



**PROGRESSIVE  
PRIORITIES**  
AN ACTION AGENDA  
FOR AMERICA

Center for American Progress



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# 1

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## PROGRESSIVE PRIORITIES:

### Restoring America's Purpose

*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

—PREAMBLE TO THE CONSTITUTION OF THE UNITED STATES

America is a great country. In so many ways, it is the best. To be sure, our government has made its share of mistakes and there is much room for improvement, but as Bill Clinton once said, “There is nothing wrong with America that cannot be cured with what is right in America.” Nowhere in the world are there people like the American people—generous, independent, diverse, optimistic, and free—and there can be no doubt that as this country moves forward, it will be even better. This is as our Founding Fathers intended—that we continuously strive to form a more perfect union.

Nearly two years ago, the Center for American Progress was created to help advance this important mission. In particular, the Center was created to develop and promote a compelling progressive agenda and a vision for a strong, just, and free America that ensures opportunity for all. At its essence, progressivism is about two simple things: progress and the future. Progressivism is about moving forward, achieving progress through principled and pragmatic approaches to addressing our shared challenges. Progressives are focused on enhancing wellbeing: the wellbeing of ourselves and our families; of our neighbors and colleagues; of our fellow

citizens and international partners; and the wellbeing of the earth and the future generations that will inhabit it.

Progressives understand that good policies are rooted in and grow out of our fundamental values. As British thinker Sir Geoffrey Vickers once pointed out, policy judgments are really an utterly dissoluble compound of three kinds of assessments: (a) what do we care about? (b) what is going on? and (c) what can we do?

What do progressives care about? Although there is no Magna Carta for what it means to be a contemporary progressive, progressives believe that Americans are bound together by a common commitment to a set of bedrock American values—including opportunity, fairness, liberty, community, openness, responsibility, and innovation. These time-honored values provide the foundation to the progressive impulse for human improvement and guide progressives to focus on achieving substantive change through creative means.

At the Center for American Progress, we believe that it is essential that these values serve as the platform for a governing agenda. By creating a robust climate for intellectual exchange, the development of new ideas, and genuine collaboration, progressives can begin to connect our core principles to the real problems that Americans face. If we fail to apply our values to our actions and to our policymaking, value statements become empty words.

Out of this concern, this book was born. We felt it was important to ground our affirmative progressive vision in very specific and practical policy solutions that policymakers could readily adopt and implement. Therefore, we created this book to present new thinking in several targeted priority areas where progressives can make a difference. Although this book makes recommendations on a broad range of issues, covering 14 specific areas altogether, we recognize that this must be only the beginning of an ongoing project of presenting creative and practical solutions to our nation's emerging and ongoing challenges—and that ultimately these solutions must be rooted in our bedrock progressive values. These values have served our country well and they have stood the test of time.

## PAST AS PROLOGUE

As we study the challenges of the 21st century, our history as progressives points us in the direction of solutions. The progressive impulse arose in response to disturbing trends in American life associated with rapid industrialization and the emergence of a powerful and uncontrolled capitalist economy during the latter 19th and early 20th centuries. Progressive reformers sought to improve conditions for Americans by harnessing the power of the national government to assist the needy and vulnerable; to regulate and balance a rapidly developing capitalist economy; and to challenge totalitarian forces across the globe who threatened to undermine democracy and freedom.

The progressive response to insecurity and exploitation was a politics rooted in the core virtues of fairness, global leadership and community:

*Fairness.* Progressives worked to create the legal, political, and economic conditions that would allow individuals to use their abilities and aspirations to make the most of their lives.

Fairness required government action to protect basic rights and liberties for every American, to level the economic playing field, and to provide basic services and opportunities. But citizens had obligations as well: to treat people with respect, understand different backgrounds and views, and avoid self-interested actions and beliefs that unfairly harm others. Fairness did not guarantee that everybody will be the same, think the same, or get the same material benefits in life. It simply attempted to guarantee a fair shot at success.

*Global leadership.* Progressivism focused on protecting American interests and extending American values on a global scale, with economic power, military might, and moral strength. Progressives led the fight to extend democracy by opposing fascism and communism on every continent. Progressives relied on military power, but had a coherent national security strategy that included moral leadership, alliance-building, burden-sharing, and strong public diplomacy.

