accounts.
9. Khan and Moore, "2 Nuclear Experts Briefed Bin Laden, Pakistanis Say"; Khan, "Pakistan Releases Nuclear Scientists for Ramadan's End"; and Baker, "Pakistani Scientist Who Met Bin Laden Failed Polygraphs, Renewing Suspicions."
10. For a much more extensive discussion of each of these points, see Matthew Bunn and Anthony Wier, "Blocking the Terrorist Pathway to the Bomb," available at http://www.nti.org/e_research/cnwm/overview/path.asp as of October 23, 2003.
11. On potential terrorist bomb-building capabilities, see J. Carson Mark et al., "Can Terrorists Build Nuclear Weap-

- ons?" in Paul Leventhal and Yonah Alexander, *Preventing Nuclear Terrorism* (Lexington, Mass.: Lexington Books, 1987; available at <http://www.nci.org/k-m/makeab.htm> as of July 11, 2003). This remains the most authoritative unclassified treatment of the subject—in part because it represents something of a negotiated statement by experts with a range of views on the matter. See also John P. Holdren and Matthew Bunn, "Technical Background," *Controlling Nuclear Warheads and Materials* (available at http://www.nti.org/e_research/cnwm/overview/technical.asp as of July 11, 2003).
12. The most dangerous example being the case of senior Pakistani nuclear weapon scientist Sultan Bashiruddin Mahmood, an anti-American Islamic extremist who met with bin Laden at length and discussed nuclear weapons. See, for example, Kamran Khan and Molly Moore, "2 Nuclear Experts Briefed Bin Laden, Pakistanis Say," *Washington Post*, December 12, 2001; Kamran Khan, "Pakistan Releases Nuclear Scientists for Ramadan's End," *Washington Post*, December 16, 2001; and Peter Baker, "Pakistani Scientist Who Met Bin Laden Failed Polygraphs, Renewing Suspicions," *Washington Post*, March 3, 2002.
 13. President George W. Bush, "State of the Union Address" (Washington, D.C.: The White House, Office of the Press Secretary, press release, January 28, 2003; available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> as of January 30, 2003).
 14. President George W. Bush, "President Bush Addresses U.N. General Assembly" (New York, NY: The White House, Office of the Press Secretary, transcript, September 23, 2003; available at <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html> as of October 21, 2003).
 15. For a useful assessment, see "Global Partnership Update: A Post-Evian Assessment" (Washington, D.C.: Strengthening Global Partnership Project, Center for Strategic and International Studies, July 2003, available as of October 20, 2003 at <http://www.sgpproject.org/GP%20Update%20no1.pdf>).
 16. See "Joint Statement Between the United States of America and the Russian Federation" (Washington, D.C.: The White House, September 27, 2003, available as of October 20, 2003 at <http://www.whitehouse.gov/news/releases/2003/09/20030927-11.html>).
 17. See, for example, Anthony Wier, "International Efforts to Combat Smuggling in Nuclear Weapons and Materials," last updated September 2003, available as of October 20, 2003 at http://www.nti.org/e_research/cnwm/interdicting/worldsmuggling.asp. Also see, The White House, Office of the Press Secretary, "Fact Sheet: Proliferation Security Initiative—Statement of Interdiction Principles," September 4, 2003, available as of October 23, 2003 at <http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>.
 18. Remarks by both Abraham and Rumiantsev, "Second Moscow International Nonproliferation Conference," September 19, 2003, and personal communications with DOE officials, March, July, and September 2003.
 19. Total spending on the programs focused on controlling nuclear warheads, materials, and expertise was \$602.5 million in FY 2001, the last year of the Clinton administration. When it first came to office, the Bush administration called for substantial cutbacks in these efforts, requesting \$435.4 million in FY 2002. The final approved level for FY 2002 was \$683.3 million, counting funding from supplemental appropriations passed in response to September 11 (in which the administration proposed no increased funding for these programs). In FY 2003, the administration's request was \$597.4 million—still slightly below the final Clinton level, despite the events of September 11. The final appropriation by Congress, counting supplemental appropriations, was \$713.7 million. For FY 2004, the administration has requested \$653.5 million, and while Congressional action is not completed, it appears that the final budget will be quite close to the requested figure. The calculation in the text assumes that Congress simply approves the request for these programs in FY 2004 without adding or subtracting funding or accounting for inflation. If the budgets are adjusted to account for price changes using OMB's government-wide price deflator, then the real gap between the last Clinton budget and the cumulative budget requests by the administration becomes even larger, nearing \$200 million spread out over the three years, or about 11 percent of the total. For all the final appropriations figures, and the administration's FY 2002, 2003, and 2004 request figures, see Wier, "Interactive Threat Reduction Budget Database," *op. cit.* To be fair, nearly all of this reduction from continuing a flat Clinton-era budget came in the Bush administration's FY 2002 budget request, made soon after coming to office, before the administration had time to review these programs in detail. If the most recent FY 2004 request is considered as most representative of the administration's current approach, had this request been made and approved in each of the 3 years of the Bush administration, total spending would have been 8% more than simply continuing the Clinton-era budget, without adjusting for inflation.
 20. See Anthony Wier, "Interactive Threat Reduction Budget Database," last updated September 2003, available as of October 20, 2003 at <http://www.nti.org/cnwm>, and Anthony Wier and Matthew Bunn, "Funding Summary," last updated September 2003, available as of October 20, 2003 at http://www.nti.org/e_research/cnwm/overview/funding.asp. Total threat reduction funding is in the range of \$1 billion, spread across the Departments of Defense, Energy, and State, but many of these funds go to worthwhile endeavors not directly focused on controlling nuclear

- weapons, materials, and expertise, from dismantling missiles to destroying chemical weapons to promoting military-to-military contacts. For discussion, see Bunn, Wier, and Holdren, *Controlling Nuclear Warheads and Materials*, op. cit., pp. 46-59.
21. Calculations derived from figures in U.S. Office of Management and Budget, "Charts on the Updated Fiscal Situation," July 2003, available as of October 20, 2003 at <http://www.whitehouse.gov/omb/charts/msr-charts.html>.
 22. Calculation based on DOE budget documentation for FY 2002, FY 2003, and FY 2004.
 23. Though not updated since March 2003, an extensive discussion of a number of output measures for programs to prevent nuclear terrorism can be found in Bunn, Wier, and Holdren, "Output Measures: How Much is Done, and How Fast is the Rest Getting Done?" in *Controlling Nuclear Warheads and Materials: A Report Card and Action Plan*, pp. 61-83. This chapter is available as of October 23, 2003 at http://www.nti.org/e_research/cnwm/cnwm_chapter5.pdf.
 24. The 35 ton figure was publicly confirmed by Secretary of Energy Spencer Abraham in "Remarks to the Second Moscow International Nonproliferation Conference," September 19, 2003, available as of October 20, 2003 at <http://www.ceip.org/files/projects/npp/resources/moscow2003/abrahamremarks.htm>. This figure was supplemented and clarified by personal communications from DOE officials, July and September, 2003.
 25. In FY 2002, comprehensive upgrades were completed on only 2 percent of the potentially vulnerable nuclear material in Russia, according to DOE's figures. See discussion in Bunn, Wier, and Holdren, *Controlling Nuclear Warheads and Materials*, op. cit., pp. 64-70.
 26. Personal communications from DOE officials, July and September 2003.
 27. While major new steps to accelerate the effort would be needed to meet the 2008 goal, some significant acceleration is likely on the current track. The program, having completed upgrades at most of the small, particularly vulnerable nuclear facilities (where upgrades had a substantial impact on reducing proliferation risk, but little impact on a measure based on how much material was secured) is now focusing increasingly on buildings holding huge quantities of nuclear material, so that each building upgraded will add more to the total quantity of material secured. In addition, over the past year discussions of an arrangement that would allow cooperative upgrades to move forward at particularly sensitive sites have made considerable progress; if that agreement is reached, and is successful, this could accelerate progress significantly. Personal communications with DOE and laboratory officials, July and September 2003.
 28. Personal communications from officials from Sandia National Laboratories and a DOD contractor, October 2003.
 29. This decision is officially confirmed in U.S. Congress, General Accounting Office, *Weapons of Mass Destruction: Additional Russian Cooperation Needed to Facilitate U.S. Efforts to Improve Security at Russian Sites*, GAO-03-482 (Washington, DC: GAO, March 2003, available as of October 20, 2003 at <http://www.gao.gov/new.items/d03482.pdf>), pp. 4-5.
 30. See, for example, U.S. Department of Energy, "The United States, Russian Federation, Romania, and the International Atomic Energy Agency Cooperation on Nonproliferation" (Washington, DC: September 22, 2003, available as of October 20, 2003 at <http://usinfo.state.gov/topical/pol/arms/03092215.htm>).
 31. For more on the Yugoslavia case, known as Project Vinca, see U.S. State Department, "Fact Sheet: Project Vinca," Washington, D.C., August 23, 2002; available as of October 23, 2003 at <http://www.state.gov/r/pa/prs/ps/2002/12962.htm>. Also see, Matthew Bunn, "Removing Nuclear Materials from Vulnerable Sites," available as of October 20, 2003, at http://www.nti.org/e_research/cnwm/securing/vulnerable.asp.
 32. Sam Nunn, remarks to the Carnegie Endowment for International Peace 2002 Nonproliferation Conference, Washington, D.C., November 14, 2002 (available at http://www.nti.org/c_press/speech_samunn_1114.pdf as of January 3, 2003).
 33. See, for example, Yuri Volodin, Boris Krupchatnikov, and Alexander Sanin, "MPC&A Regulatory Program in the Russian Federation: Trends and Prospective," in *Proceedings of the 43rd Annual Meeting of the Institute for Nuclear Materials Management, Orlando, Florida, June 23-27, 2002* (Northbrook, Illinois: INMM, 2002); and Dmitry Kovchegin, "Approaches to Design Basis Threat in Russia in the Context of Significant Increase of Terrorist Activity," in *Proceedings of the 44th Annual Meeting of the Institute for Nuclear Materials Management, Phoenix, Arizona, July 13-17, 2003* (Northbrook, Illinois: INMM, 2003, available as of October 20, 2003 at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/kovcheginINMM%20Paper.pdf).
 34. See discussion in Bunn, Wier, and Holdren, "Part III: Recommendations for the Future," in *Controlling Nuclear Warheads and Materials*, pp. 91-162; available as of October 24, 2003 at http://www.nti.org/e_research/cnwm/cnwm_partiii.pdf.
 35. For a discussion of the problems posed by access, in particular, see U.S. Congress, General Accounting Office, *Weapons of Mass Destruction: Additional Russian Cooperation Needed to Facilitate U.S. Efforts to Improve Security at Russian Sites*, GAO-03-482 (Washington, DC: GAO, March 2003, available as of July 11, 2003 at <http://www.gao.gov/new.items/d03482.pdf>).
 36. For more discussion on the current programs in

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37. For a more detailed version of this recommendation, see Bunn, Wier, and Holdren, *Controlling Nuclear Warheads and Materials*, op. cit., pp. 115-118.
38. See Anthony Wier, "Legislative Update," last updated October 2003, available as of October 20, 2003 at http://www.nti.org/e_research/cnwm/overview/legislative.asp.
39. Dick Lugar, "Eye on a Worldwide Weapon Cache," *The Washington Post*, December 6, 2001.
40. George W. Bush, introduction to the *National Security Strategy of the United States of America* (Washington, DC: September, 2002).
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THE POTENTIAL BENEFITS OF A MEDICAID FAMILY PLANNING EXPANSION IN TEXAS

OVERVIEW

In the United States, nearly all sexually active women who do not wish to become pregnant report using a contraceptive method. Despite this, nearly half of all US pregnancies each year are unintended. Recognizing that these pregnancies affect individuals and society at large, for more than 30 years the federal and state governments have attempted to help women and men better meet their family planning goals by subsidizing reproductive health services.

This paper provides information on family planning in Texas and the United States, focusing largely on funding issues. It examines a state proposal for expanding access to family planning services for low-income women through a Medicaid waiver, and it recommends that Texas explore all possible avenues for implementing such a waiver in the near future.

BACKGROUND

The average American woman spends a considerable number of her childbearing years trying to avoid becoming pregnant. Although nine out of 10 sexually active, fertile women who do not wish to become pregnant report using a contraceptive method, nearly half of all US pregnancies each year are unintended. Approximately half occur because a contraceptive method failed or was used incorrectly or inconsistently. The remaining unintended pregnancies occur among the small proportion (7 percent) of women who do not use any birth control method at all.¹

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In Texas, 11 percent of women of childbearing age (15-44) become pregnant each year (nearly 494,000 out of 4.4 million in 1996). Out of these pregnancies, 67 percent result in live births, 18 percent in abortions, and 15 percent in miscarriages.² In FY 2001, the Medicaid program paid for nearly half (48 percent) of all births in Texas.³ The state has one of the highest teen pregnancy rates in the nation (11 percent), and unmarried women account for 30 percent of all births (compared with 32 percent nationally).⁴ The vast majority of pregnancies among teens and unmarried women are unintended.⁵

While the proportion in any given year is small, over a lifetime the proportion of women who have an unintended pregnancy is substantial. In 1994, 48 percent of women ages 15-44 had had at least one unintended pregnancy (excluding miscarriages), 30 percent had had at least one abortion, 28 percent had had at least one birth that was unintended at conception, and 11 percent had both an abortion and an unintended birth.⁶ At 1992 rates, 14 percent of women can expect to have had an abortion before age 20, 37 percent by age 30, and 43 percent by age 45.⁷

Unintended pregnancies affect both individuals and society at large in a number of ways. Women who unintentionally become pregnant are less likely to recognize their pregnancy in its earliest stages and to initiate early prenatal care—two factors which affect the health of infants.⁸ Unintended pregnancies may also threaten a woman's ability to complete her education or participate in the workforce, and therefore her ability to support herself and her family.⁹ In the end, society as a whole is affected as a result of increased public costs for medical care, welfare, nutritional assistance, and other programs funded by taxpayers.

For more than three decades, the federal and state governments have played an important role in reducing unintended pregnancies and promoting reproductive health by subsidizing family planning services. In recent years, Medicaid waivers have become an increasingly popular vehicle for expanding access to these services. As discussed later in this paper, Texas should continue to explore its Medicaid family planning waiver options, especially since it may be possible to draw down federal funds to finance such waivers at little or no added cost to the state.

FAMILY PLANNING FINANCING

Among U.S. women who use a reversible method of contraception, about one-quarter visit a publicly funded clinic or a private doctor reimbursed by Medicaid to obtain services each year. Another 40 percent obtain privately funded care, and the remaining women do not visit a provider. Both age and income play an important role in determining if women receive family planning services from publicly or privately funded providers.

For example, among women using reversible contraceptives, 42 percent of those with incomes below 200 percent of the federal poverty line (FPL) visited a publicly funded provider in 1988. In contrast, only 16 percent of women with incomes at or above 200

percent FPL did so. Similarly, while 43 percent of women ages 15-19 using reversible contraceptives had a publicly funded visit, such visits represented less than 10 percent among women age 30 or older.¹⁰

PRIVATE INSURANCE

Historically, private health insurance plans in the United States have failed to provide full coverage for prescription contraceptives. However, coverage of oral contraceptives has been growing among employer-based health insurance. For example, the percentage of workers whose insurance covered this type of prescription increased from 64 percent in 2001 to 78 percent in 2002.¹¹ This is due in part to the fact that almost half of states have enacted laws requiring insurance coverage of contraceptives.¹² Both the U.S. Equal Employment Opportunity Commission and a U.S. district court have ruled that an employer's failure to include contraceptives in its prescription drug plan constitutes gender discrimination under Title VII of the Civil Rights Act. In addition, legislation that would extend contraceptive coverage to all privately insured women is currently pending in Congress.¹³

This is good news for women with employer-based health insurance, but in Texas in 2001, less than 60 percent of the population under age 65 had this type of coverage. Not surprisingly, the demographic groups most at risk for an unintended pregnancy (women ages 18-24, unmarried, low-income, Black, or Hispanic) are among those with the highest likelihood of being uninsured.^{14,15} Since contra-

Given this reality, Texas can and should take advantage of the opportunity to expand access to family planning services through a Medicaid waiver.

ceptive supplies alone can cost hundreds of dollars per year (approximately \$360 for oral contraceptives, \$180 for the injections, \$450 for the implant, and \$240 for an IUD), public funding plays an important role in providing access to family planning services for those who lack comprehensive private insurance coverage.¹⁶

PUBLIC SPENDING

In 1994, federal, state, and jurisdictional governments reported spending \$715 million on contraceptive services and supplies, excluding sterilizations and abortions. The largest source of funding was the joint federal-state Medicaid program, which financed 46 percent of all public spending on contraceptive services and supplies. Title X of the Public Health Services Act provided 21 percent of public funding, the Social Services Block Grant (SSBG) provided 5 percent, and the Maternal and Child Health (MCH) Block Grant provided another 5 percent. State-only funds (funds not required to match federal funds for Medicaid or the MCH Block Grant) provided the remaining 23 percent of public dollars for contraceptive services and supplies.¹⁷

In addition to providing reversible contraceptive methods, all four major sources of federal family planning dollars allow for the provision of sterilization services. However, as a result of federal restrictions that have been in place since 1979, almost the entire responsibility for providing public funds for abortion rests with individual states.¹⁸

Including both state and federal funds, Texas spent \$68 million on family planning services for approximately 421,000 clients in FY 2001 (see Table 1). Approximately 41 percent of family planning expenditures were funded by the SSBG, 31 percent by Medicaid, 15 percent by Title X, and 12 percent by the MCH Block Grant. As discussed later, Texas is unusual in its heavy reliance on the SSBG for family planning dollars.