*Community.* Progressives believed community strength is more important than narrow economic self-interest. The focus on community provided progressives with a sense of national purpose and placed citizenship at the heart of successful democratic governance. It asked business and corporate interests to recognize the impact of its decisions on workers, localities, and the environment. The progressive focus on community also recognized the importance of bringing politics back to the people, and of creating an active and engaged citizenry imbued with a sense of duty and sacrifice to society and country. Most importantly, progressives believed that citizens and leaders alike must give something back by staying involved in the affairs of their community, voting, voicing opinions, volunteering, and placing the country's needs above narrow self-interest.

With these values as the foundation for action, progressives set the stage for America's emergence as a global power.

As the challenges in early 20th century American life grew larger, progressives worked to improve society and balance corporate dominance. The progressive ideal of using "Hamiltonian means to achieve Jeffersonian ends" was carried out to create a strong national government that promoted democratic values and increased economic opportunities for all citizens.

The New Deal, the Fair Deal, and other domestic progressive initiatives allowed citizens, through their national government, to correct severe economic and racial injustices that individuals and the private economy alone could not address. Just a short list of major progressive accomplishments includes: dramatically expanding public education; developing fair and safe working conditions; supporting unionization and the minimum wage; building public transportation and highways; establishing national parks and protected lands; cleaning our air and water; expanding voting rights; weaving a social safety net anchored by Social Security, Medicare, and Medicaid; ensuring safer food and drugs; funding world-class medical advancements and scientific achievements; writing the GI Bill; embracing the civil rights movement; and launching the space program.

On the international front, progressive presidents like Woodrow Wilson and Harry Truman supported strong military and diplomatic intervention to make the world safer for Americans, to defend our values, to promote freedom and democracy, and to improve the conditions of people around the globe. Progressives' foreign policy accomplishments include fighting and

winning two world wars and the Cold War; creating the Marshall Plan; building the post-war international trading system; pushing for international human rights treaties; and helping to liberate tens of millions of people worldwide from poverty and oppression.

## DEFINING A MODERN PROGRESSIVE IDENTITY

Today we are presented with new challenges. Contemporary progressives face ongoing threats from extremists and terrorists across the globe that are far different than the totalitarian and communist threats we battled in the 20th century. In key areas, the limits of government power have been tested, and perhaps exceeded. The private sector is recognized as the primary engine of economic growth. The importance of strong moral values, personal responsibility, and entrepreneurship in resolving social pathologies is widely understood.

At the same time, almost a century of progressive reform proves that, in some roles, government's effectiveness can no longer be seriously questioned. The progressive track record includes effective government action in increasing access to quality health care, improving public education, providing a safe and sound retirement for the elderly, and protecting the environment.

Today's leaders and citizens face a world of once unimaginable economic opportunities—and competition for jobs and profits from every corner of the earth. The American military is the most powerful in history, yet we are unsure how to deploy it against terrorist networks and extremist regimes. Our economy is growing, but more and more middle-class families are losing access to jobs, health care, and affordable housing. In the information age, government secrecy is on the rise. Individuals are being asked to take full responsibility for their lives, while large institutions seem increasingly eager to avoid taking any responsibility at all.

The progressive challenge in the 21st century is to resolve these contradictions in ways that accord with our values, and make America stronger, more prosperous, more free, and more secure. With history as our guide and our values as the foundation of a progressive political vision, we have an opportunity to put forth a new and compelling message that meets the conditions of the 21st century and gives people hope for a better future by strengthening the middle class, asserting global leadership, and reforming our political system to better serve the American people.

### Strengthen the Middle Class by Enhancing Opportunity and Prosperity

Progressives believe that America is prosperous and strong when we provide opportunity to the middle class and have a system that rewards work and is open to all regardless of one's station in life. Our diversity is our strength and all Americans should have the opportunity to combine their aspirations and ambition into a meaningful and dignified life. It is vital that progressives focus on supporting those who are working hard, but falling short.

Rather than valuing and rewarding work, conservative economic policies reward concentrations of wealth and privilege, and stifle the progress of middle-class Americans by shifting the



tax burden onto their backs, cutting wages for their jobs, and ending medical and retirement benefits for their old age.

A new progressive agenda will honor and support work by promoting quality education, home ownership, a fair tax system, and health care for all. We will make sure that public resources are available to promote private growth; from basic infrastructure to advanced technology, we will support innovation and ensure that American individuals and businesses have the tools they need to compete in the world economy. We will ensure that our open and growing economy benefits all by recognizing our social responsibilities to those threatened by change.

### Assert Global Leadership and Enhance American Security

Progressives understand that terrorism and weapons of mass destruction pose a real and present danger to our nation, and that an integrated national security strategy is required to defeat these dangers. We believe that the United States should have a military that is second to none and we are willing to use force to defend our national interests when we must. Protecting the American people must be our highest priority. At the same time, we believe that America should prevent conflict whenever possible and that America should lead vital global alliances and reformed international organizations to better serve our national security. Progressives believe in an America respected as much for its values as its strength around the globe.

In opposing the myopic and counterproductive direction of current U.S. national security policies, progressives should not abandon their historical commitment to internationalism and the aggressive use of all of the tools in our arsenal—hard and soft—to advance American interests and security, improve world living conditions, and promote global peace and stability. Progressives understand that rebuilding America's economic strength is essential to safeguarding our nation. Moreover, progressives believe America should have a national energy policy that strives to reduce our reliance on foreign oil and foster energy independence through the promotion and development of alternative and sustainable energy sources.

Conservatives, rather than protecting our citizens by spreading American ideals and offering American help to improve life in the developing world, rely instead on a go-it-alone “preventive war” strategy that diminishes our military capacity, alienates our allies, hurts our brave enlisted men and women and their families, and neglects the needs of Americans at home.

### Revitalize Democracy and Reform Governance

Progressives believe the privileges of American life for all must be accompanied by responsibility from all and a genuine commitment to serve the larger community: citizens owe something to their families and localities; public officials to the national interest; and corporate leaders to shareholders, employees, consumers, and communities. Included in this responsibility, progressives recognize that the commonwealth should be used for the common good and that Americans have a duty to manage wisely the national and natural assets we hold in trust for future generations.

Rather than demanding accountability from all, lobbyists and private interests are corrupting the democratic process more than ever. Public officials are not held accountable when their

policies end in failure, and in this administration they are promoted. Corporations give executives more pay and privileges while workers are down-sized and their jobs go overseas. And our Defense Department leaders are absolved when they send troops into battle without adequate plans or supplies.

For all sectors of society, progressives insist on reform, responsibility, and accountability. Progressives support protecting the public trust and the public interest by ending cronyism, favoritism, and corruption in government and the private sector. Furthermore, progressives strive to reform their government so that it is more responsive, more innovative, and more effective. Progressives prefer empowering people and achieving outcomes over protecting bureaucracy. Very simply, progressives still ascribe to the aspiration for democracy “of the people, by the people, and for the people.”

## PROGRESSIVE PRIORITIES: AN ACTION AGENDA FOR AMERICA

Profound national challenges face the country; progressives must have the courage to address them. As a progressive organization, the Center for American Progress has a lot to say about America’s future. We are optimistic about America’s prospects and confident in Americans’ ability to solve problems and make progress for the future. Indeed, there are many innovative and practical solutions to our current and future challenges. Several of them are presented in this book.

There is no doubt that progressives are concerned, even alarmed, about the direction the current administration has taken the country. We believe strongly that America’s security, prosperity, and democracy have all been significantly undermined by the administration’s approach over the past few years. Because we believe America can do better, the experts and staff of the Center for American Progress came together to create this book to offer some new, affirmative ideas that are grounded in our fundamental progressive values and that provide pragmatic, forward-looking solutions to several of our current challenges.

In taking on this endeavor we sought merely to begin the process of crafting an effective progressive policy agenda. Though many important policy priorities are covered, all are not. No single volume could speak to every significant issue government must address. In crafting the chapters that follow, we consciously limited our criticism of current policies in order to focus on solutions. We included just enough critique to frame the need for our specific, practical recommendations.

The 14 substantive policy areas addressed in the succeeding chapters generally fall under the three goals outlined above: (1) strengthen the middle class by enhancing opportunity and prosperity; (2) assert global leadership and enhance American security; and (3) revitalize democracy and reform governance. Most of the chapters included in this volume were originally published over the course of the past several months. In most cases, these chapters have been updated slightly to reflect new or additional facts since the original publication. Because progressives do not currently control the federal government, all of ideas presented here remain fresh and relevant.

To help expand opportunity and promote prosperity in America, the first five chapters propose a universal health care plan; a reformed tax system that is more simple and more fair to those who work for a living; specific recommendations on how to improve education for all children by focusing on teachers; an opportunity agenda to help diminish ongoing disparities based on race; and a set of proposals intended to foster and enhance innovation in the American economy.