In 2003, the appropriations bill passed by the 78th legislature included a provision that would deny family planning funds to organizations that perform elective abortions or that contract with or provide funds to organizations that provide such services.¹⁹ Planned Parenthood has said that the budget cuts could cost them \$13 million, which would affect approximately 115,000 low-income women who receive non-abortion services at their clinics, including Pap tests, cancer screenings, and contraception. It is not clear how other family planning providers, such as hospitals, would be affected, and the fate of the provision remains uncertain. In response to a lawsuit filed by several Planned Par-

enthood affiliates, a U.S. district court issued a preliminary injunction in August of 2003 to prevent its enforcement.²

The Texas Department of Health (TDH) is primarily responsible for the administration and oversight of family planning funds in the state, and its Family Planning Program provides a wide range of medical, educational, and counseling services. There are more than 100 TDH-funded family planning agencies in over 350 clinics across Texas. Services are provided directly by TDH regional health facilities and through organizations that contract with TDH. Medicaid-eligible individuals may also receive family planning services through providers in private practice, federally-qualified health centers, and rural health clinics.²¹

Since the program has an open-ended financing structure, Medicaid clients are guaranteed access to services as long as they meet the state's eligibility criteria. However, there is no such guarantee

Table 1
Public Funding of Family
Planning Services in Texas, FY 2001

Total expenditures	\$67,769,099
Title XIX (Medicaid)	20,883,927
<i>Federal</i>	18,895,664
<i>State match</i>	1,988,263
Title X	10,355,113
Title V (Maternal and Child Health Block Grant)	8,447,698
<i>Federal</i>	4,629,370
<i>State match</i>	3,818,328
Title XX (Social Services Block Grant)	28,082,361
<i>Direct Title XX</i>	6,689,704
<i>TANF funds transferred to Title XX</i>	21,392,657
Number of clients receiving services	420,864
Title XIX, Title X, Title XX	360,955
Title V	59,909
Average expenditure per client	\$161

Sources: (1) All data except number of Title V clients – Texas Department of Health, *Fiscal Year 2002 Operating Budget* (November 2001). Online. Available: <http://www.tdh.state.tx.us/budget/fyob2002/default.htm>. Accessed: April 10, 2003. (2) Number of Title V clients—Women's Health and Family Planning Association of Texas, *Costs for Family Planning Services*. Online. Available: <http://www.whfpt.org/facts/costsline.html>. Accessed: April 20, 2003.

Note: Excludes indirect administration expenditures.

for individuals who qualify only for services financed by Title X, SSBG, and MCH funds. States receive a capped dollar amount for each of these programs, regardless of the number of people who may be eligible.

TITLE X

In 1965, the federal government made its first grants to support the provision of family planning services as part of the Johnson administration's War on Poverty. In 1970, Congress enacted Title X of the Public Health Services Act, which is the only federal program devoted solely to family planning. Today, more than 4,500 of the roughly 7,000 family planning clinics nationwide receive Title X funds, which on average provide about one-quarter of their revenues. A national set of standards regarding eligibility, confidentiality, preventive care, and counseling apply to all women served at Title X clinics, regardless of the source of payment for any individual client. Title X experienced budget cuts in the 1980s and then grew steadily through the 1990s, but after accounting for inflation, funding has decreased by 60 percent since 1980.²² President Bush's FY 2004 budget included \$275 million for Title X (approximately \$10 million less than the amount appropriated by Congress for FY 2003), but bills passed by the House and Senate would maintain or increase the program's current level of funding.^{23, 24}

In Texas, health care agencies that provide comprehensive family planning services contract with TDH to receive Title X funds. In most cases, eligibility for fully subsidized services is limited to individuals with family incomes at or below the federal poverty level.²⁵ However, for individuals who are unmarried and under the age of 19, eligibility is determined using individual income. Clients with incomes between 100 percent and 200 percent FPL (up to 250 percent in special circumstances) receive services on a sliding fee scale.²⁶

MATERNAL AND CHILD HEALTH BLOCK GRANT

Dating from the 1930s, Title V of the Social Security

Act was enacted to reduce infant mortality and promote the health of mothers and children. In the early days of the Reagan administration, Congress consolidated several long-standing programs into a series of block grants to allow states greater freedom to decide how funds are spent, and Title V became the MCH Block Grant. To receive MCH allocations, states must match \$3 for every \$4 in federal funds provided through the program.²⁷

In 1989, Congress reinstated some of the federal "strings" that had been dropped at the creation of the block grant. Perhaps because of its increased level of accountability to federal policymakers and the fact that it provides a set of readily identifiable, politically popular services (not just those related to family planning), MCH appropriations grew steadily during the 1990s. In FY 1997, 31 states and the District of Columbia supported direct medical care related to contraceptive services with MCH funds. However, with Medicaid underwriting the

bulk of such care for low-income pregnant women and children, states have increasingly moved toward using MCH funds for supportive services that Medicaid is unlikely to cover. These include infrastructure needs assessments, quality assurance and training, outreach and education, transportation, translation, and case management services.²⁸

In Texas, MCH funds allocated for family planning are used to reimburse public and private contractors on a fee-for-service basis for the care they provide.²⁹ Client eligibility is limited to children through age 21, women under age 45, and men 21 and older seeking a vasectomy. Clients must have family incomes below 185 percent FPL, be otherwise uninsured for the service provided, and not be eligible for Medicaid or CHIP.³⁰

SOCIAL SERVICES BLOCK GRANT

Dating back to the 1970s, Title XX of the Social Security Act was enacted to require states to address major social service goals set forth by the federal government. Family planning stood virtually alone as a medical service that could be funded by the program. When Congress transformed the program into the Social Services Block Grant in 1981, it eliminated numerous federal requirements and contin-

Despite the fact that Texas may be able to implement a waiver at little or no added cost to the state, political opposition remains an obstacle.

ued to list family planning as one of the services states could provide. The program's budget has been cut significantly over time, and even before accounting for inflation, SSBG funding is now at its lowest level since the early 1970s. With some restrictions, states are allowed to transfer a portion of their federal Temporary Assistance to Needy Family (TANF) allocations to shore up the SSBG.³¹ Since FY 2002, SSBG appropriations have remained flat at \$1.7 billion.³²

In FY 1997, Texas accounted for slightly more than half of all SSBG family planning expenditures nationwide (\$13.6 out of \$27 million in 15 states). As a result, it has been considerably impacted by the recent cuts and has opted to transfer TANF dollars to compensate for losses since FY 2000.³³ TDH uses these pooled funds to reimburse contract agencies on a fee-for-service basis for the family planning services they provide. Client eligibility is limited to individuals with incomes at or below 150 percent FPL, and a sliding-scale co-payment may be assessed for up to 25 percent of an agency's reimbursement rate.³⁴

Overall, the average annual state cost per waiver client would be approximately \$40.

fants and children ages 1-5 also qualify at higher incomes), parents of children with family incomes below 17 percent FPL, and disabled individuals with incomes below 74 percent FPL. Pregnant women with family incomes below 158 percent FPL qualify for pregnancy-related care and 60 days of postpartum coverage.^{38, 39}

The State Children's Health Insurance Program (SCHIP) was enacted by Congress in 1997 to provide health coverage for children under the age of 19 in families with incomes too high to qualify for Medicaid, but too low to afford private insurance.

SCHIP is similar to Medicaid in that states receive federal reimbursement for the cost of providing covered services, but unlike Medicaid, SCHIP funding is capped at a fixed dollar amount each year.⁴⁰ In Texas, the SCHIP benefit package specifically excludes pre-pregnancy family reproductive

services and supplies, as well as medications that are prescribed only for the purpose of primary and preventive reproductive health care (exceptions are made for diseases, illnesses, or abnormalities related to the reproductive system).⁴¹

MEDICAID AND SCHIP

Enacted in 1965 as Title XIX of the Social Security Act, Medicaid is a joint federal-state program that provides health care services for certain low-income Americans. In 1972, Congress amended the Title XIX statute to require states to provide family planning services and supplies for categorically eligible Medicaid beneficiaries.^{35, 36} While Texas is reimbursed for approximately 60 percent of the cost of most covered medical services, the federal reimbursement rate for family planning services and supplies is 90 percent.

Unlike other subsidized family planning programs in Texas, Medicaid is the only one in which the majority of health care providers are private physicians. The program provides comprehensive family planning services for individuals who qualify for regular Medicaid coverage or for 60 days of postpartum care following a Medicaid-funded birth, and is prohibited from collecting co-payments for these services.³⁷

In Texas, those who qualify for regular Medicaid coverage include children under the age of 19 with family incomes below 100 percent FPL (in-

COST SAVINGS RESULTING FROM PUBLIC SPENDING

As discussed earlier, one in four U.S. women who use a reversible method of contraception rely on a publicly funded source of care, either a family planning clinic or a private physician reimbursed by Medicaid. According to a 1990 analysis by the Alan Guttmacher Institute (AGI), if publicly funded services were not available, these women would have between three-quarters of a million and 1.7 million additional unintended pregnancies annually. As a result, for every government dollar spent on family planning services, an average of \$4.40 is saved by averting short-term public expenditures (during pregnancy and the two years following a birth) for medical care, welfare, and nutritional services.⁴²

A similar AGI analysis published in 1996 found that if publicly subsidized family planning services were not available, women who currently use them would have an estimated 1.3 million additional unplanned pregnancies annually. Approximately 48 percent would end in abortions, 40 percent in unintended births, and the remainder in miscarriages. As a result, the federal and state governments would spend an additional \$1.2 billion to cover Medicaid costs associated with unintended

births and abortions each year. Thus, for every dollar spent on publicly funded contraceptive services, an average of \$3 is saved in Medicaid costs for pregnancy-related and newborn medical care.⁴³

MEDICAID FAMILY PLANNING WAIVERS

Ordinarily, federal Medicaid law allows states to cover only individuals who fall into pre-defined eligibility groups and meet certain income criteria. It also requires states to provide enrollees with benefits that are comparable in amount, scope, and duration. However, states may apply for permission to “waive” these rules.⁴⁴ In the case of family planning, states may apply for a waiver that allows them to provide a limited set of services to individuals who would not otherwise qualify for regular Medicaid coverage.

WAIVER PROPOSALS IN OTHER STATES

Realizing the potential for both individual health benefits and public cost savings, 18 states have secured family planning waivers that allow them to provide services to (1) postpartum women who would ordinarily lose Medicaid coverage 60 days after giving birth, (2) individuals who lose Medicaid coverage for any reason, or (3) individuals with incomes below a specified percentage of the federal poverty level. Four states currently have applications pending approval (see Table 2). Once a waiver is approved, states are eligible to receive federal reimbursement for 90 percent of the cost of providing family planning services to waiver clients (other services are reimbursed at a lower rate).

In order to obtain a waiver, states must include a research evaluation component in their proposal. They must also show that their waiver is “budget neutral” to the federal government; in other words,

Table 2
Medicaid Family Planning Waivers

State	Basis of Eligibility		
	Losing Medicaid Postpartum (Length of Family Planning Benefit Extension)	Losing Medicaid for Any Reason (Length of Family Planning Benefit Extension)	Income Only (% FPL Eligibility)
Alabama	–	–	133
Arizona	2 years	–	–
Arkansas	–	–	133
California	–	–	200
Colorado	–	–	pending approval (150)
Delaware	–	2 years	–
Florida	2 years	–	–
Illinois	–	5 years	–
Maryland	5 years	–	–
Minnesota	–	–	pending approval (275)
Mississippi	–	–	185
Missouri	1 year	–	–
New Mexico	–	–	185
New York	–	–	200
North Carolina	–	–	pending approval (185)
Oklahoma	–	–	pending approval (185)
Oregon	–	–	185
Rhode Island	2 years	–	–
South Carolina	–	–	185
Virginia	2 years	–	–
Washington	–	–	200
Wisconsin	–	–	185

Source: Rachel Benson Gold, “Medicaid Family Planning Expansions Hit Stride,” *Guttmacher Report on Public Policy* (October 2003), p.12. Online. Available: <http://www.agi-usa.org/pubs/journals/gr060411.pdf>. Accessed: November 2, 2003.

Notes: In CA, MN, NY, OR, and WA, the target population includes men. In AL, IL, and NC, waiver services are limited to women age 19 or older.

Notes: In CA, MN, OR, and WA, the target population includes men. In AL, IL, and NC, waiver services are limited to women age 19 or older.

that estimates of federal Medicaid spending with a waiver do not exceed estimates of spending without a waiver. States have accomplished this by arguing that subsidized family planning services reduce unplanned pregnancies among low-income women who are likely to be eligible for costly Medicaid-funded prenatal, delivery, and postpartum care if they become pregnant. As of 2001, states seeking approval must also facilitate access to primary care services for family planning waiver clients. They may meet this requirement by establishing formal arrangements with community health centers.⁴⁵

At least two recent state studies support the argument that Medicaid family planning waivers can result in cost savings by averting pregnancy-related expenditures. For example, a state-funded program in California, which later received approval for federal reimbursement under a Medicaid waiver, provided contraceptive services and supplies to 642,000 women and 28,000 men with incomes below 200 percent FPL in FY 1997-1998. Prior to their first visit, one-third of clients were using an ineffective contraceptive method or no method at all. After their visit, 95 percent were using an effective method, and 40 percent left with a more reliable method than they had been using previously. As a result, researchers estimate that the program prevented 108,000 unintended pregnancies (24,000 of which would have been to teens). While the family planning program spent \$114.4 million on direct client services, the averted pregnancies are estimated to have saved the state \$511.8 million in medical, social service, and education costs.⁴⁶

Similarly, Rhode Island's family planning program, which extends benefits for two years to postpartum women who would ordinarily lose coverage 60 days after giving birth, is estimated to have prevented 1,443 deliveries to Medicaid-eligible women from 1994 to 1997. While the program cost \$5.7 million to administer over this period, the state estimates that the averted births avoided an expenditure of \$14.3 million. In addition, the proportion of women with Medicaid-funded deliveries who became pregnant within nine months of a previous birth has been nearly cut in half since the program's implementation. This is significant because a short interval between births is a well-established risk

factor for low birth weight, which is a major cause of infant mortality in the United States.⁴⁷

TEXAS WAIVER PROPOSAL

During the 77th Texas legislative session, Governor Rick Perry vetoed SB 1156, an omnibus Medicaid bill that included a provision for a five-year demonstration project (a waiver) to expand access to preventive health and family planning services for low-income women.⁴⁸ Two bills that were introduced early in the session, HB 1156 and SB 812, also addressed the issue of a women's health waiver. In the fiscal notes for these bills, the Legislative Budget Board (LBB) estimated that a waiver would have saved the state more than \$131 million over the period 2002-2006 as a result of Medicaid cost savings from averted births.^{49, 50}

Although Governor Perry vetoed SB 1156 in 2001, he instructed the Health and Human Services Commission (HHSC) to continue to pursue a women's health waiver.⁵¹ As a result, HHSC submitted a concept paper in April 2002 to the federal agency responsible for Medicaid, the Centers for Medicare & Medicaid Services (CMS). In response, CMS

gave the "go-ahead" for the state to submit an application. Since that time, HHSC has worked on drafting the document with the help of a committee convened by the agency's commissioner.⁵²

During the 78th legislative session, HB 2606 was introduced in an attempt to move the waiver process forward. The LBB scored its cost savings at \$75 million over the period 2004-2008.^{53, 54} A public hearing was held in April of 2003, but ultimately, the bill died in committee.

The type of waiver described in HB 2606 would expand Medicaid eligibility in Texas to cover a variety of family planning and preventive services for all women between the ages of 18 and 44 with family incomes at or below 185 percent FPL. In the concept paper submitted to CMS, HHSC estimates that the number of women potentially eligible for services would increase by approximately one million, up from the current level of 339,000 to 1.4 million, during the first year of the project.⁵⁵

In the fiscal note for HB 2606, the LBB assumed that the number of women receiving services under a waiver would be 317,382 in FY 2004 and 634,763 in subsequent years.⁵⁶ The estimated average annual

As a result, only 0.8 percent of waiver clients (one out of 120) would have to avert an unintended birth in order for the state to break even on its annual investment.