To help America demonstrate global leadership and enhance our national security, chapters six through eleven make recommendations regarding enlarging and preserving our all-volunteer Army; an integrated approach to improving our homeland security; the creation of an improved professional intelligence corps; controlling weapons of mass destruction; improving our foreign assistance infrastructure and creating a development policy that fosters benefits at home and abroad; and how America can achieve energy security and independence.

Finally, to help America revitalize democracy and improve governance, chapters twelve through fourteen make recommendations regarding how best to secure America while protecting our civil liberties; the nomination and confirmation of federal court judges to protect fundamental American values; and improving regulatory decisionmaking designed to protect our health, safety, and the environment by using technology to collect and analyze more data.

Despite the range of topics covered here, we recognize how much work remains to be done. The Center for American Progress has endeavored to begin to respond to the challenge of presenting a policy agenda grounded in fundamental progressive values. We claim no monopoly on truth in presenting here our principles and policy ideas. We merely aim to bring forth the proud progressive tradition of responding to great national needs with an equally strong public spirit and commitment to social and political change.

—John D. Podesta  
President and CEO



# 2

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## PROGRESSIVE PRESCRIPTIONS for a Healthy America

*When health is absent, wisdom cannot reveal itself,  
art cannot manifest, strength cannot fight, wealth  
becomes useless, and intelligence cannot be applied*

– HEROPHILUS OF CHALDERON  
Greek physician and philosopher, 335-280 BC

America's health system is in crisis, leaving out too many and costing too much. Forty-six million Americans lack health insurance today. Millions more are struggling to pay premiums that are growing five times faster than wages, even as their benefits shrink. While some Americans have access to the most sophisticated medical care in the world, others are left to overcrowded emergency rooms, underfunded clinics, or no health care at all—all because they lack the insurance it takes to pay for the care they need. These injustices are inconsistent with Americans' respect for human dignity and commitment to opportunity for all. Unlocking our health care system's potential for everyone in America is the great moral challenge of our time.

To meet this challenge, the Center for American Progress proposes a practical, fair, and responsible plan to improve our health, not just our health care system.<sup>1</sup> Rather than dismantling our current system and starting from scratch, the Center's plan builds on the system's strengths while responding to its serious shortcomings. By embracing this approach, the Center's plan guarantees affordable, valuable health coverage for everyone, including those who have coverage today. Our reforms ensure that cost is not a barrier to coverage by providing income-related financial assistance. Additionally, by investing in key areas to improve health care quality and outcomes while reducing costs, Americans will get better value for their health care dollars. In

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return for these advancements, all individuals will be expected to contribute toward the health care system they will inevitably use. Accordingly, we propose to help pay for the investments necessary to improve access, affordability, and quality through a small value-added tax, the revenues from which will be dedicated exclusively to health system improvements. The Center's plan requires tough choices and shared sacrifice, but Americans do not shy away from the hard work necessary to ensure greater opportunity and security for all.

The benefits from securing affordable, valuable health coverage for all are not abstract. Modern medicine provides us with innumerable opportunities to live our lives to the fullest. For example, proper prenatal care dramatically reduces complications during pregnancy, birth defects, and infant mortality. Immunizations protect infants, children, and adults from illnesses and death caused by infectious diseases. Scientific advancements in the diagnosis and treatment of mental illnesses enhance the hope of recovery. Medications enable otherwise impaired people to work. State-of-the-art heart treatments, such as the implanted defibrillator received by Vice President Cheney and the quadruple bypass surgery received by former President Clinton, reduce the risk of dying from a heart attack.

Today, millions of Americans are denied such opportunities because they lack one simple protection: health insurance. Health insurance is the portal to our health care system. Without it, even routine health care services can be priced out of reach or otherwise denied, resulting in prolonged illnesses and worse health outcomes. When uninsured individuals do receive care, they are likely to be treated differently than those who have health insurance. For example, uninsured persons with traumatic injuries are less likely to be admitted to the hospital, receive fewer services if they are admitted, and are more likely to die than insured trauma patients.<sup>2</sup> Experts estimate that lack of health insurance causes 18,000 unnecessary deaths among adults each year in the United States.<sup>3</sup> Other effects of our failing health system are less obvious but no less devastating. For example, parents desperate to get their children much-needed mental health treatment are sometimes left with no option but to relinquish their children to the foster care system.<sup>4</sup> Americans face these difficult choices every day in their struggle to get the health care they and their families need.

Guaranteeing an American right to affordable, quality health coverage will not only lead to unprecedented gains in personal health and opportunity, it will also improve the economic health of our nation. Uninsured individuals pay \$33 billion out-of-pocket for the care they receive each year, and an additional \$41 billion in “uncompensated” care costs are placed on and passed through the health system.<sup>5</sup> These costs are borne by everyone, in the form of higher premiums for those who are insured and higher taxpayer costs to support safety net providers. In addition, the potential economic value to the nation to be gained in better health outcomes from uninterrupted coverage for all Americans is estimated to be between \$65 and \$130 billion each year.<sup>6</sup> Accordingly, the costs to the nation of our failing health system—even apart from the individual gains to be had with respect to personal health and opportunity—justify securing affordable, valuable health coverage for everyone.

America's health care crisis is not inevitable or a conundrum that defies solution. It is a pressing national problem festering in the midst of political paralysis. Our nation's leaders have issued urgent warnings of a Social Security crisis that in fact does not exist. Yet they have turned their backs on the suffering and insecurity millions of Americans face each day. Just as our nation has overcome tough challenges in the past, we can do so again. Our history is marked by moments where leaders broke through what were then viewed as insurmountable obstacles to achieve what are now considered basic, even sacred, protections. Ensuring affordable, high-quality health care is this generation's great challenge. With conviction and a practical, fair, and responsible plan, it can be achieved.

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*Practical.* The human and economic costs of large and persistent insurance gaps require that our nation expand affordable health coverage to all as quickly as possible. Policy solutions must be streamlined and simplified. Elements necessary to achieve the goal must be the highest and most pressing priority, while excessive details and extraneous issues that could derail success must be tabled. Policy options that build on existing structures and areas of consensus must be embraced.

*Fair.* Health care must be affordable and accessible to all, irrespective of health, age, income, or work status. Improving fairness and expanding opportunity necessarily means targeting those left out of the system by providing new options and financial assistance to remove existing barriers to coverage. It also means lowering the cost and improving the value of coverage for those who struggle to pay for it today. Coverage should be improved as it is expanded.

*Responsible.* Achieving and sustaining affordable, valuable health care coverage for all requires increased responsibility from each of us and the nation as a whole. In exchange for a seamless, affordable health system, everyone must be held responsible to either sign up for health coverage or pay into this system which they will inevitably use. And at a time of mounting federal deficits and concern about rising health care costs, a credible, responsible approach to improving health and health care for all must tackle difficult financing questions. Americans recognize that few good things in life are free. To reap the tremendous personal and national benefits of improving health and health care for all, we must secure adequate, sustainable financing necessary to achieve the goal.

## CURRENT STATE OF PLAY

The United States has a health care crisis that is getting worse, not better, over time. After a brief decline in the number of uninsured from 1998 to 2000, five million additional Americans lost their health insurance from 2000 to 2003.<sup>7</sup> At latest count, 46 million Americans lack health insurance.<sup>8</sup> Meanwhile, there are many troubling warnings signs about the state of Americans' health. For example, the United States has lower life expectancy than 22 other nations,<sup>9</sup> near-epidemics of preventable conditions,<sup>10</sup> and an infant mortality rate that actually rose in 2002 for the first time in 40 years.<sup>11</sup> We can improve our health through better health

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care. For example, approximately one in six pregnant women, and one in four pregnant African-American women, do not get early prenatal care.<sup>12</sup> By improving access to such care, we can dramatically reduce infant mortality, birth defects, and low birth weight—which will in turn reduce health problems later in life. Virtually nothing will do more to improve access to health care than extending health coverage to all and improving the value of health coverage for all.

The majority of uninsured individuals report that they lack coverage because it is too expensive.<sup>13</sup> This is no surprise: the average total premium for an employer-based family plan was \$9,950 in 2004<sup>14</sup>—representing nearly the entire annual income of a full-time, minimum-wage worker. The cost of premiums for employer-based plans has outpaced wage growth by nearly fivefold since 2000,<sup>15</sup> affecting not just employees and their families, but businesses and jobs. Unlike other industrialized nations, the United States relies heavily on employers to pay for health benefits as part of employee compensation, rather than broad-based financing sources. As a result, employers are forced to choose between maintaining health benefits, increasing wages, and adding jobs.