Table 3
Estimated Five-Year Impact of Texas HB 2606 on State General Revenue Funds

Fiscal Year	Probable GR Cost of Providing Additional Services	Probable GR Savings from Averted Medicaid Births	Probable Net Positive (Negative) Impact on GR Funds
2004	(\$12,758,737)	\$0	(\$12,758,737)
2005	(25,517,472)	16,800,000	(8,717,472)
2006	(25,517,472)	57,600,000	32,082,528
2007	(25,517,472)	57,600,000	32,082,528
2008	(25,517,472)	57,600,000	32,082,528
Total	(\$114,828,625)	\$189,600,000	\$74,771,375

Source: Texas House Bill 2606 (Introduced) Fiscal Note, 78th Legislature, regular session (2003). Online. Available: http://www.capitol.state.tx.us/tlo/legislation/bill_status.htm. Accessed: April 8, 2003.

costs per client covered under the waiver would be \$144 for family planning services (10 percent paid by the state, 90 percent paid by the federal government), \$30 for preventive office visits (40 percent paid by the state), \$35 for breast and cervical cancer screenings (28 percent paid by the state), and \$40 for prescription drugs related to family planning (10 percent paid by the state). Overall, the average annual state cost per waiver client would be approximately \$40 ($\$144 \times 0.10 + \$30 \times 0.40 + \$35 \times 0.28 + \$40 \times 0.10 = \40.20).

The LBB estimates that a waiver would avert several thousand births that would have otherwise been paid for by Medicaid: 3,500 in FY 2004 and 12,000 in subsequent years at a cost of \$12,000 each (40 percent paid by the state). Based on these assumptions, Table 3 shows the five-year impact of HB 2606 on state general revenue (GR) funds.

If 634,763 women receive services under a waiver and 12,000 births are averted each year, for each dollar the state spends, it will save \$2.26 in state Medicaid costs ($\$57,600,000$ state savings from averted births / $\$25,517,472$ state cost of providing waiver services = \$2.26) when fully implemented in 2006.⁵⁷ Using the LBB's assumptions, one averted Medicaid birth would pay for the annual cost of providing waiver services to 120 women ($\$4,800 / \$40 = 120$). As a result, only 0.8 percent of waiver clients (one out of 120) would have to avert an unintended birth in order for the state to break even on its annual investment.

If the current mix of funds used by the state to finance family planning services remains unchanged, one major obstacle for the type of waiver described in HB 2606 is its short-term cost. The Texas legislature faced a large budget shortfall during the 78th session, and as introduced, HB 2606 had a net negative impact of more than \$21 million on

state GR over the 2004-2005 biennium (with a net positive impact thereafter). This is due to the fact that the state would have to pay for services for at least nine months before realizing any cost savings from averted pregnancies among waiver clients, who would not all enter the program at once.

However, as noted by the bill's author, Texas is not taking advantage of a budget strategy that could reduce or eliminate the added state cost of implementing a waiver.⁵⁸ As described earlier, Texas currently spends MCH and SSBG dollars on family planning activities. However, these block grant funds may also be used to support a wide range of non-family planning activities. As a result, if the state could find a way to substitute MCH and SSBG dollars currently spent on family planning for state GR in a non-family planning portion of the budget, the newly available GR could be used to take advantage of the 90 percent reimbursement rate offered by the federal government for Medicaid family planning services.⁵⁹

In a simple example, if \$1 million in federal SSBG funds currently used to finance family planning activities can be substituted for \$1 million in state GR currently used to finance any of the numerous activities that qualify for SSBG funding under federal law (for example day care, protective services for children and adults, employment and training services, etc.), the state could use the \$1 million in GR to draw down additional federal dollars through the Medicaid program. As described earlier, the LBB estimates the average annual cost of a waiver client at \$249 (including family planning and non-family planning services), with \$40 paid by the state and \$209 paid by the federal government. As a result, a \$1 million state expenditure on the waiver could draw down \$5.2 million in federal funds ($\$209 / \$40 = 5.2$ federal dollars per state dollar).

If the state were to adopt this funding strategy, cost estimates for a waiver would have to account for the fact that many women formerly served by MCH and/or SSBG funds devoted to family planning would now qualify for coverage under the waiver instead. To address cost containment concerns, the state could place a cap on the number of waiver enrollees or adjust the income eligibility criteria for the program. As with all waiver applications, the state would have to demonstrate that their proposal is budget-neutral to the federal government; in other words that the cost of providing family planning services is offset by savings from averted Medicaid births.

Among the concerns raised by this potential swapping of funds is its impact on access to services for minors. The waiver described in HB 2606 would exclude women under age 18, and if MCH and SSBG funds are moved out of the family planning budget, only minors who qualify for regular Medicaid coverage or who have access to a Title X clinic could receive subsidized services. Swapping funds may also impact the providers of family planning services. For example, clinics that currently receive block grant funds stand to lose an important source of revenue if the state moves toward a Medicaid-focused family planning program. Budget constraints and political priorities at different levels of government are an additional consideration. Depending on one's perspective, federal MCH and SSBG dollars may be a more (or less) stable funding source than state GR appropriations.

Aside from the issue of cost, another obstacle for the type of waiver described in HB 2606 is interest group opposition. In July of 2002, the Greater Austin Right to Life Committee organized a campaign to encourage citizens to contact Governor Perry and ask him to not endorse the women's health waiver under development by HHSC. The group objects to the waiver because it would allow for increased funding of family planning organizations that provide abortion services and referrals.⁶⁰ However, a Scripps Howard Texas poll conducted in 2002 suggests that a majority of Texans may not share this opposing view. Seventy percent of survey respondents favored increased funding for family planning services and counseling to reduce unintended pregnancies, 76 percent favored continued public funding for Planned Parenthood to provide family planning services to low-income women, and 70

percent favored confidential access to contraception for teens.⁶¹

CONCLUSION

Given the potential for both individual health benefits and public cost savings, Texas should continue to explore all possible avenues for implementing a Medicaid family planning waiver in the near future. As discussed throughout this paper, public spending on family planning services results in Medicaid cost savings by preventing unintended pregnancies and averting pregnancy-related expenditures.

Although Texas currently spends MCH and SSBG dollars on family planning activities, these block grant funds may also be used to support a wide range of non-family planning activities. As a result, if the state could find a way to substitute MCH and SSBG dollars currently spent on family planning for state GR in a non-family planning portion of the budget, the newly available GR could be used to finance a waiver that takes advantage of the 90 percent reimbursement rate offered by the federal government for Medicaid family planning services.

Despite the fact that Texas may be able to implement a waiver at little or no added cost to the state, political opposition remains an obstacle. In the end, without a women's health waiver, both low-income women and taxpayers lose. Unintended pregnancies will continue to occur, and Medicaid will continue to pay. Given this reality, Texas can and should take advantage of the opportunity to expand access to family planning services through a Medicaid waiver.

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NOTES

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POST- CONGRESSIONAL LOBBYING AND LEGISLATIVE SPONSORSHIP: DO MEMBERS OF CONGRESS REWARD THEIR FUTURE EMPLOYERS?

REVOLVING DOOR LOBBYING AND PUBLIC POLICY

The number of former members of Congress leaving office to become lobbyists has increased substantially in recent years. In 1957, the *Congressional Quarterly Almanac* reported that less than a dozen former members of Congress were registered as lobbyists.¹ By 1994, *Congressional Quarterly* reported that 25 percent of former members of Congress found their way back into the Capitol Building representing special interests.² The revolving door syndrome has raised serious questions about the use of legislative power. In 1996, Congressman Charles Canady, critical of the increasing numbers of former members of Congress becoming lobbyists, stated that “revolving door lobbying smacks of impropriety,” and called for “restrictions on former public servants cashing in on their experience gained at the taxpayer’s expense.”³ This post-congressional career pattern suggests the possibility that the behavior of members of Congress may be affected by the members’ post-congressional career plans. As the number of former congressmen-turned-lobbyists increases, the possibility that public policy will be affected also increases. One way in which congressmen may behave differently in the public policy arena is in their sponsorship of legislation.

This study gauges the effect of post-congressional lobbying on bill sponsorship in the U.S. House of Representatives. The findings indicate that those members of Congress who intend to become lobby-

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ists remain considerably more active in the legislative arena during their last term in office than those who simply intend to retire from public life. One could conclude that those who intend to become lobbyists either may be sending signals to prospective interest groups by informing them of their policy expertise or may be rewarding future employers with a public policy favorable to the future employers in exchange for post-congressional employment. These two possibilities present the prospect that elected officials are using their congressional seat as a stepping stone to a more profitable career.

CONTEXT

When the framers of the U.S. Constitution set out to create a new government, they had the intention of controlling the ambitions of those chosen to represent the public by requiring frequent elections.⁴ Those who wish to represent the public interest are reliant on the support of their constituency. The use of "frequent elections" ensures representatives are dependent on and sympathetic to their constituents.⁵ Because the success of elected officials is so intrinsically tied to the wishes of their constituents, the likelihood of misusing their power is theoretically minimized and they are more likely to stay in office for longer periods. However, Madison did warn that representatives "will be compelled to anticipate the moment when their power is to cease."⁶

The framers of the U.S. Constitution accepted ambition as a necessary condition that could actually improve representation in American politics; however, ambition comes in different forms. Joseph Schlesinger describes three types of ambition—progressive, static and discrete.⁷ When analyzing members of Congress on the verge of retirement, discrete ambition, defined as the ambitions of members of Congress upon leaving public life, is the most important indicator that reflects retiring members' desire to serve for a specific term and then withdraw from public office. The electoral process cannot control discrete ambition because when members of Congress no longer seek reelection, their constituents can no longer hold them account-

able. Furthermore, discrete ambition may threaten democratic policymaking since it is based on the representatives' personal and hidden ambitions rather than the interests and desires of their constituencies. Representatives on the verge of leaving elected office may have post-tenure goals and ambitions that conflict with their public interest role.

The post-congressional lobbying is a recent phenomenon. In 1955, of the 579 persons registered as lobbyists, only 11 were former members of Congress.⁸ While the number of former members-turned-lobbyists may have been relatively small in comparison to today, Lester Milbrath argues that earlier former members of Congress might not have been particularly competent.⁹ As public policy has become more complex, the number of former members of Congress who have become lobbyists has increased substantially. John Hibbing finds that the

structure of the institution and its committee system "encourages representatives to specialize"¹⁰ in particular policy areas. This specialization is most marketable to lobbying interests.

In addition to a specific policy specialty, the modern former member brings an understanding of the rules of and key actors

within the system.¹¹ An understanding of public policy and institutional arrangements became increasingly important as the substance of policy grew in complexity. The traditional "iron triangle" model¹² of policy relationships was replaced with the more complex system of "issue networks."¹³ If the modern representatives can demonstrate mastery of this complex system, they are valuable to those who wish to understand and influence future outcomes. Former members of Congress, especially those with long congressional tenures, are now considered assets to lobbying organizations.

THE LEGISLATIVE BEHAVIOR OF CONGRESSMEN IN THEIR FINAL TERM

LAME DUCKS

When contemplating leaving office, legislators change their behavior in a variety of ways. Some suggest that legislators who expect to leave office become lame duck representatives and are less active in the legislative arena. In this vein, Kenneth

This post-congressional career pattern suggests the possibility that the behavior of members of Congress may be affected by the members' post-congressional career plans.

Prewitt reports that, "Office holders wishing to retain their positions will be more concerned about the electorate than will office holders unconcerned about their political future."¹⁴ For these legislators, the need to keep in close contact with their constituency is less important once they made the decision to retire. As Stephen Frantzich suggests, "[F]or one's constituency the choice to retire means a slacking off of efforts and a reduction in the ability to faithfully represent them. For the Chamber, it is clear that retirees do not carry their weight."¹⁵ Representatives serving out their last term as lame ducks are less likely to travel back to their home districts or assign staff to their district offices.¹⁶

MORE FOCUSED

Other political scientists have found little change in the behavior of members of Congress during their last term in office. John Lott and Robert Reed believe that the electoral process eliminates politicians whose policy positions deviate from those of their constituents.¹⁷ Lott and Davis further conclude that retiring senators actually deviate less during their last term of office,¹⁸ and that the "shirking is found to be completely eliminated"¹⁹ amongst those who become lobbyists or who seek future employment in government.

One might expect that the freedom associated with no longer having to appease constituents would lead to a greater willingness to tackle unpopular and risky issues, but Janet Hook finds that this is not the case. Hook reports that retiring members of Congress are not willing to take political risks even though they are free of electoral defeat. Hook writes, "Indeed, congressional leaders say the lame ducks seem less—not more—willing to take tough votes. Party discipline is harder to enforce, they say, because the leadership has lost leverage over people who no longer need them for future committee assignments or legislative favors."²⁰

SHIFT IN FOCUS

The contention that retiring representatives are risk-averse is disputed by Gary Jacobson who argues that lame duck representatives are actually more willing to support unpopular positions than those who have to face their constituents.²¹ Other researchers conclude that "elections apparently discourage members from having a focused and

potentially successful legislative agenda."²² The argument is that retiring members of Congress will be less inclined to sponsor "frivolous legislation," and more inclined to have a focused agenda,²³ perhaps because they have shifted their focus to a narrower constituency—possible future employers.

These studies suggest that the behavior of retiring members of Congress may differ from those who are not retiring in ways that have consequences for the system of representation and the formulation of public policy. The importance of this issue requires further investigation into the behavior of members of Congress during their last term of office. The statistical pattern of bill sponsorship during representatives' last term is the dependent variable in this study.

LEGISLATIVE ACTIVITY

Unfortunately, the literature explaining bill sponsorship is relatively sparse.²⁴ Much of the literature that studies legislative activity tends to focus on roll call voting or co-sponsorship of bills.²⁵ While this literature provides useful insight into the legislative behavior of representatives, a more stringent measure of their priorities is reflected by analysis of the bills they choose to fully sponsor.

Members of Congress sponsor bills for a variety of reasons. Only a small percentage of bills actually become law. Representatives may introduce bills not with the intention of seeing them become law but with the intention of sending a signal to some group. These signals may be sent to a variety of groups including other members, the executive branch,²⁶ individuals outside of government institutions, the media in order to attract exposure for themselves or certain issues, or their constituents. Perhaps of greatest concern for the public, however, are the members of Congress that may sponsor legislation in order to send signals to interest groups. While this study does not analyze the substance of the bills, it does look at the number of bills that are introduced, and asks whether representatives' future career ambitions have any effect on their legislative activity during their last term.

Former members of Congress, especially those with long congressional tenures, are now considered assets to lobbying organizations.

RESEARCH DESIGN

The hypothesis of this article is that legislators send signals through bill sponsorship to interest groups and lobbying organizations. To control for the possibility that members of Congress are sending signals to their constituents, only the legislative activity of members of the House of Representatives during their last term in office is analyzed. By focusing on the last term, one can assume that legislative behavior is not motivated by the desire for reelection. While some members of House of Representatives run for other offices, those included in this data set are those who voluntarily retired from public life meaning they did not run for higher office, their constituents did not remove them from office, and they were not appointed to executive or judicial positions.²⁷ The unit of analysis in this study is the individual member of Congress who served at least two consecutive terms before voluntarily retiring between the years of 1984 and 1996. This time period was selected because it provided a sufficiently large sample for analysis and for which reliable data was available. There were a total of 169 former members of the House of Representatives who served at least two consecutive terms and voluntarily retired from office during this period.²⁸

Data was gathered on a variety of measurement items. The number of bills introduced during the representative's last year in office is hypothesized to be a function of the number of bills introduced in the second to last term in office, the representative's age, the number of years in office, and whether or not the representative became a lobbyist. The descriptive statistics for each of these variables are presented in Table 1. These include the minimum and maximum counts, as well as the mean counts and the standard deviations.

LEGISLATIVE ACTIVITY

Wendy Schiller points out that there are resource, opportunity and political costs associated with in-

roducing bills in Congress.²⁹ These costs are much greater for bill sponsorship than for other types of legislative activity. Unlike resolutions, amendments, private bills and even co-sponsored bills, actual sponsorship of a bill is a clear commitment to the issue the bill addresses. Bill sponsorship gauges firm commitment to an issue and can be used to send signals to internal and external actors.

Once all of the former members who retired voluntarily from the 99th through the 104th Congresses were identified, the number of House bills that each member introduced during his or her last term was recorded.³⁰ The number of House bills excludes all types of resolutions, amendments, private bills, and co-sponsorships. The data distribution describes a wide range of legislative activity levels including six former members of Congress who did not sponsor bills during their last term and one member who sponsored 47 bills—the most sponsored by any member. The mean number of bills sponsored by retiring members meeting the selection criteria was 12.41.

Using ordinary-least-squares (OLS) regression, a model was developed and several hypotheses tested to predict legislative activity during the member's last term. As previously stated, the numbers of bills that are sponsored during the last term are expected to affect the member's post-congressional career plans. It should be noted that there is no good measure of post-congressional intentions except for actual behavior. Since it is impossible to measure the intentions of congressmen who are planning to retire, their observed employment behavior is assumed to be a suitable proxy for their intentions. It is assumed that those who became lobbyists had future expectations of becoming lobbyists upon leaving office.

LOBBYISTS

The analysis shows that those representatives who plan to become lobbyists will remain more active in the legislative arena than those who do not plan to

Table 1
Descriptive Statistics for the Dependent and Independent Variables¹

Variable	N	Minimum	Maximum	Mean	Std. Deviation
Last Term's Activity	169	0	47	12.41	10.27
Previous Term's Activity	169	0	81	14.66	13.42
Age	169	34	85	61	11.05
Tenure	169	3	54	17	9.28

1.Note: Because of the dichotomous nature of the variable lobbyists, descriptive statistics for it are not provided. The variable is described in the text.

become lobbyists. Non-lobbyists were more likely to become lame duck representatives while those who became lobbyists were more active members of Congress. Discrete ambition, therefore, may be the cause of Lott's finding of little shirking among representatives-turn-lobbyists, and Herrick, Moore and Hibbing's finding that retiring representatives have more focused agendas.³¹ Those who plan to become lobbyists are attempting to avoid negative publicity which may harm them down the road. In the model, the variable describing the representative's post-congressional career is a dichotomous variable, coded "0" if the member retired from public life but did not become a lobbyist and "1" if the member retired from public life and did become a lobbyist.³² Miscellaneous sources indicate that, of the 169 members meeting the selection criteria, 64 (38 percent) became lobbyists.³³

THE PENULTIMATE TERM

It is further hypothesized that the legislative activity of the term previous to the last term will influence the last term's legislative activity. Those who sponsored large quantities of legislation during their last term are more likely to have sponsored large quantities the term before. This variable is measured the same way the dependent variable is measured except for the time period being examined. It should be noted that those members who voluntarily retired from office after serving only one term were not included in the analysis because it was necessary to compare the penultimate term's activity to the final term's activity. It should also be noted that the absolute level of legislative activity in the penultimate term is used rather than the difference in legislative activity between the penultimate and final terms because using the difference may distort the relationship. Different members whose level of legislative activity did not change would have been indistinguishable in the model regardless of the level of legislative activity.

As reported in Table 1, during the second to the last term in office exiting members introduced a mean of 14.66 bills. This is a difference of 2.25 bills more than the mean introduced during the last term. During the penultimate term, the most bills sponsored by a former member of Congress is 81, and the least is zero.³⁴

Representatives may introduce bills not with the intention of seeing them become law but with the intention of sending a signal to some group.

AGE AND TENURE

It is expected that the retiring member's age and his or her length of congressional service will influence the member's legislative activity. It is understood that those who are older will be less active during their last term. While it is difficult to control for health and stamina, age plays a simple surrogate for such conditions. Table 1 shows that the mean retirement age was 61 with one person retiring at the age of 34 and another at the age of 85.

Tenure also affects legislative activity. Tenure is measured as the number of years served by a member of Congress. Those who have been in office longer have the advantage of possessing greater expertise and seniority, marketable commodities desired by lobbyists. Higher tenured representatives may be less threatened by electoral defeat and less likely to sponsor frivolous legislation. Table 1 shows that one person left office after serving three years, and one person left office after serving 54 years.

The mean number of years served was 17.

FINDINGS

Table 2 shows the results from the OLS regression. In Model 1, we see that the member's age or tenure does not significantly impact the number of bills introduced during the last term. With a correlation coefficient of 0.01, the length of service in the House is statistically insignificant in determining the legislative activity witnessed during the last term. This is a surprising find, considering that more senior members tend to be less active. Since they are more likely to hold positions of power, they are more likely to have their bills taken seriously and less likely to sponsor superfluous legislation. For example, those who served ten years in the House sponsored a mean of 11.78 bills, while those who served 30 years sponsored only 9.3 bills. A similar pattern emerges for age. With a correlation coefficient of 0.006, age of the representative is statistically insignificant in determining the legislative activity in the last term in office. Members in their 50s and 60s are more active than members in their 70s and 80s. The results of this model suggest that age and tenure are not significant in determining the level of legislative activity.

Since these variables are not statistically significant in Model 1, they were excluded from Model 2.

In Model 2 the number of bills that are introduced during the last term is strongly related to both the previous term's legislative activity and the member's future expectation to become a lobbyist. Those members who were active during the last term also were active during the previous term. In Model 2, for every additional bill introduced during the penultimate term there were 0.56 additional bills introduced in the final term. Thus, congressmen active in terms prior to their final term tend to remain active during their last term.

Of greatest significance is the role of post-congressional lobbying. Those who went on to become lobbyists remained significantly more active during their last term in office than those who did not become lobbyists. Controlling for other factors, post-congressional lobbyists sponsored on average 2.2 more bills than those representatives that did not become lobbyists for the time period and criteria considered. This modest, statistically significant increase suggests that the behavior of members of Congress may be dependent on their post-congressional ambitions. Members of Congress who expect to become lobbyists sponsor more bills during their last term, while those who do not expect to become

lobbyists sponsor fewer. What is equally striking is that almost half the variance can be explained by using these two variables. With a robust R^2 of 0.53, the previous term's legislative activity and the expectation of becoming a lobbyist upon leaving Congress are significant factors in predicting the legislative behavior of members of Congress.

There are several possible explanations for why members have remained active during their last term. One possibility is that the activity is a function of an agreement of *quid pro quo*. Representatives may be sponsoring legislation with the intent of appeasing future employers. This may explain why Herrick, Moore and Hibbing find that legislative agendas become more focused for those who plan to retire.³⁵ It may also be the case that this intensity is due to the presence of a more focused audience, specifically interest groups and lobbying organizations. Another less ominous possibility is that members of Congress who plan to become lobbyists sponsor more legislation during their last term because they are sending signals to interest groups—informing interest groups of the member's policy expertise. From this perspective, the intent of bill sponsorship is not to subvert public policy, but simply to advertise to prospective clients.

Variables	Model 1	Model 2
Lobbyist	2.34* (1.19)	2.2* (1.14)
Previous Term's Activity	.563*** (.043)	.56*** (.04)
Age	.006 (.07)	
Tenure	.01 (.08)	
Constant	1.143 (3.54)	3.5*** (.92)
N	169	169
Adjusted R ²	.52	.52
R ²	.53	.53
* $p < .05$ ** $p < .01$ *** $p < .001$		

CONCLUSION

One way to study the extent to which bills are used as signals to interest groups and lobbying organizations is to test the likelihood of success of a bill. One hypothesis could be that bills introduced during the last term for the purposes of sending signals would not be successful in becoming law. If the intent of the bills was to advertise or send signals then they may not be successful because it may not have ever been intended to be successful. If bills are statistically successful at becoming law as those introduced by non-retiring members, then one might speculate that the bills were being introduced for some other purpose than sending signals, perhaps as a reward to future employers.

There is anecdotal evidence of members sponsoring legislation or serving on committees immediately before leaving office that had direct bearing on the interests of their future employers. For example, Congresswoman Marilyn Lloyd, Democrat from Tennessee, served on the Armed Services Committee, and then lobbied for Lockheed—a major Pentagon Contractor. Roy Rowland, the former Georgia Democrat who once sat on the Commerce Committee, left Congress and lobbied on behalf of 28 clients,

many of whom had legislation pending before his old committee.³⁶ In an extreme example, Bill Gradison, the one time ranking Republican on the Subcommittee on Health Care, resigned just two months after being reelected to office with 70 percent of the vote in order to become president of the Health Insurance Association of America whereupon he attacked the Clinton administration's proposed national healthcare plan.

The notion that members of Congress become lame ducks during their last term is a simplification of reality. There is a much more complex set of behaviors and motives at work and it becomes necessary to recognize the ambitions of members of Congress during different periods throughout their legislative career. The evidence presented here suggests that characterizing those who voluntarily retire as lame ducks may hide a greater variance in the behavior of elected officials. Those who voluntarily retire may also have discrete ambitions that potentially jeopardize the interest of the public.

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NOTES

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4. James Madison, Alexander Hamilton, and John Jay, The Federalist Papers, Ed. George W. Carey and James McClellan. (Dubuque: Kendall/ Hunt Publishing Co., [1788] 1990), p. 267.
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6. Ibid., p.290.
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9. Lester W. Milbrath, The Washington Lobbyists, (Chicago: Rand McNally and Co., 1963), p.67-68.
10. John R.Hibbing, Choosing To Leave: Voluntary Retirement From The U.S. House of Representatives, (Washington D.C.: University Press of America, 1982), p. 60.
11. Ibid, pp. 60-61.
12. The iron triangle model posits a long-term standing relationship among members of Congress, interest groups and bureaucrats that oversee a policy area.
13. Hugh Hecl, "Issue Networks and the Executive Establishment," in Public Policy Theories, Models, and Concepts: An Anthology, ed. Daniel C. McCool (Englewood Cliffs, NJ: Prentice Hall, 1995), p. 263. Issue networks are informal relationships among a large number of actors who work in broad policy areas
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20. Janet Hook, "Hill's Flock of Lame Ducks: Legislative Wild Cards," Congressional Quarterly, (September 12, 1992), p. 2694.
21. Ibid.
22. Herrick, et. al., Unfastening the Electoral Connection, p. 225.
23. Ibid., p. 214.
24. The following have dealt with bill sponsorship: William P. Browne, and Delbert J. Rinquist, "Sponsorship and Enactment: State Lawmakers and Aging Legislation, 1956-1978." American Politics Quarterly, vol. 13 (1985), pp. 447-66; Rebekah Herrick, Michael K. Moore, and John R. Hibbing, "Unfastening the Electoral Connection: The Behavior of U.S. Representatives When Reelection Is No Longer a Factor," Journal of Politics, vol. 56, no.1 (February 1994); John R. Hibbing, "Contours of the Modern Congressional Career." American Political Science Review, vol. 85 no. 2 (June, 1991) pp. 405-428; Wendy J. Schiller, "Senators as Political Entrepreneurs: Using Bill Spon-

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25. For examples of literature focusing on roll call voting behavior see the following: David R. Mayhew, *Congress: The Electoral Connection*, (New Haven, Conn.: Yale University Press, 1974); John W. Kingdon, *Congressmen's Voting Decisions*, (Ann Arbor: University of Michigan Press, 1989); and Douglas R. Arnold, *The Logic of Congressional Action*, (New Haven: Yale University Press, 1990). For examples of literature focusing on cosponsorship see: Mayhew, *The Electoral Connection*, 1974; James E. Campbell, "Cosponsorship Legislation in the US Congress," *Legislative Studies Quarterly*, vol. 7 (August, 1982) pp. 415-22; William P. Browne, "Multiple Sponsorship and Bill Success in US State Legislatures," *Legislative Studies Quarterly*, vol. 10 (November, 1985) pp. 483-88; Daniel Kessler and Keith Krehbiel, "Dynamics of Cosponsorship," *American Political Science Review* vol. 90 no. 3 (1996) pp. 555-566; Rick K. Wilson, and Cheryl D. Young, "Cosponsorship in the US Congress," *Legislative Studies Quarterly*, vol. 22 no. 1 (February, 1997) pp. 25-43.
 26. Wilson and Young, *Cosponsorship in the US Congress*, 1997.
 27. The data identifying those members who retired voluntarily during the period 1984 to 1996 comes from Rebecca Borders and C.C. Dockery, *Beyond the Hill: A Directory of Congress from 1984 to 1993 Where Have All the Members Gone?* (Lanham MD: University Press of America, 1995). In it the authors identify all of those members who retired during that period, and they find out what they have been doing since leaving office. The list was supplemented with data from Roll Call's "Casualty List—The 105th Congress". <http://www.rollcall.com/rcfiles/casulties.htm>. list of exiting members of the House, accessed January 2000; and *The Roster of United States Congressional Office Holders and Biographical Characteristics of Members of the United States Congress. 1789-19993: Merged Data: ICPSR number 7803*.
 28. Being that I also control for the previous legislative activity of individual members of Congress, I exclude all those members who served only one term.
 29. Schiller, "Senators as Political Entrepreneurs", p.188.
 30. The data counting the number of bills that were introduced by each member of Congress comes from : *The Library of Congress, Thomas Legislative Information on the Internet*. Online. Available: <http://thomas.loc.gov/>. Accessed January 7, 2000.
 31. Lott, "Attendance Rates", p. 133; and Herrick, Moore and Hibbing, "Unfastening the Electoral Connection", p. 214.
 32. By public life I simply refer to the member's decision to seek an elective office or to be appointed to an executive or judicial post.
 33. The data identifying those members who became lobbyists during the period 1984 through 1996 comes from Borders and Dockery, *Beyond the Hill* (1995); Arthur C. Close, and John P. Gregg, *Washington Representatives*, (Washington D.C.: Columbia Books Inc., 1987); Arthur C. Close, Gregory L. Bologna and John P. Gregg, *Washington Representatives*, (Washington D.C.: Columbia Books Inc. eds. 1989); M.A. Bettelheim, *Directory of Registered Federal Lobbyists*, 1st ed. (Orange, NJ: Academic Media, 1973); and the Center for Responsive Politics, <http://www.crp.org/lobbyists/database.htm>. Accessed: January 12, 2000; and Amward Publications, *Washington Lobbyists/ Lawyers Directory '79/80 3rd ed.* (Washington DC: Am Ward Publications, 1979).
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 36. Eilperin, "Revolving Door," Online.

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21ST CENTURY SOCIAL SERVICES: A PRIVATE OR PUBLIC AFFAIR?

EXAMINING THE ROLES OF
GOVERNMENT AND VOLUNTEERS
IN SOCIAL SERVICE DELIVERY

In his 2002 State of the Union address, President George W. Bush encouraged all Americans to contribute at least two years of community service over their lifetimes.¹ Since the late 1980s, policymakers and politicians have made similar appeals for greater volunteerism and community service, advocating them as a remedy for declining civic participation and as a better model for delivering social services than government-based programs. Political leaders justifiably encourage volunteering since citizen participation has always played a central role in American culture. In fact, recent estimates indicate that 44 percent of adults—nearly 84 million Americans—formally volunteered for groups and organizations in their communities during 2001—a volunteer workforce equivalent to more than nine million full-time

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employees. In economic terms, these contributions of the volunteer work force are valued at \$239 billion.² Indeed, volunteerism plays a vital civic and economic role in American society.

In spite of its potential economic and civic benefits, however, volunteerism as a replacement for government-based social services is a highly oversimplified policy. It incorrectly interprets the relationship between volunteer activities and government-sponsored social programs, ignores the limitations of volunteer and nonprofit efforts, and undermines the unique strengths and accomplishments of the various productive sectors of the economy.

A BRIEF HISTORY OF VOLUNTEERISM AND THE WELFARE STATE

The original providers of social welfare services in the United States were religious institutions and family support networks. During the 18th and 19th centuries, these voluntary associations expanded and attempted to address a growing number of social needs including hunger, child welfare, and poverty. Christianity's prominent role in American society acted as one impetus for this expansion. The second "Great Awakening," beginning around 1800, unleashed a wave of public energy for Christian evangelism, which spread to a multitude of social welfare causes.³ A desire to maintain social order also spurred the growth of voluntary organizations. Following the Civil War, industrialization, urbanization, and immigration all increased the demand for social welfare services. Through the work of Jane Addams, Lillian Wald, Florence Kelley, and others in the settlement home movement, formalized social service institutions emerged and laid the groundwork for the contemporary field of social work.⁴

Over the course of the 20th century, public interest in providing social welfare services through the government increased dramatically. During the Great Depression of the 1930s it became clear that private associations and informal support networks were ill-prepared to meet the growing

needs of many citizens. As social unrest became a cause for concern, the United States government began to provide social services on a broad scale for the first time. Concentrating on relief, recovery, and reform, President Franklin Delano Roosevelt used federal programs to provide for the social welfare of the American public. Replacing religious and private organizations, the government gave birth to the welfare state. For the next fifty years, American presidents continued to maintain or extend the role of the government as the main provider of social services.⁵

The expansion of government's role in social services such as Medicare, Social Security and welfare continued through the Carter presidency. Eventually, however, government assistance for social programs became an issue of contention.⁶ During the 1980s, an ailing economy, skyrocketing national debt, and concerns about public dependency on

federal assistance made welfare programs an appealing target for budget cuts. The Reagan administration gradually scaled back social welfare spending and transferred many programs from the federal government to states, localities, and private organizations.⁷

While public support for spending on social services de-

clined in the 1980s and 1990s, significant needs persisted among the poor and otherwise disadvantaged in the United States. To address this situation, President George H. W. Bush proposed that the nation's nonprofit organizations and volunteers assume the role that government once played in providing social assistance. To support this initiative, the Bush administration created the Points of Light Foundation.⁸ This strategy remained popular at the federal level through the Clinton administration and during the present administration of President George W. Bush. Its latest incarnation, the White House Office of Faith-Based and Community Initiatives, creates competition from faith-based organizations for government social service contracts and broadens the circle of organizations replacing government social services with private programs.⁹

Since the late 1980s, policymakers and politicians have made similar appeals for greater volunteerism and community service, advocating them as a remedy for declining civic participation and as a better model for delivering social services than government-based programs.