Most employers offer health benefits and want to continue to do so. In 2004, 63 percent of small employers (3 to 199 workers) and 99 percent of large employers (200 or more workers) offered health benefits.<sup>16</sup> Most employers believe it is very important to provide or contribute to their employees' health coverage and support efforts to expand employment-based coverage to more working families.<sup>17</sup> Yet employer-based coverage is eroding. In 2004, at least five million fewer jobs provided health insurance than in 2001.<sup>18</sup>

These trends in employment-based coverage would have translated into even greater growth in the number of uninsured had it not been for Medicaid, the federal-state health program for low-income individuals. Medicaid enrollment among the non-elderly increased by nearly 6 million from 2000 to 2003,<sup>19</sup> despite significant fiscal pressures in the states resulting from the economic downturn and loss in tax revenue, partly due to federal policy. Like employers, states are struggling with health care costs, as governors project average state Medicaid spending growth rates of 12.1 percent in FY 2005.<sup>20</sup>

These cost and coverage pressures in both the public and private sectors have created a growing consensus for change and an opportunity to achieve long-overdue reforms. By pursuing a practical, fair, and responsible plan for improving health and health care coverage, we can ensure that everyone in the United States has an equal opportunity to affordable, high-quality health care. The resulting health and economic gains will benefit individuals, employers, communities, and the nation as a whole.



## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

Achieving affordable, valuable health care coverage for all requires action in three major policy areas: expanding access to coverage by building on existing structures; promoting fairness in the system by improving the affordability, adequacy, and value of coverage; and fully funding these improvements through shared responsibility.

### Expanding Access to Coverage

Today, the majority of insured, non-elderly Americans have either employment-based coverage (78 percent) or Medicaid (13 percent).<sup>21</sup> Rather than dismantling our health system and starting from scratch, we propose filling the gaps between these two primary sources of coverage. We recommend supplementing the employer system with a new health insurance pool, modeled on the federal employees' health insurance system, for individuals as well as employers seeking a stable, affordable choice of private health insurance plans. Furthermore, we recommend expanding and strengthening Medicaid. These policies are described below.

#### EXPAND STABLE, AFFORDABLE COVERAGE OPTIONS FOR INDIVIDUALS AND EMPLOYERS

Building on the two largest sources of coverage today—job-based health benefits and Medicaid—would vastly improve access to health care. But these options are not enough to ensure access for all. Those who make too much to qualify for Medicaid, but have no access to affordable coverage through their job or a family member's coverage, can be left without options. Today, most such individuals are either uninsured or get coverage through the individual market. However, obtaining coverage through the individual market presents a number of challenges, particularly for those with limited incomes or known health problems. Rather than pursue the aggressive regulation and oversight that would be required to ensure access to coverage through the individual market, the Center's plan proposes to ensure access through a new national health insurance pool.

A national health insurance pool modeled on the one available to federal employees will ensure a stable, affordable choice of private insurance plans. The Federal Employees Health Benefits Program (FEHBP) currently provides coverage throughout the nation to more than 8 million federal enrollees and their dependents.<sup>22</sup> Coverage is available to anyone who is eligible for FEHBP and premiums are community rated, so that no one can be denied coverage or charged more simply because of his or her age or health status. Because of its size and organization, FEHBP can offer a range of options with low administrative costs. Similar attributes will apply to the new health insurance pool. Additionally, our plan will further stabilize the costs and options for coverage available through the pool by creating reinsurance protections, as described below.

Through this health insurance pool, everyone will have access to the same stable, affordable coverage options available to federal employees—including the president, members of Congress, and Supreme Court justices. All employers will also have access to the new health insurance pool, but no employer will be required to join it. Employers with successful health benefit programs can keep them in place without disruption. But for those employers looking to streamline their efforts to provide quality health benefits, this pool will be an attractive option.

At the same time, employers will be encouraged to continue their present role in providing health benefits. The current tax advantages of job-based health benefits will be maintained, whether the employer contributes to its employer-sponsored plan or to coverage provided through the new health insurance pool. Employers who participate in the pool will reap the benefits of its administrative efficiencies and reinsurance protections.

To extend the private health insurance options that are available through FEHBP to additional individuals and employers, Congress should enact legislation creating the new health insurance pool. The legislation should provide that:

- Private insurers offering coverage through FEHBP must also offer coverage through the new health insurance pool.
- Individuals can directly enroll in coverage through the new pool.
- Any employer can offer its employees and their dependents coverage through the pool. Employers must make an “all-or-none” decision about the health benefits they offer to their employees: tax-advantaged employee health benefits can either be offered through the new pool or outside it, but not both. This approach will prevent employers from selectively enrolling relatively healthy (and inexpensive) employees in the employer-sponsored plan while enrolling relatively unhealthy (and expensive) employees into the new pool.
- Reinsurance protections will be created to prevent unexpectedly high premiums due to enrollment of sicker individuals. This reinsurance will reimburse insurers participating in the new pool for a percentage of any individual’s claims costs in excess of an annual threshold, effectively spreading the costs of the highest-cost individuals across society.