WELFARE'S FALL FROM FAVOR

While many may question the efficiency of government-based social services, few deny that the government delivery model has made great progress for the cause of social welfare. Although government assistance was originally developed as a social service delivery model designed to meet the needs of the public in ways private charities, churches, and informal associations could not, over time it has fallen in popularity. Three prevailing schools of thought constitute the rationale for the continuing contraction of government-based social services, and each raises important questions for policymakers and administrators.

First, "smaller government" advocates claim that the government is unable to provide social services in a cost efficient manner. According to Libertarian Party activist Steve Dasbach, "Over the past 30 years, politicians have spent \$7 trillion on government programs to eradicate social problems. Now, they're forced to admit they did such a terrible job and wasted so much money that the only solutions left are non-governmental solutions."¹⁰ While social service costs are sizeable, there is no specific evidence that private organizations are capable of providing programs at a lower cost. The large cost of government-run programs can be attributed to other inefficiency factors in government, many of which non-government organizations must also confront. George Frederickson, former president of the American Society for Public Administration, notes that "most public sector problems trace not to poor management but to flawed policy, political interference, inadequate resources, impossible jobs, and overblown reforms."¹¹ In other words, the cost of government social service programs can be decreased if policymakers addressed other problems within government. However, private organizations confront many of the same inefficiency issues and consequently there is little guarantee that their costs will be lower.

Second, critics argue that government-sponsored programs lack quality because impersonal bureaucracies are incapable of facilitating caring, human contact. This perspective proposes that volunteers, whose contributions of time and effort are moti-

vated by altruism and civic duty, provide more caring human contact and personalized services. There is no doubt that a human connection in the realm of social services adds value to any such program. However, this interpretation undermines the altruism and civic motivation of civil servants who comprise the bureaucracy. This position also ignores the core characteristics of public administrations that enable them to provide the highest quality of services to the public. According to Frederickson, these characteristics include "representative democratic government, merit appointment and promotion, efficiency, economy, equity, separation from politics, and a commitment to the greater good."¹²

Third, proponents of volunteerism express concern regarding the decline in social capital, an idea that gained currency with the publication of Robert Putnam's book, *Bowling Alone: The Collapse and Revival of American Community*. Putnam, a professor of public policy at Harvard University, proposed volunteerism as a strategy for combating the decline in civic life in the United States. His research documented de-

clining civic engagement in political, religious, and voluntary action, and a broader decline in "social capital," defined by Putnam as the benefits of belonging to a social network or community.¹³ Neighbors, for example, create social capital when they organize neighborhood watch groups to safeguard each other's homes. According to Putnam, this downward trend in social capital and civic engagement began after World War II and accelerated each subsequent decade. This decline takes the form of diminishing participation in "secondary associations" such as parent-teacher associations, neighborhood associations, civic and fraternal organizations and bowling leagues.¹⁴ Putnam's message resonates in light of the renewed interest in volunteerism and community involvement following the events of September 11. In the months following the terrorist attacks, citizens overwhelmed social service agencies with offers of help for victims. President George W. Bush responded by creating the USA Freedom Corps, a national service program designed to support homeland defense efforts.¹⁵ While there are solid arguments against the claims that government-delivered social services are cost-ineffective and preclude a human

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connection, volunteerism does appear to be the best way to fulfill the desire for civic engagement.

VALORIZING VOLUNTEER EFFORTS

Putnam's premise that civic engagement is a democratic cornerstone aligns with America's historical memory. According to Susan Ellis, a volunteerism expert, "Almost all institutions that benefit society today were started by volunteers before America won its independence. Teachers, doctors, fire fighters, police officers, postmasters, armies and newspaper writers worked without compensation."¹⁶ Similarly, according to the theory of the "virtuous citizen," civic participation and active engagement in public life lie at the

heart of effective citizenship. As summarized by Frederickson, attributes of a virtuous citizen include the capacity for philosophical judgment, belief, and individual moral responsibility. This requires citizens to possess a civic life whereby they make philosophical judgments that uphold and defend the nation's values, of which civic participation is a cornerstone.¹⁷ In exchange, the government bears a responsibility to allow citizens opportunities for participation. According to Kenneth Ashworth, LBJ School of Public Affairs professor and former Texas Commissioner of Higher Education, "People live together most productively and harmoniously . . . if they have the opportunity and freedom to participate and be heard in setting the goals and purposes of their society . . . [and] if they have the opportunity to share in the country's productive capacity and to participate in the actions and work of their society."¹⁸

While volunteerism may be a cornerstone of a functioning democracy, volunteer-based social services are not adequately positioned to entirely replace government as the primary vehicle for delivering social services. Such an interpretation not only underestimates the complexity of the relationship between volunteers and government in social

service delivery, but also ignores the limitations volunteers and nonprofit organizations face in providing social services.

Lester Salamon, Director of the Johns Hopkins Center for Civil Society Studies, argues that a "romantic mythology" is largely responsible for creating the view that a thriving volunteer sector can reduce or replace government programs. This my-

thology envisions "spontaneous citizen action as both an alternative to social programs provided by the state, and the most effective vehicle for citizen participation in public affairs."¹⁹ Many policy analysts are skeptical about this romanticized citizen service proposal because it often stems from a deeper desire for government expansion or contraction. According to a recent study by the Urban Institute, "Some fear that civil society is simply a ploy to replace government,

while others view it as a mere smoke screen for increasing government spending through nongovernmental intermediaries."²⁰ Thus, advocates for volunteerism are not only those who favor smaller government, but also those who would like to see more government funds funneled into social services via nonprofit organizations. Both groups can use volunteerism as a narrow platform to achieve broader ends.

Those who advocate volunteerism on the basis of decreased government ignore a study conducted by Salamon and fellow Johns Hopkins researcher S. Wojciech Sokolowski which investigated the sources of civic participation and voluntary behavior. Based on a review of data on volunteer participation in 24 countries taken from the Johns Hopkins Comparative Nonprofit Sector Project, the study found that volunteer activity levels increase with government social welfare spending and that the scale of this activity increases with the size of the formal nonprofit sector. The researchers concluded that government social welfare enhances voluntary activity:

It appears that this variation is related to the extent of government social welfare activity . . . [and] seems to be due to the contribution

One unique characteristic of nonprofits is an inherently discriminatory delivery system that is responsive to the interests of donors and volunteers alone. The intention is not to serve one population at the expense of another, but nonprofits must target services to select populations due to their limited institutional capacity.

that government support makes to the expansion of organized nonprofit activity . . . Especially telling is the challenge that our data seem to pose to the conservative political theory that government social welfare involvement crowds out voluntary initiative. If anything, the opposite seems closer to the truth.²¹

The study's evidence of a mutually reinforced relationship between government and voluntary participation in social welfare provision indicates that shifting the role of social service delivery from government to the voluntary sector is neither good policy nor an effective remedy for declining civic engagement.

The relationship between government and volunteers is broad, deep, and multidimensional. Volunteer contributions figure prominently in government delivery of social services. According to the *Nonprofit Almanac*, a joint publication of Independent Sector and the Urban Institute, of the 55 percent of the adult population that volunteered in 1998, 16 percent of volunteer time was spent in government.²² Volunteers participate in a myriad of settings: public schools, public libraries, local parks and recreation programs, hospitals, centers for services to the aging, courts, prisons, and homeless shelters, among others. Citizens also volunteer in many capacities: citizen advocacy groups, informal community activities, AmeriCorps, and even court-mandated community service.²³

In Texas, state agencies successfully employ more than 200,000 volunteers in over 100 different service positions, according to a recent survey by LBJ School professor of volunteerism Sarah Jane Rehnborg. The estimated annual value of the total time contribution amounts to more than \$35 million, excluding cash donations and fundraising efforts on the part of volunteers. But the real value of volunteers is more than monetary. Volunteers in Texas state agencies help the government connect with citizens and provide services to communities that might not otherwise be reachable for lack of financial or human resources.²⁴ For example, the Texas Parks and Wildlife Department's Volunteer Instructors program employs 3,500 trained and certified volunteers to deliver

hunter, boater, and angler education to approximately 50,000 Texans each year. It is unlikely that the Department could sustain these programs without the assistance of volunteers.²⁵

When it comes to the personal experience of volunteers, a *New York Times Magazine* article by Sara Mosle, "The Vanity of Volunteerism," offers some insight. When Mosle quit teaching to pursue a career in journalism, she decided to serve as a mentor to twelve of her former students, all Dominican and African-American children from upper Manhattan. As the story unfolds, Mosle wavers between enthusiasm for her kids, guilt that she cannot do more, satisfaction in her successes, and frustrations with her limitations. In the end, she concludes that her services are no substitute for government assistance. "What all these kids need isn't me, but a real after-school program."²⁶

THE LIMITATIONS OF VOLUNTEER EFFORTS

Mosle simply highlights some of the common limitations of volunteer efforts and concludes that the idea that volunteerism could replace government social service programs is impractical and overly idealistic.

Mosle's piece raises several important points about the shortcomings of volunteer efforts. Brandeis University law and policy professor Deborah Stone suggests that Americans view security as a desirable goal for communities. Organizational and financial security is certainly one advantage of public, tax-funded services since limited funding is a per-

sistent problem faced by many nonprofit organizations. In fact, Purdue University economist Richard Steinberg's research found that for every three dollars of government assistance cut, charitable organizations recoup, at best, one dollar.²⁷ Steinberg's research demonstrates the reality that government is the only institution with the capacity to secure social services for every American in need.

Another security issue related to a volunteer-based delivery model is the inability of managers to compel volunteers to complete needed work. Typically, this problem relates to the limited free time volunteers are able to provide, especially in an era when two-income families are increasingly prominent and short on time. In addition, there are some jobs that only the government will take on. Mosle cites the example of the Meals on Wheels program

in Dallas, Texas. Unable to recruit a sufficient number of volunteers to serve the Dallas elderly population, Meals on Wheels began offering to pay "volunteers" to deliver meals but found that a limited number of people were willing to work with the elderly under either arrangement.²⁸ In his classic essay, "The Tragedy of the Commons," Garret Hardin reinforces this concept, stating, "Social arrangements that produce responsibility are arrangements that create coercion, of some sort."²⁹ Because government social service programs are accountable to the public, they are *compelled* to provide reliable services via public administrators or face political retribution from the public. Public administrators, in turn, are essentially "coerced" to comply in order to ensure their own job security. Voluntary sector delivery models lack this security, as they are vulnerable to the whims of their donors and volunteers—persons over whom they have no compulsory powers.

Matters of equity also manifest themselves differently in government and volunteer-based models. Accountability dictates that government programs provide equitable benefits to all persons in need. One unique characteristic of nonprofits is an inherently discriminatory delivery system that is responsive to the interests of donors and volunteers alone. The intention is not to serve one population at the expense of another, but nonprofits must target services to select populations due to their limited institutional capacity.

It is worth noting that the voluntary sector model's reliance on volunteer labor creates problems regarding the retention of institutional memory. Mosle's article quotes former Independent Sector president Sara Melendez, who argues that the nature of volunteerism is changing. "People are volunteering, but when they do, it's more of a one-shot deal—half a day one Saturday—instead of once a week for x number of weeks."³⁰ Mosle also points out that there is a limited amount of knowledge volunteers can absorb during their brief and intermittent hours of service. She notes that she was able to understand much more about her kids as a teacher than as a volunteer mentor. "Had I not first seen my kids for five hours a day, 180 days a year, I doubt that I would have ever learned that vision problems accounted for a lot of Adam's reading difficulties or that Jaber's older brother was beating up on him."³¹

Some researchers have interpreted Mosle's article as a dismissal of the value of volunteers. However, Mosle herself points to several success stories among her "adoptees," including one student who

went on to win a college scholarship for community service. Mosle simply highlights some of the common limitations of volunteer efforts and concludes that the idea that volunteerism could replace government social service programs is impractical and overly idealistic.

VALUING VOLUNTEERISM ... AND GOVERNMENT

A more balanced view of the role of volunteers recognizes that the respective productive sectors that make up our society—public, private and voluntary—each occupy unique and essential roles. In their book *Reinventing Government*, Ted Gaebler and David Osborne observe:

Business leaders are driven by the profit motive; government leaders are driven by the desire to get reelected. Businesses get most of their money from their customers; governments get most of their money from taxpayers. Businesses are usually driven by competition; governments usually use monopolies. Differences such as these create fundamentally different incentives in the public sector . . . Government is democratic and open; hence it moves more slowly than business, whose managers can make quick decisions behind closed doors . . . Government must often serve everyone equally, regardless of their ability to pay or their demand for a service; hence it cannot achieve the same market efficiencies as business.³²

Gaebler and Osborne recognize that the private and public sectors operate differently because of different constraints, goals, and methodologies, which can also be said about the nonprofit sector. The differences between the three sectors should cause them to be considered complementary, not competitive.

The nonprofit sector functions uniquely to provide a diversity of approaches. The greatest benefit the nonprofit sector can provide is responsiveness. Unconstrained by incremental approaches dictated by the need to achieve agreement and accountability on a broad scale, the nonprofit sector can frequently function with greater freedom, agility, and flexibility to tackle the social problems of the day. Driven by mission, nonprofits can address needs that government and business do not. Alternatively, nonprofits can offer different versions of services offered by governmental or for-profit enterprises. In

other cases, nonprofits can advocate on behalf of communities or serve as laboratories where new and innovative approaches to social problems can be incubated and tested. At the same time, nonprofits' diversity and responsiveness create a highly fragmented sector largely characterized by resource constraints. These limitations cast doubt on the sector's ability to meet the massive social service needs of the United States on its own. Paul C. Light, vice president of the Brookings Foundation, best captures the unique strength of government to tackle the most ambitious problems on a massive scale:

Achievement appears to adhere to government's readiness to intervene where the private and nonprofit sectors simply will not. It is impossible to imagine the private sector taking the lead in rebuilding Europe . . . The federal government appears to do best when it exercises its sovereignty to take big risks that no other actor could ever imagine taking.³³

Nonprofits have strengths best used to address some societal issues in a distinct fashion; however, there are certain risks associated with social service delivery that only the government is capable of handling.

CONCLUSION

Voluntary associations and civic participation play a vital role in the functioning of American democracy and civic life. When politicians trumpet volunteerism, however, we should listen to their praise with caution. It is all too easy for romanticized, oversimplified notions about volunteerism to give rise to the view that volunteer-based efforts can or should replace government assistance as the preferred model for social service delivery. The reality is that providing social welfare services entails a complex set of relationships among government policies, government spending, and civic engagement. Each sector responds to some social needs better than others, leveraging their respective resources and capabilities to create unique solutions.

The risk of underestimating or ignoring this complex reality is that one sector may displace another and eliminate the benefits society derives from both sectors' contributions. If nonprofits and volunteer-based social services transplant government assistance, American society can no longer ensure a standard of equity to recipients of social services. Furthermore, placing such demands on the voluntary sector threatens to undermine its unique char-

acter. Satisfying the demands of millions may necessitate an evolution from diverse, responsive entities to larger, more bureaucratic institutions that mirror government institutions. Therefore, the best way to ensure that citizens in need receive the assistance they require is to preserve and encourage the participation of both government and nonprofits in the delivery of social services.

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EUROPEAN COMPETITION POLICY REFORM

INTRODUCTION

When Mario Monti, the European Union's Commissioner for Competition, first took office in 1999, his Belgian predecessor Karel Van Miert said, "Now you will have to get used to being thought of as the most powerful man in Europe."¹ Mr. Miert's remark rang true because competition policy has been among the most developed and successful areas of policymaking in the European Union (EU), with similarly broad supranational powers only in trade and monetary policies.² The Directorate-General for Competition (DG Competition), the European Commission's (EC) branch for determining and implementing competition policy, wields powerful discretion that affects consumer welfare and corporate profits throughout Europe and the world.

Recently, however, European competition policy and its architects have been the subjects of harsh criticism. First, the Commission's decision to block the \$42 billion GE/Honeywell merger in 2001, which would have been the largest industrial merger ever, sparked furious responses from across the Atlantic, questioning the validity of and motives for the Commission's merger control and competition policy. Then, in late 2002, the European Court of First Instance (CFI) overturned three Commission merger rulings in three months (Airtours/First Choice, Schneider/Legrand, and Tetra Laval/Sidel), pushing its authority and accountability into unprecedented embarrassment and peril. Finally, the Commission has struggled to maintain its overwhelming workload in an under-resourced environment.

As a result of these recent events, the Commission has initiated a comprehensive and radical reform effort. Initiated earlier as a part of Commissioner Monti's plan to prepare European competition policy for an enlarged EU and a more integrated global economy, the reforms have been revisited in response to both new external pressures and previously overlooked internal problems that have emerged in recent crises. This paper examines the framework for European competition policy, explains the case for reform, reviews

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reform measures to date, evaluates their effect, and analyzes factors that may determine future success of current reforms.

OVERVIEW OF EUROPEAN COMPETITION POLICY

Antitrust was a foreign idea to western European countries before and shortly after World War II when cartels and inter-firm cooperation were a normal part of the business environment across much of the continent. As an important component of the post-war reconstruction package, the U.S. pressured European governments to accept American-style competition as a fundamental principle of market operation. Partly due to the problem of cartels and concentrated markets in Germany, the Treaty of Paris framers incorporated strong antitrust provisions into the final text of the document.³

Despite the lack of precedent, from its inception, European competition policy has benefited from community-wide uniformity and consistency. After a short period of silence in the 1970s due to epidemic institutional sclerosis, European competition policy regained momentum in the late 1980s as Europe moved toward a single market. Between the Padoa-Schioppa report (1987) and the Cecchini report (1988), the Commission reached the conclusion that Europe would reap the full benefits of a single market only if competition policy promoted the full and free play of competition to accompany the lowering of internal trade barriers.⁴

Some now argue that competition policy offers one of the best examples of European policymaking as regulation, and perhaps of regulation as the most effective mode of European policymaking.⁵ Essentially, European competition policy pursues one precise goal: to defend and develop effective competition in the Common Market.⁶ The pursuit of this goal materializes in four main action areas: antitrust, merger control, liberalization of monopolistic economic sectors, and monitoring of state aid. This paper confines its scope to the first two areas.

European antitrust rules primarily target restrictive agreements and abuses of dominant market positions. Article 81 (formerly Article 85) of the EC Treaty prohibits price-fixing, production limitations, market or resource sharing between competitors,

discriminatory conditions imposed on parties not included in an agreement, and other cartel-like arrangements. Some such behaviors may be exempted from the prohibitions of Article 81 if they may ultimately encourage competition. Prior to the reforms, the Commission derived strong procedural power from Council Regulation 17 of 1962, which required companies to notify the Commission of every business dealing in order to receive an exemption from the prohibitions of Article 81.⁷ Apart from proceedings based on formal notifications, the Commission could also pursue investigations based on complaints from competitors or consumers, or simply on its own initiative. Article 82 (formerly Article 86) of the EC Treaty prohibits overcharging, hostile undercharging

aimed at excluding existing or prospective competitors, and other discriminatory policies of a dominant firm in a certain market.

Although the combination of companies through mergers, acquisitions, or joint ventures generally promotes market efficiency, abuses are also possible. The Merger Regulation of 1990 prohibits those mergers in

the EU that are likely to result in a company's engaging in anti-consumer behavior.⁸ The Merger Regulation empowered the Commission to act as a "one-stop shop," using a "community dimension" to investigate and decide whether to clear or block mergers.⁹ (According to EC protocols, the community dimension of a merger or acquisition is assessed using thresholds based on the combined turnover of the companies in question. The most important thresholds are the worldwide threshold [EUR 5 billion] and the Community-wide threshold [EUR 250 million]. Below these thresholds, authorities in member states enforce merger control under their own legislation.) Mergers involving combined revenues greater than the critical thresholds require Commission notification and approval before taking effect. The majority of cases receive clearance in a preliminary investigation known as Phase I. Those that fail to pass Phase I often have a good chance of passing Phase II, although before the reform very few companies could escape the four-month probe "without giving the Commission its pound of flesh in the form of disposals or pledges not to harm competitors."¹⁰ Only in very rare cases has the Commission prohibited a merger after the two investigative phases.¹¹

The Commission has a variety of enforcement

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options for use against specific cases it regards as anti-competitive, including the right to prohibit a deal before it commences, stop a particular practice currently in progress, and impose large fines. The Commission's decision can be appealed to the CFI or the Court of Justice of the European Communities (ECJ.) However, this check on powers can hardly be seen as adequate for achieving the desired balance between regulation and competition since a court ruling typically takes months or years—too long for any business strategy to remain viable.

THE CASE FOR REFORM

At the start of the new century, the system of competition policy formulation and implementation found itself beleaguered by a number of difficult problems after years of success and relatively smooth operation. The problems were internal and external in nature and varied in different fields of practice. For example, antitrust problems were procedural while merger control problems were substantive. Regardless of the specific problem, however, they shared the same root: European competition policy was outdated in an enlarged Europe, a more sophisticated economy, and a globalized world.

The Commission's antitrust policy suffered from inherent procedural problems. When Regulation 17 was adopted in 1962, the community had only six members. The economy was smaller and business transactions were easier. Both the Commission and national antitrust authorities lacked experience with antitrust law enforcement. More importantly, in the early days, market integration and the promotion of a single market were the central features that determined both the goals and the scope of antitrust policy.¹² Therefore, an *ex ante* control system made sense for businesses, market watchdogs, and the community as a whole.

Since 1982, as the EU grew to a more sophisticated single market economy of 15 members, the Commission found itself inundated with hundreds of notifications annually. Every notification had to be accompanied by appropriate investigative measures, published in the Official Journal in 11 languages, and other formalities applied as required by Regulation 17.¹³ With 25 member states just over the horizon, the

Commission's resources would certainly have been drained if the centralized prior, notification system had continued. Worse, a large portion of the heavy workload was unnecessary. No evidence better illustrates the dysfunction of the system than the stunning fact that in more than 35 years, Regulation 17 had only resulted in nine prohibitive decisions being made. In fact, for many cases, antitrust issues were of minor or no relevance.¹⁴

While the Commission's inherent problems with antitrust policy were primarily procedural, its problems with merger policy problems were more substantive and thus more difficult to reform. While business communities appreciated the Commission's merger policy prior to reform because it was more "sympathetic" than national poli-

cies,¹⁵ others lobbied for changes in two areas: methodology and checks and balances. To determine the permissibility of a merger, European lawmakers had invented the "dominance test" method, which roughly measures market share. However, economists, questioning the viability of the dominance test, argued that Europe should adopt the "substantial lessening of competition" (SLC) test used in the

U.S. In addition to problems of methodology, concerns had arisen regarding the Commission's uncurbed power. The thinly staffed Merger Task Force (MTF) within the Commission investigated and decided merger cases within a very short time, based mostly on evidence prepared by competitors to the merging parties.¹⁶ Thus, external judicial review was virtually nonexistent. A disturbing yet largely accurate analogy is that the Commission served as prosecutor, jury, and judge and used biased evidence against defendants that had no right of appeal.

Besides internal problems, the Commission's merger and antitrust policies were subject to external pressure as a result of the highly politicized GE/Honeywell case. The criticism was not only that Mario Monti dared to block what would have been the largest industrial merger in the world and the last major action by American business icon Jack Welch, but that the merger of the two U.S. companies had already been cleared by the DG Competition's American counterparts, the Department of Justice and the Federal Trade Commission.

A disturbing yet largely accurate analogy is that the Commission served as prosecutor, jury, and judge and used biased evidence against defendants that had no right of appeal.

Although Mr. Monti assured his American counterparts that they “share the same goals and pursue the same results,” the dominance test received widespread skepticism.¹⁷ In fact, the GE/Honeywell case was not the first occasion where the Commission blocked a transaction already cleared by foreign authorities. In 2000, the merger of two South African platinum mining and processing companies, Lonrho and Gencor, was blocked by the Commission despite having already been approved by the South African authorities.¹⁸ As national economies have grown increasingly interdependent in the globalized world, the need for multilateral cooperation in competition policy has become urgent because of the frequently extraterritorial nature of rulings.

The internal problems and external pressures created a credibility crisis within the Commission. The overturning of three DG Competition decisions by the CFI in 2002 placed intense pressure on the DG Competition to reform. The rulings were significant not only because the EU’s second highest court overturned the DG Competition’s prior rulings, which Mr. Monti rightly argued ought to happen occasionally under effective judicial review, but also because of the simple and strong language used in the verdicts. Language such as, “[the Commission’s ruling was] marred with errors, omissions and contradictions” served to discredit the methods and the procedures the DG Competition used to decide cases. A credibility crisis could be more devastating than a specific policy blunder, especially to the Commission—well known for its elitist culture.

PROGRESS TO DATE

As a result of the internal and external problems, it was clear to the Commission that reforms would be necessary to meet future demands effectively and maintain credibility. The first set of reforms took place in antitrust policy. Internal works on the reform of Regulation 17 started inside the DG Competition as early as February 1997 and culminated in a white paper in 1999, laying out both the case and a blueprint for reform of antitrust procedure in the community.¹⁹ On November 26, 2002, the EU

adopted the Commission’s formal proposal to reform Regulation 17. Changes to the 40-year-old procedural rule will take effect on May 1, 2004 at the same time ten new members join the EU. The reforms of Regulation 17 fall into two broad categories: simplification and decentralization. Companies will no longer need to notify the DG Competition of every business agreement in order to obtain clearance or exemption under the antitrust rules. Instead, complainants and applicants will bring their cases to the authority they consider best placed to handle it. Generally, the DG Competition will look at cases that affect three or more national markets, while member states will consider the remainder. In addition, to ensure regular consultation between and consistency among the different enforcement agencies, a network of European Competition Authorities (ECN) will be set up.

Merger control reforms are also underway. After a year of consultation and debate culminating in a green paper on December 11, 2002, the EC decided to adopt a comprehensive reform of the European merger control system.²⁰

To make matters worse, after a new era of vigorous antitrust enforcement under the Clinton administration, an ultraconservative Bush administration is making bilateral ties with the EU seem shaky, jeopardizing multilateral integration.

In terms of substantive methods, the reform did not embrace the American SLC test, but rather tried to improve the dominance test by adding clarifications and revisions. In terms of procedure, the most notable changes were the creation of the chief competition economist position within the DG Competition and the appointment of a peer review panel that would scrutinize the investigating teams’ conclusions with a “fresh pair of eyes.” The DG Competition has since been recruiting more economists rather than lawyers in an effort to adjust its expertise. Under the reformed regulations, companies under investigation will be allowed more flexible timetables and better access to the DG Competition’s ongoing review, including participation in a “clear-the-air” meeting where they will have the chance to defend themselves against competitors’ negative assessments being used by the DG Competition as evidence. Finally, the Commission welcomed the fast-track procedure set up by the CFI and promised to continue to pursue contacts with the ECJ and the CFI to facilitate speedy judicial review of its decisions. Additional reforms still under

consideration include the creation of a special competition chamber or a competition court within the EU's judicial system or the expansion of the DG Competition's jurisdiction to include cases for which critical turnover thresholds are not surpassed but which involve three or more national markets.²¹

In addition to antitrust and merger control reforms, the Commission has undertaken a number of international coordination reforms. After the GE/Honeywell case, the DG Competition, led by Commissioner Monti, worked hard to improve bilateral cooperation with its counterparts in the U.S. In September 2001, both sides agreed to refocus on the Merger Working Group, a dialogue platform set up earlier. In December 2002, the group produced its first product: "Best Practices" on cooperation in merger investigations—guidelines that both sides have agreed to follow when reviewing the same transactions. Since the reforms were implemented, the EU has come to the forefront in promoting multilateral cooperation on competition policy. In 2002, it succeeded in including competition policy in the Doha round of WTO negotiations.²² On a less formal level, the International Competition Network (ICN) was launched in October 2001, following intensive discussions initiated in 2000.²³ The ICN was designed as a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries to spread a common competition culture and to adopt concrete but non-binding guidelines.

ANALYSIS AND EVALUATION

Beneath specific reform measures, the Commission has a clear strategy: to concentrate its limited resources on making strategic and international decisions at the EU level and leaving more trivial implementation work to national authorities and courts.

The critics wrongly dismiss the reform on the grounds that giving national courts greater jurisdiction may cause confusion. They do not consider that corporate lawyers would happily choose a most favorable court. While Mr. Monti refutes this criticism by stating that uncertainty already existed within the former competition policy due to the si-

multaneous application of EC law and national competition laws,²⁴ the stronger argument for reform is that it will solve the problem of the overwhelming workload, safeguard competition, and decrease legal uncertainty. With the national courts providing an additional level of scrutiny, firms are likely to adopt more conservative strategies and avoid aggressive anticompetitive agreements.²⁵

In its new implementation of merger control policy, the Commission has embarked on a more fruitful path with respect to its economic method. A chief economist, a team with more economic experts, and an internal quality control system will certainly improve the quality of its economic analysis. Greater

transparency in the investigation process will also prove beneficial. However, the reactions to these reforms by political and business circles have been mixed. Multinational companies, investment bankers, and lawyers argued that the merger control scheme was "fundamentally flawed" and were deeply disappointed to see the reform fall short of the complete over-

The breakdown [in Cancún] demonstrates that it is unlikely the U.S. will begin seeking a global antitrust scheme as is badly needed for a successful reformation of EU competition policy.

haul they requested.²⁶

Some criticisms of the newly implemented reform measures do have merit. The need for effective checks and balances is largely untouched by current reforms. Still, the DG Competition, unlike its American counterparts, lacks the authority to break up a company, so it still has the incentive to act more conservatively in merger reviews. However, it is important to note that these issues are outside the DG Competition's authority and will require the ECJ to expedite judicial review and the European Commission to grant it additional authority where need be.

While it is still too early to tell if the reforms will be successful, their ultimate success is contingent upon a number of factors. The first factor in whether or not the reforms will proceed steadily is the Commission's ability to take immediate and drastic measures to restore credibility in the wake of multiple court defeats. If the recently reported potential disbandment of the Merger Task Force (MTF) and reorganization of the DG Competition are what the Commission chooses to pursue, the prospects may not be optimistic.²⁷ If the MTF were disbanded, it would take with it criticism and scars of failure but upbeat morale and professional exper-

tise would also disappear. The global economic slowdown is a great opportunity for the MTF to make internal reforms like changing personnel, renovating methods, and spending more time on single cases. Due to its current internal reforms, now may not be the best time to terminate its existence.

A second factor affecting the reform efforts is U.S. policy, without which no global effort can be successful. However, the official American view toward integrating global competition law has been to concentrate on bilateral cooperation agreements, some unilateral extraterritorial enforcement, and consultations and technical assistance to other countries. To make matters worse, after a new era of vigorous antitrust enforcement under the Clinton administration, an ultraconservative Bush administration is making bilateral ties with the EU seem shaky, jeopardizing multilateral integration. The U.S. Trade Representative, Robert Zoellick, has even threatened that the U.S. might opt to pull out of the WTO altogether and there is clear evidence that recent U.S. trade policy has indeed shifted heavily in favor of regionalism.²⁸ Indeed, the recent fiasco of the WTO Ministerial Meeting in Cancún, which made the Doha round negotiation objectives almost impossible to achieve on time, was largely due to the fact that developing and developed countries, led by the U.S. and the EU, could not agree even on a negotiation agenda concerning issues such as antitrust and labor standards. The more prominent reasons for the breakdown in Cancún, such as the North-South gap and lack of U.S. commitment to multilateralism, were essentially unimportant. The breakdown demonstrates that it is unlikely the U.S. will begin seeking a global antitrust scheme as is badly needed for a successful reformation of EU competition policy.

CONCLUSION

Clearly, the European Union needs a strong competition policy. To realize the lofty goals of the Lisbon strategy that European leaders set for themselves in 2000, a strong economy is the determining factor. As the most important element of the market and the key to a prosperous economy, competition should be regulated properly and wisely. European competition policy, with its successful past, is in a good position to achieve that goal, but it must confront and fix its problems thoroughly and quickly before they accumulate. The recent reforms—which have simplified procedures, redistributed the regulatory workload between the DG Competition and mem-

ber-state authorities, improved ruling methods, and strengthened international cooperation—are a good start, but certain core problems have yet to be addressed. The European Commission still needs to decide whether to stick with its controversial economic test determining the permissibility of mergers, or to shift closer to American methods. More importantly, the Commission must have a clear vision of how to promote its competition policy internationally amidst the upheaval of international economic relations. With the imminent enlargement from 15 to 25 member states, which translates into a daunting mission for competition policy, the Commission must work harder, better, and above all safer. It must take advantage of the less intense economic activities of the current economic downturn to push its reforms further, and it must avoid entangling itself in controversial lawsuits before fixing its internal problems. Finally, a healthy and constructive relationship with American antitrust agencies must be sought and maintained.