#### STRENGTHEN AND EXPAND MEDICAID

Medicaid provides essential protections for more than 52 million of the nation’s most vulnerable children, low-income parents, persons with disabilities, and seniors.<sup>23</sup> Yet, due to complex eligibility rules and competing demands on limited state resources, many low-income Americans remain uninsured. In 2003, more than one-third of non-elderly Americans with incomes below the federal poverty level (\$14,860 for a family of three in 2003) were uninsured.<sup>24</sup>

Medicaid should be expanded to protect the working poor and indigent adults who often fall through the cracks of today’s system. Federal constraints on program eligibility will be removed so that every person earning less than a certain percentage of the poverty level (*e.g.*, 100 to 150 percent of poverty, or \$19,350 to \$29,025 for a family of four in 2005) will qualify. To offset new state costs due to this expanded eligibility, the proportion of Medicaid spending funded by the federal government will be increased. States are already struggling to make ends meet in the wake of the economic downturn and lost revenues from federal tax cuts. To prevent these state fiscal constraints from impeding progress in covering the uninsured, new federal funding will offset the marginal increase in state costs due to ensuring coverage for all low-income individuals. However, states will receive full federal assistance to extend coverage only if they effectively enroll those eligible for the program.

Using its administrative authority, the Department of Health and Human Services (HHS), under the direction of the Centers for Medicare and Medicaid Services, should take the following two steps to encourage full enrollment. First, HHS should promote simplification and ease current Medicaid eligibility requirements (as permitted under existing legislative authority). It should issue program guidance that clarifies that states can in many cases drop the Medicaid asset tests or set them to the lowest common denominator across low-income programs like Temporary Assistance for Needy Families (TANF) and food stamps. An interagency working group should establish the definition of this minimum allowable asset test.

Second, HHS should undertake an aggressive effort to enroll all individuals who are currently eligible for Medicaid and the State Children's Health Insurance Program by: issuing a letter to state Medicaid directors emphasizing the availability of enhanced federal matching funds for all state outreach, eligibility, and enrollment activities; issuing program guidance clarifying the quality control safe harbors to assure states that they will not be penalized for using presumptive eligibility and other aggressive enrollment standards; and increasing federal outreach initiatives (e.g., through media campaigns and partnerships with local and charitable organizations).

Congress should enact legislation to enable more individuals to qualify for Medicaid. The legislation should:

- Expand Medicaid eligibility to all individuals with incomes below a certain percentage (e.g., 100 or 150 percent) of the federal poverty level, with full federal financing of the marginal costs of expansions. Specify that states will receive this increased federal assistance to extend coverage only if they effectively enroll those eligible for the program.
- Change the definition of assets under the Supplemental Security Income (SSI) program, for purposes of determining Medicaid eligibility only. This follows the precedent set in the regulation for the Medicare low-income drug benefit, which uses the SSI definition of assets as the basis for determining Medicare low-income drug benefit eligibility in the first year, but then index those asset limits to inflation in subsequent years.<sup>25</sup> The result is an asset limit that increases with inflation, rather than staying at the same nominal level and effectively restricting eligibility over time.
- Clarify that states can allow families earning up to 250 percent of the federal poverty level to obtain Medicaid coverage for their children with serious disabilities, as contemplated in the Family Opportunity Act.<sup>26</sup>

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*Achieving affordable, valuable health care coverage for all requires action in three major policy areas: expanding access to coverage by building on existing structures; promoting fairness in the system by improving the affordability, adequacy, and value of coverage; and fully funding these improvements through shared responsibility.*

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*The federal government currently subsidizes health benefits, but those subsidies are not distributed fairly.*

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## Promoting Fairness

The policy recommendations described above would ensure that everyone in the United States has access to health insurance, regardless of their health status, state of residence, age, gender, or other characteristics. Additional protections are necessary, however, to ensure that the coverage is affordable, adequate, and provides value. Under our plan, as described below, Medicaid expansions and tax credits will make coverage more affordable for low- and middle-income Americans. We also recommend policies to ensure the adequacy of Medicaid benefits so that cost-sharing

is not a barrier to appropriate care for low-income Americans. In addition, the value of health coverage can be improved, ensuring that Americans get the most out of their health care dollar. While American health care can be the most advanced in the world, it is also bedeviled by high costs and inconsistent quality of care. Those on the receiving end of health care too often encounter a system that focuses on diseases rather than patients, is geared toward treating rather than preventing problems, and frequently promotes high-cost but low-value care. Therefore, rather than only expanding access to the current system, we must lay the groundwork for improving health care quality and value by focusing on three key areas that could produce large returns on investment: health promotion, improved information, and cutting-edge information technology.