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NOTES

1. "Europe's Fearless Diplomat," *The Economist* (July 5, 2001).
2. Mario Monti, "European Competition Policy for the 21st Century," (Speech/00/389 at the Fordham Corporate Law Institute Twenty-eighth Annual Conference on International Antitrust Law and Policy, New York, October 20, 2000).
3. See Francis McGowan, "Competition Policy: The Limits of the European Regulatory State," in *Policy-Making in the European Union*, ed. Helen and William Wallace (New York: Oxford University Press, 2000), pp. 118-119.
4. Peter Montagnon, *European Competition Policy* (London: Royal Institute of Public Affairs, 1990), p. 1.
5. McGowan, p. 145.
6. European Commission, *Competition Policy in Europe and the Citizen* (Luxembourg, 2000), p. 7.
7. Council Regulation (EEC) No. 17 implementing Article 85 and 86 [now 81 and 82] of the Treaty, Official Journal, P 013, 21/02/1962, pp. 0204 – 0211.
8. Council Regulation (EEC) No 4064/89 of December 21, 1989 on the control of concentrations between undertakings, Official Journal L 395, 30/12/1989, pp. 0001 – 0012.
9. European Commission (2000), p. 21.
10. Normally divestiture of a certain part of merging parties' business elsewhere. Francesco Guerrera,

- "Why Handshakes May Get Harder: Competition at the Crossroads," *Financial Times* (November 21, 2002). However, there were exceptions, the most recent being the Haindl/UPM Kymmene and Carnival/P&O cases which were authorized without conditions after Phase II. Mario Monti, "Europe's Merger Monitor," *The Economist* (November 7, 2002).
11. As of the end of 2002, the Commission had reviewed more than 2,100 mergers. 90 percent were cleared unconditionally during Phase I, including cases as huge as Compaq/Hewlett-Packard (2000). Only 18 deals in total were prohibited. *Ibid.*, note 10.
 12. Tim Wißmann, "Decentralised Enforcement of EC Competition Law and the New Policy on Cartels," *Journal of World Competition*, vol. 23, no. 2 (2000), p. 124.
 13. European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Commission Programme No. 99/027 (Brussels, April 28, 1999), p. 12.
 14. This is because companies widely adopted the legal strategy of reporting everything to the Commission to avoid fines, as fines were not applicable to reported agreements. Wimann, p. 128.
 15. Morten Brogerg, "EC Merger Control," *European Management Journal*, vol. 14, no. 6 (December 1996), pp. 622-627.
 16. For example, in the Tetra Laval/Sidel case, a MTF team, usually two to three people, had to review 39 opinions from both parties within two days to make a decision.
 17. Mario Monti, "Antitrust in the U.S. and Europe: A History of Convergence," (Speech/01/540 at the General Counsel Roundtable, American Bar Association, Washington DC, November 14, 2001).
 18. D.J. Neven and L.-H. Röller, "The Allocation of Jurisdiction in International Antitrust," *European Economic Review* 44 (2000).
 19. European Commission (1999).
 20. European Commission, *Green Paper on the Review of Council Regulation (EEC) No 4064/89* (Brussels, December 11, 2001).
 21. European Commission (2000), p. 21.
 22. An antitrust code was included in the Havana Charter for the WTO's failed predecessor, the International Trade Organization. It then failed to stay in the 1947 General Agreement on Tariffs and Trade and 1995 WTO agreements. See Clifford Jones, "Toward Global Competition Policy? The Expanding Dialogue on Multilateralism," *Journal of World Competition*, vol. 23, no. 2 (2000), pp. 95-99.
 23. European Commission Directorate-General for Competition, *XXXIst Report on competition policy* (Brussels/Luxembourg, 2002).
 24. Mario Monti, "Guest Editorial: A European Competition Policy for Today and Tomorrow," *Journal of World Competition*, vol. 23, no. 2 (2000), pp. 1-3.
 25. Pedro Pita Barros, "Looking Behind the Curtain—Effects From Modernisation of European Union Competition Policy," *European Economic Review* (Accepted October 3, 2002, Article in Press, Corrected Proof).
 26. "Monti braves the catcalls," *The Economist* (December 13, 2001).
 27. Francesco Guerrera, "EU Holds Fish Knife Over Merger 'Piranhas,'" *Financial Times* (March 25, 2003). DG Competition plans to vote on the proposal in early May, 2003.
 28. The U.S. has entered into bilateral free trade agreements with Jordan, Singapore and Chile since 2001.

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THE HARVARD- CHUBAIS PARTNERSHIP: CREATING A KLEPTOCRATIC FRANKENSTEIN

INTRODUCTION

For decades, the heavy curtains of the Cold War severed the relationship between the United States and the Soviet Union. Capitalism espoused the virtues of free markets, private property, and the rule of law, and found little merit in communism with its preference for a planned economy, state-owned property, and freedom from excessive legislation. These ideologies shared no obvious common ground and were responsible for the dramatic division between the two nations. This troubled relationship was radically altered, however, on December 25th, 1991, when the Soviet Union abruptly ceased to exist.

The collapse of the Soviet economy and dissolution of the State profoundly changed the dynamics between these two countries and gave Western economists the opportunity to celebrate a long-awaited ideological victory: privatization of a socialist system. The significance of this opportunity was not lost on U.S. economists or politicians, and the rhetorical maelstrom that followed the Soviet Union's collapse called for further democratization, increased accountability, and instantaneous economic reform. Media images showed Bill Clinton and Boris Yeltsin embracing and beaming, symbolizing the promise of a new era in U.S.-Russia relations.

In Washington, the principal conviction regarding the former Soviet Union's transition to a market-based economy was that it must be fearless and immediate.¹ "Shock therapy" was the prescribed medicine and Jeffrey Sachs, a Harvard economist who advised Russian leaders on financial policies, reiterated this notion in proverbs that have since become famous. "You cannot cross a chasm in two jumps,"² he insisted, "...you have to cross it in one." Russian citizens, deprived of comfortable standards of living, believed that the economic reforms would work, and hoped that implementation would

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be straightforward, painless, and successful. Optimism was understandably high with the seemingly endless flow of goodwill from U.S. diplomats and financiers. However, there was little information regarding the effectiveness of foreign aid policies in other European countries undergoing similar transitions. Lessons from the Visegrád countries of Poland, Hungary, and Czechoslovakia suggested that the relationship between donors and recipients was complex, nuanced, and could lead to undesirable consequences if conducted hastily.³

The Cold War had created a very real distinction between East and West. Language, culture, and distance often hindered aid appropriation and led to misinterpretations of purpose during the Visegrád transitions. In these Central European case studies the donors themselves often compromised the very principles of democracy the U.S. promoted. Just as communist central planners set production quotas, U.S. officials set privatization quotas. Unfortunately, these new quotas ignored *ochkootiratel'stvo*, the readjustment or outright fabrication of figures, a practice with a long history under communism.⁴ Shrewd Central Europeans sometimes manipulated the mechanics of foreign aid delivery and redirected the outcome toward more personal gain. Because aid transactions were naively viewed by Westerners as straightforward, U.S. loan officers were unmindful of the possibility that some recipients were using donated money to line their political nests. Other dubious conditions involved recipients' protests that they had little input into aid decisions and were not consulted before action was taken. Officials in Warsaw, Budapest, and Prague complained that their concerns were ignored despite the nearby presence of American bureaus and missions. One Polish official, summarizing the inherent difficulties in cross-cultural aid transmissions, said he was struck by how Americans seemed to be driven to do good without having a clear idea of what they were trying to accomplish.⁵ First in Central then Eastern Europe, U.S. aid methodology ignored the philosophical notion that *how* aid was being distributed—through and to whom, under what circumstances, and with what goals—was as significant as the form the aid

took. This logistical inadequacy coupled with financial and political collusion between the United States and Russia, robbed Russia of its assets and destroyed the Russian people's burgeoning but fragile belief that democracy and privatization enhanced their lives. Rather than rebuilding the nation, the aid structure created a kleptocracy—a nation plundered by its rulers—out of the ruins of the Soviet Union.

THROWING ASIDE THE CURTAIN

When the race to Russian transition began in 1991, capitalist entrepreneurs flocked to the scene of history-in-the-making, eager to play a role in the transformation of Russia's command economy to a capital market. The West commenced a repeat performance of its aid efforts in the Visegrád countries by enlisting international lending institutions and the foreign-aid community to press for privatization, but the process of transition in the former Soviet Union differed from that of Central Europe: in the Visegrád countries, aid recipients were troublingly few, but in Russia this number dwindled even further. From 1992-1997 the United States funneled the bulk of its Russian economic aid portfolio into the hands of a single group of self-declared "Young Reformers" known as the "Chubais Clan" after its leader Anatoly Chubais.⁶ Chubais' closest colleagues, including Maxim Boycko, Alfred Kokh, Dmitry Vasiliev and Sergei Shishkin, formed a dangerously influential alliance with the one U.S. institution granted the most flexibility and funding in this endeavor to transform Russia: Harvard University.⁷

Harvard professor Jeffrey Sachs and Harvard economist Andrei Schleifer met Yegor Gaidar, known to Russians as the first "architect" of economic reform. In late 1991, Chubais and Yeltsin attended reform meetings outside of Moscow as the vast Soviet state was collapsing. As the Russians paired off with their Western counterparts to work on economic policies, they found each other to be of a similar ilk. They were ambitious, eager to make policy history, and willing to take drastic

First in Central then Eastern Europe, U.S. aid methodology ignored the philosophical notion that how aid was being distributed—through and to whom, under what circumstances, and with what goals—was as significant as the form the aid took.

measures to do so. They combined forces to strategize the immediate privatization of Russia's state-owned enterprises.

Although absent from the meetings, Harvard's Lawrence Summers also endorsed the Sachs-Gaider-Chubais policies. Appointed by President Bill Clinton in 1993, Summers became the new Undersecretary of the Treasury for International Affairs and assumed direct responsibility for the design and implementation of international economic policies. He had deep-rooted ties to the privatization goals of Harvard's Russia Project, as well as to his colleagues Andrei Shleifer and Jeffrey Sachs. Each of these individuals was convinced of the legitimacy of "shock therapy" policy, and believed that such a policy would save Russia from its drowning financial state. Their strategic positions paid off handsomely, affording them unrestrained influence and creating the necessary milieu to engage in opportunistic fraud.

Harvard's Institute for International Development (HIID), directed by Jeffrey Sachs, Jonathan Hay, and Andrei Shleifer, received an unprecedented amount of federal funding to carry out its plans of Russian reformation.⁸ The United States Agency for International Development (USAID) directly awarded HIID \$40.4 million in noncompetitive grants and gave its directors the power to steer and coordinate an additional \$300 million reform portfolio, which encompassed privatization, legal reform, the promotion of capital markets, and the development of a Russian securities and exchange commission.⁹ For USAID to approve such large sums of money to any one organization was "highly unusual,"¹⁰ but U.S. policymakers maintained that "Russian economic reform was so important, and the 'window of opportunity' to effect change so narrow," that it was justifiable to grant the Harvard Institute special treatment.¹¹

The financial latitude HIID enjoyed over U.S.-funded Russian reform projects was exceptional, extending beyond the conventional wisdom that contractors should be independent from funding sources in order to avoid conflicts of interest. Harvard contractors, perceived as having exclusive access to key information and contacts, were entrenched and captured by the industry they would

ultimately regulate. Additionally, the Harvard Russia Project had special status within the U.S. aid bureaucracy and was able to secure terms that were far more advantageous than those for other aid contractors.¹² Two Cooperative Agreements managed by USAID's Moscow mission designated HIID as the recommending body for aid policy while it was simultaneously designated as the chief recipient of that aid. HIID was also charged with overseeing other aid contractors, many of whom were competitors. In 1996, Congress asked the General Accounting Office (GAO) to investigate the unusual

allocation of grand-scale foreign policy to a single private entity. In the resulting report to the Chairman of the House Committee on International Relations, the GAO noted that HIID had "served in an oversight role for a substantial portion of the Russian assistance program"¹³ and that it had "substantial control of the U.S. assistance program."

¹⁴ Despite the GAO's allusion to impropriety, HIID continued to insist that contractors use specific institutions and people, and the relationships it maintained were markedly reciprocal.

Similar to Harvard's club of economic consultants was Chubais' coterie of Russian politicians. Core members of what was dubbed the "St. Petersburg Clan" were originally brought together through university activities in the formerly named Leningrad. These members were intensely connected and well-accustomed to Western economic models. During the Gorbachev years of *glasnost* and *perestroika* they were overtly involved in political activities and had positioned themselves in many layers of Moscow city government. When the Soviet Union fell apart in 1991, many of these politicians in key government posts discovered the utility of having Western contacts—they could leverage U.S. support for use as a political and economic resource. The Harvard-Chubais partnership began in 1991 and by 1992 Russian reform activities were centralized in the *Goskomimushchestvo* (GKI), the State Property Committee of which Chubais was head. After Yeltsin was elected president of the new Russian Federation in June of 1991, the Supreme Soviet passed a law mandating privatization. One of its plans was the pet project of the Harvard-Chubais team: a mass-voucher privatization program in

Chubais' closest colleagues . . . formed a dangerously influential alliance with the one U.S. institution granted the most flexibility and funding in this endeavor to transform Russia: Harvard University.

which citizens were given shares in state-owned enterprises.¹⁵ The privatization program that the Supreme Soviet passed in 1992 was crafted to prevent corruption, but when Chubais implemented it, it was barely recognizable. He and his cronies excluded from privatization the industries that had real market value such as oil, electrical power and telecommunications—in short, the crown jewels. The enterprises made available to Russian citizens were only those of dubious or no value at all. These leftover assets were converted into joint stock companies and the stock was handed over to the property fund for distribution of ownership among the populace. Blocks of shares were offered for sale at public auctions, where bidding took place with special investment vouchers.

This model of privatization, while theoretically feasible, was riddled with problems in practice. The vouchers, distributed well in advance of the actual auctions, plummeted in value due to a combination of high inflation and the general expectation that the program would remain stalled forever. Once the price of a voucher dropped to the price of a bottle of vodka, speculators accumulated large amounts of them and used them to strengthen insider dominance. Further compromising access by Russian citizens, auctions were held in remote areas, were announced only shortly before starting, and were exclusive depending on the network of local police. In this way, managers retained control over most industries, investors accrued very little value, and the average Russian experienced a decline in living standards unmatched even by their stark socialist existence.¹⁶ Yeltsin, citing the duplicitous nature of government, derided “Chubais-style” privatization. Russians who noted that the transition to capitalism was benefiting a select few began to call it the “great grab.”¹⁷ Chubais became one of the most hated public figures in Russia.

Despite these developments, Chubais continued to collaborate frequently with HIID, galvanizing U.S. support for being a “radical reformer” and serving as the gatekeeper for hundreds of millions of dollars in U.S. taxpayer aid, subsidized loans, and rescheduled debt. He established a variety of organizations to carry out privatization, most notably, the Russian Privatization Center (RPC) and a net-

work of Local Privatization Centers (LPCs). These organizations were used to give two clan members sole proprietorship over approximately \$300 million dollars in aid money and millions more in loans. Vital western contacts propelled members of the clan into top positions within the Russian government, making them formidable players in local politics and economics. Observing these developments, Russian sociologist Olga Kryshstanovskaya noted that “Chubais has what no other elite group has, which is the support of the top political quarters in the West, above all the USA, the World Bank and the IMF, and consequently, control over the money flow from the West to Russia.”¹⁸ The impropriety of the relationship between Harvard and the St. Petersburg Clan was becoming obvious. The

mayor of Moscow, Yuri Luzhkov, attending a Harvard conference in 1998, castigated Chubais and his monetarist policies and “singled out Harvard for the harm inflicted on the Russian economy.”¹⁹ While this may have been an impolite reference to the conference hosts, at that juncture many officials in both the U.S. and Russia agreed with the sentiment. The transnational relationship was elite and hostile to external governance, and countered the United States’ expressed goal of encouraging citizen participation. When Chubais, as First Deputy Prime Minister, began to bypass democratic processes with the use of presidential decrees, it became impossible to hide the hypocrisy.

The power of the Chubais clan had grown exponentially since 1992. Eventually the group controlled not only privatization mechanisms, but also anti-trust policy, bankruptcy policy, taxes, and relations with regions, including the organization of gubernatorial elections. Their programs were so controversial however, that reliance on presidential decree was essential to putting them in place. Members of the clan boasted that every major marketization had been accomplished by this method instead of by parliamentary action. Harvard associates justified this blatant undermining of democratic processes by insisting that it was the only way to achieve overnight market reform. Hay and his colleagues actually drafted a number of the decrees themselves. USAID’s Walter Coles, a key official in the Russian restructuring, revealed

The transnational relationship was elite and hostile to external governance, and countered the United States’ expressed goal of encouraging citizen participation.

the logic behind these dictatorial mandates when he stated that Russia's parliamentary body, the Duma, would never have supplied large amounts of money to mobilize reform.²⁰

To facilitate the movement of funds, USAID set up a network of ostensibly private organizations that helped reformers circumvent legitimate governmental bodies, such as the Duma, ministries, and branch ministries. The flagship organization was the Moscow-based RPC.²¹ The board of directors included Andrei Shleifer, Anders Åslund, Maxim Boycko, Eduard Boure, Dmitry Vasiliev—all connected to either Harvard or the St. Petersburg Clan—and Anatoly Chubais. HIID was both a "founder" and "Full Member."²² The RPC was "a very convenient source for multi-donor funding,"²³ and was "held up by many in the aid community as a model for other aid-supported organizations."²⁴ With the help of HIID, the RPC received approximately \$45 million from USAID, and took in millions in grants from the European Union (EU), the governments of Japan and Germany, and the British Know How Fund. The World Bank loaned the RPC \$59 million and the European Bank for Reconstruction and Development (EBRD) offered \$43 million.²⁵

Formally, the RPC was a private sector organization. Its legal status was nonprofit and nongovernmental, but it exhibited properties that were distinctly public: it was funded by Russian presidential decree, received foreign aid because it was headed by Russian government officials, created macroeconomic policies on inflation, and negotiated with international financial institutions. Largely because of its ambiguous status, the RPC conducted its business undetected for a significant period of time.

Local Privatization Centers also carried out functions that suggested a public nature, but they, too, were ambiguous. Three aid-paid consulting firms—Price Waterhouse, Arthur Andersen, and Carana—reported in 1996 that, rather than supporting development, the LPCs were "steeped in political considerations" and did not seem to have sustainability as a goal.²⁶ The Institute for Law-Based Economy (ILBE) was set up to help develop a legal and regulatory framework for markets, but

a 1996 confidential State Department report revealed that the founders, which included the president and fellows of Harvard University, "are expected to provide political support for the activities of the ILBE."²⁷ USAID's Coles conceded that organizations like these were "set up as a way to get around the [elected] government bureaucracy,"²⁸ and they also created an inhospitable environment for other parties who needed to be brought on board for legal and regulatory reforms. Notwithstanding corporate collusion, another troubling outcome of the United States' lively financial support for Russian reforms was that the aid drastically altered the political equilibrium by explicitly helping free-market reformers defeat their opponents. These reformers' policies were instrumental in executing what is now recognized as the greatest robbery in world history.

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THE CONSEQUENCES

In the aftermath of the attempt at "shock treatment" privatization, the Russian Business Monitor declared "It's Official: American Aid for Russian Reforms Has Been a Disaster." Many media outlets, after assessing the ruins of the former Soviet economy, echoed this opinion. The World Reporter wrote that the majority of Americans polled believe that Harvard corruption was directly responsible for the failure of reforms in Russia. In 1996, Congress asked the GAO to investigate the delegation of critical foreign policy to a private entity, and the ensuing report concluded that USAID's management of HIID had been "lax."²⁹ Chairman Gilman of the House Committee on International Relations reported that "regrettably, our current policies toward Russia are not achieving the...objectives we...have sought."³⁰ HIID fired Hay and Shleifer amid allegations that they had abused the trust of the United States Government by using personal relationships for private gain.³¹

The magnitude of evidence for both impropriety and fraud forced Congress to officially admit that the policies of privatization in Eastern Europe were

wrong and needed to be corrected. However, one of the most tragic consequences of this debacle—that the Russian public no longer believes in economic reform or the market economy—will prove difficult to undo. And to render justice more elusive, all of the loans tendered by the World Bank, the IMF and the EBRD will be repaid not by the financial oligarchs and the tycoon capitalists, but by the Russian people. “Grabatization” effectively destroyed American credibility in Russia, and created wealth inequities greater than they had ever existed in Russian society. It was a catastrophic end to what was initially a journey of hope.

THEORETICAL APPLICATIONS

The story of international aid gone awry corresponds, in various ways, to three particular theories of economics: Public Choice Theory,³² the Theory of Economic Regulation,³³ and Control Fraud Theory.³⁴

PUBLIC CHOICE THEORY

Public Choice theory begins with the bedrock of all economics—the assumption that human beings are rational and seek to maximize personal gain. It argues that public officials, despite their roles as public servants, are not immune to the promotion of self-interest. The predictable pursuit of self-interest, public choice theory explains, is often the cause of disappointing performance in American government.

It is almost tautological to note the parallels of this theory to the tale of Russian privatization. The entire drama is one of rational pursuit of self-interest and the maximization of plunder, and the agents involved exemplified a statement by theoreticians Gottfredson and Hirschi about the characteristics of criminals:

Criminals are unable or unwilling to delay gratification; they seek short-term pleasures and are relatively unconcerned with the long-term results of their behavior; and while they may use charm for gain, they are generally insensitive to the needs and suffering of others.³⁵

Sachs, the Harvard economist who came to symbolize “shock therapy,” was so seductive in public speeches that he was described as a faith healer. His “Harvard credential, American pizzazz, and boyish showmanship”³⁶ took his audiences by storm, and yet nowhere within this display was it apparent that

he, or any of the other advocates for immediate reform, was assessing the larger implications. While they might have truly believed that cold-turkey reform was the best approach, they seemed unable to grasp the degree to which their individual transactions contributed to a greater network of damage.

The performance of privatization, as public choice predicts, did lead to abject disappointment, and the outcome of reform strays from the theory in only one respect: public choice asserts that an organization of self-interested bureaucrats is likely to produce bigger government that constantly recreates itself, but this particular group found strength in small numbers. The core of their power rested on their sophisticated elitism, and in their ability to project a tight-knit “dream team” ethos to the world. Bringing in more agents would have been counterproductive.

THEORY OF ECONOMIC REGULATION

George Stigler’s theory of economic regulation classically involves the behavior of industries, but can readily be applied to the behavior of political actors. In both cases, public resources are used to improve the economic status of specific groups, the most obvious and accessible contribution being a direct government subsidy. Not only were the cliques involved in Russian privatization granted government subsidies, they were granted them in unprecedented amounts. This aid was then used to obtain additional aid, which confirms a second tenet of Stigler’s theory: control over entry by new rivals is also a desirable public resource. As mentioned above, HIID’s contributions to the Chubais clan made it possible to take over governmental decision-making, as well as alienate political rivals who attempted to reign in their controversial policies. Politics in this sense is not an “imponderable . . . shifting mixture of forces”³⁷ but a rationally devised, strategic system. The “industry” seeking power, the Russian reformers, went directly to the appropriate seller, lauded models of Western economics, and consequently made out like bandits. In addition, the costs of obtaining legislation that Stigler describes—achieving simultaneity of decision, including all of the community, and dealing with inefficiencies in the political process—were avoided. The use of presidential decree to craft policy was a more polished political method, as was the reformers’ distinct reliance on personal relationships.

Another hypothesis of economic regulation is that “regulation is acquired by the industry and is designed and operated primarily for its benefit.”³⁸

When Cooperative Agreements designated HIID as both the recommending body for aid policies and the chief recipient of that aid, and also charged them with overseeing other competitive aid contractors, this prophecy was fulfilled. The industry was effectively captured.

The most striking prediction of Stigler's theory is his assertion that the benefit to the economic group falls far short of the damage to the rest of the community. Surveying the financial plight of the Russian citizenry following privatization, this is undoubtedly true, and Stigler summarizes it with stirring accuracy: "Until the basic logic of political life is developed, [true] reformers will be ill-equipped to use the state for their reforms, and victims of the pervasive use of the state's support of special groups will be helpless to protect themselves."³⁹

CONTROL FRAUD THEORY

The final theory that applies to the fiasco of Russian privatization is Control Fraud theory. Its author, William Black, describes four phenomena in a kleptocracy—one of the two realms in which this theory applies. The first is that exploiting control magnifies the amount of loot obtained. The circumstances of privatization under the Harvard-Chubais partnership were primed to maximize the take, but there are no figures reflecting the exact amount stolen. There are only cryptic loan documents and vague calculations by the Russian Cabinet. However, since the scene of Eastern European reform has been referred to as "the crime of the century," there should be no doubt that the robbery was devastating.

The second feature of control fraud is that the powerful desire to maintain control compels leaders to act like "control freaks," ignoring and even aggressively excluding opposition. The quasi-private organizations set up by USAID and the Chubais Clan were specifically designed to skirt the Duma and avoid bureaucratic processes. These actors were so insistent on defying public and legislative input that they invoked the exclusive and autocratic presidential decree.

A third characteristic of control fraud is that it is notoriously difficult to detect and prosecute. It took approxi-

mately five years for Congress to compel an investigation into the relationship between Harvard and St. Petersburg reformers, a relationship that to many others, particularly contractors excluded from competitive bidding, was clearly suspect. For a private entity, Harvard was granted unrivaled control over U.S. foreign policy, yet it took years for alarms to sound. And in Russia, be-

cause the control fraud environment was emanating from the top—through members of Yeltsin's Reform Party—and because the communist culture was not accustomed to accountability, the chances of prosecution were negligible. Rosoff, Pontell & Tillman write, "There is, unfortunately, nothing unique about this pattern; most domestic varieties of white-collar

crime also have been committed abroad, either by American companies or by the United States government itself."⁴⁰ Indeed, in 1996, when Chubais was accused of making a substantial personal profit by insider trading and rewarding one of his cronies with a high-level position at a State bank, he defended himself by saying such practices were common in the west.⁴¹

The fourth characteristic of control fraud—that the combination of these elements ruins the nations being looted—cannot be overemphasized. Not only was the damage caused by the U.S.-encouraged kleptocracy titanic, but the Harvard-Chubais partnership blatantly disregarded the damage it inflicted on the United States' national image abroad. Unfortunately, opportunists trivialize negative externalities in their pursuit of an environment ripe for fraud, and the temptation to engage in fraud was virtually irresistible after the Soviet Union collapsed. U.S. political support for such drastic economic policies had never been so bipartisan, and the reveling during the transition resulted from a belief that the west had won a moral and ideological victory. Neither Harvard nor the Chubais Clan had any personal assets invested in the transition, so the stage was set for massive control fraud.

RECOMMENDATIONS

Because the behavior of Harvard University academics and Russian political leaders was, in retro-

The most striking prediction of Stigler's theory is his assertion that the benefit to the economic group falls far short of the damage to the rest of the community. Surveying the financial plight of the Russian citizenry following privatization, this is undoubtedly true.

spect, foolish and reprehensible, it is tempting simply to declare that the best course of action would have been the opposite course. It seems that every step taken was inappropriate, selfish, or embarrassingly illustrative of the cultural discrepancies between the east and west. Nevertheless, presented here are possible remedies, both obvious and subtle.

#1: HIRE INDEPENDENT CONTRACTORS.

Conventional wisdom suggests that third-party contractors should be independent from rather than associated with the hiring parties. When USAID appointed HIID to recommend aid, receive aid, and oversee its own competitors, this activity undermined even the most basic rules of accountability. HIID's temptation to almost exclusively contract itself would have been enticing to virtually anyone; vetoing these initial conditions would have negated their incentive.

#2: DIVERSIFY THE AVENUES OF FUNDING AND CLARIFY THE GOAL.

Assigning the bulk of the U.S. aid portfolio to HIID bordered on the absurd. It gave one private entity the power to dictate public economic foreign policy—an improper gift even for advisors who were considered well-connected experts. If other NGOs and consulting firms, clamoring for contracts in Russia, had been allotted aid, the power structure would have been dispersed and the relationship between the Harvard donors and the Chubais recipients would not have become so elitist.

To alleviate potential concerns about the variance in market reform recommendations, the *theme* could have been articulated clearly. USAID could have had an unambiguous mission statement that reminded every contractor of their purpose. For example: Policies on privatization are to benefit the Russian *people*, not only Russian and American leaders. Reminding policymakers of such a seemingly basic principle sounds condescending, but individuals are lured by their basest instincts when they are immersed in a criminogenic environment.

#3: GOVERN THE PRIVATIZATION PROCESS.

Not privatizing the economic industries that had actual market value—oil, electricity and telecommunications—was monumentally immoral, and setting up the auctions for the other industries in such a haphazard manner diluted the integrity of the voucher process. While Russian citizens were by no means wealthy under communism, their existence was at least somewhat secure. A transitioning economy, tumultuous by nature, should not be at

the mercy of crony capitalism or corrupt communism. Institutions should have been in place to ensure the most judicious outcome of the auctions, but there was an obvious lack of concern for the manner in which they unfolded.

#4: IMPLEMENT THE RULE OF LAW AND ALLOW DEMOCRATIC PROCESSES TO FUNCTION.

Allowing the elected members of the Duma to create legislation establishing a regulatory framework for the transition may have prevented the hijacking of millions of aid dollars by Russian elites. Instead, the U.S. supported Reform party members who circumvented parliamentary authority as a means of achieving market reform and who accomplished this in an obviously antagonistic manner via presidential decree. Harvard economists and lawyers who went so far as to draft some of the decrees themselves seriously undermined the credibility of American rhetoric that promised democracy and citizen participation.

#5: BE CONSCIOUS OF LIMITATIONS.

The United States, in its excitement about the victory over communism and its haste to install capitalism, failed to internalize common-sense knowledge about Russia's situation such as the absence of the legal structure required to maintain a market economy. Knowledge of capitalist banking systems, financial institutions, legal and regulatory frameworks, and property rights is not a component of communist societies, by definition. The expectation that Russian political, monetary and ideological systems could be transformed virtually overnight was devoid of all realism and viability.

#6: BE AWARE OF THE DONOR-RECIPIENT DYNAMIC.

The transmission of aid does not occur in a vacuum. Personal and political relationships are formed during almost any type of transaction, and if left unattended they can sire collective disaster, illustrated by the Harvard-Chubais partnership. The U.S. should be wary not only of to *whom* it donates money, but also *how* the use of that money will be interpreted. Being conscious of cultural nuances and cliques forming could have curtailed this tragedy. Instead, millions of taxpayer dollars were used to maximize utility for a mere handful of political actors, at the vast expense of both Russian and American populations.

#7: ENCOURAGE CRIMINAL PUNISHMENT FOR WHITE-COLLAR CRIMINALS.

There has long been a distinction between white-

and blue-collar crime, illuminated by the variation in the forms of punishment. While blue-collar criminals are punished by fines, imprisonment and even death, white-collar criminals often escape the consequences of their actions or are fined a negligible amount.

The actors in the privatization of Russia engaged in criminal activities that devastated an already downtrodden citizenry, ruined Russia's economic condition for years to come, and laid the debt ruthlessly on the innocent. Their myopic selfishness, because of its widespread, lingering, and tangible effects, is no better than the lowest of crimes, yet these criminals will psychologically evade their punishment until society makes clear that their actions are damnable. This message resounds most heavily in the isolated walls of a prison cell, where many of them belong.

LBJ

NOTES

1. Janine R. Wedel, "East Meets West: A New Order for the Second World," in *Collision and Collusion: The Strange Case of Western Aid to Eastern Europe 1989-1998* (New York: St. Martin's Press, 1998). I am indebted to Janine R. Wedel, the foremost scholar on this topic and by whom most of the definitive research on this topic has been conducted. I rely heavily on the aforementioned book for the background portion of this paper. I am also indebted to Alida Tallman for her help in editing this paper.
2. George M. Taber, "Rx for Russia: Shock Therapy," *Time*, vol. 139, issue 4 (January 27, 1992), p. 37.
3. Wedel, *Collision and Collusion*, p. 9.
4. James R. Millar, "From Utopian Socialism to Utopian Capitalism: The Failure of Revolution and Reform in Post-Soviet Russia" in the *George Washington 175th Anniversary Papers*. Washington, D.C.: George Washington University, 1996, as referenced in Wedel, *Collision and Collusion*.
5. Janine R. Wedel, *Collision and Collusion: The Strange Case of Western Aid to Eastern Europe 1989-1998* (New York: St. Martin's Press, 1998), p. 2.
6. Janine R. Wedel, "Tainted Transactions: Harvard, the Chubais Clan, and Russia's Ruin," *The National Interest*, (Spring 2000), p. 3. Online. Available: http://www.findarticles.com/cf_0/m2751/2000_Spring/61299039/p1/article.jhtml?term=%22tainted+transactions%22. Accessed: 3/10/03.
7. Wedel, *Collision and Collusion*, pp. 127-130.
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9. Wedel, *Collision and Collusion*, pp. 127-128.
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14. GAO, Report to the Chairman, p. 3.
15. Wedel, *Collision and Collusion*, p. 131.
16. *Ibid.*, pp. 132-133.
17. "New Round of Yeltsin Decrees Spurs Reform," *Current Digest of the Post-Soviet Press*, vol. 46 (July 13, 1994), pp. 7-8.
18. Wedel, *Collision and Collusion*, p. 126.
19. Letter from Graham Allison, professor at Harvard's John F. Kennedy School of Government, addressed "Dear Colleague," summarizing the proceedings of the Second Annual U.S.-Russia Investment Symposium, entitled "Financial and Direct Investment Opportunities in Russia," held January 9-11, 1998, at Harvard's John F. Kennedy School of Government, as referenced in Wedel, *Collision and Collusion*, p. 133.
20. Wedel, *Collision and Collusion*, p. 135.
21. *Ibid.*, p. 140.
22. GAO, Report to the Chairman
23. Interview with Ira Leiberman quoted in Wedel, *Collision and Collusion*, p. 141.
24. Wedel, *Collision and Collusion*, p. 140.
25. *Ibid.*, p. 141.
26. Interviews with a representative of Price Waterhouse, July 18, 1996; Dennis Mitchem of Arthur Andersen, August 18 and 19, 1996; and Robert Otto of Carana, August 27, 1996, as referenced in Wedel, *Collision and Collusion*, p. 143.
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28. Interview with Walter Coles, July 25, 1996, as stated in Wedel, *Collision and Collusion*, p. 140.
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39. *Ibid.*, p. 18.
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41. Wedel, *Collision and Collusion*, p. 151.
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