### ENSURE AFFORDABILITY AND ADEQUACY OF COVERAGE

The federal government currently subsidizes health benefits, but those subsidies are not distributed fairly. Although the United States leads the world in its health spending, it trails all other industrialized nations in the government's share of spending on health care.<sup>27</sup> Generally, the only federal assistance available to working families is a tax subsidy for employer contributions to coverage. Those contributions are not counted as individual income and therefore are not taxed. Because the value of this subsidy is based on tax rates, the average federal tax benefit increases with income; it is nearly 28 times higher for an individual with income above \$100,000 than below \$10,000.<sup>28</sup>

Expanding Medicaid to all low-income individuals, as described above, will begin to correct this imbalance. Yet, even with expanded Medicaid eligibility, inequities in Medicaid benefits across states and among eligible populations can still leave health care unaffordable. Medicaid waivers approved by the Bush administration that allow further leeway on benefits and eligibility have exacerbated these inequities. Therefore, we also recommend policies to ensure the adequacy of Medicaid benefits for low-income Americans.

Middle-income Americans also struggle with high insurance premiums and the inequities of the current system. For example, more than one-third of uninsured individuals in 2003 lived in households with income of more than \$37,000.<sup>29</sup> To ease these burdens, under our plan, no individual will ever have to pay more than a small percentage (e.g., 5 to 7.5 percent) of his or her family income on health insurance premiums. This protection, administered as an easy-to-access, refundable tax credit, will apply to employer-based health insurance as well as coverage obtained through the new health insurance pool. In addition, we propose to extend existing employee protections to ensure that all employers that offer health benefits provide equal op-

portunity for all employees to participate. The following steps should be taken to implement the above approach:

First, using existing authority, the Department of Health and Human Services, under the direction of the Centers for Medicare and Medicaid Services, should reduce the inequities in Medicaid benefits and assure a minimum level of protection for all beneficiaries. To do so, the Department should: refuse to approve any new or pending section 1115 waiver that restricts benefits or eligibility; and issue program guidance establishing minimum specifications for assessing state compliance with current benefit rules.<sup>30</sup>

Second, Congress should direct the Government Accountability Office (GAO) to conduct a review of all existing waivers to assess compliance with existing benefit laws and recommend modifications as necessary.

Third, Congress should enact legislation to protect individuals and families from excessive health insurance premiums. The legislation should include provisions that:

- Create a refundable tax credit to ensure that an individual's premium for health insurance available through an employer or the new health insurance pool never exceeds a certain percentage (e.g., 5 to 7.5 percent) of the individual's income. This tax credit should be efficiently administered, minimize barriers to coverage due to cost (e.g., address liquidity concerns for low-income individuals), and provide adequate protections against fraud and abuse. In implementing this provision, the Department of the Treasury should determine whether the administration of the existing Health Coverage Tax Credit<sup>31</sup> can be adapted without prohibitive costs.
- Clarify that employers that offer health benefits, whether those benefits are fully insured or self-insured, must provide all workers with equal opportunity to participate in those benefits, in terms of both eligibility and contributions.

#### ENHANCING VALUE: THREE APPROACHES

The United States spends more on health care than any other nation. In 2003, U.S. health care spending totaled \$1.7 trillion, which is an average of \$5,670 per person.<sup>32</sup> Yet Americans do not always receive the best quality care. In fact, American adults receive recommended care only about half the time, with under-utilization more common than over-utilization.<sup>33</sup> The mismatch between what we spend and what we get, in terms of the uneven quality of health care, presents a crucial challenge in achieving affordable, valuable health care coverage for all. It is not enough merely to expand access to the current system. Americans must also secure better value for their health care dollars through improved health care quality, outcomes, and efficiency. We focus on three key value improvements that could produce large returns on investment.

*First, we must create a national focus on disease prevention and health promotion.* The United States is plagued by preventable diseases that have a devastating impact on personal health and contribute to the nation's soaring health costs. Yet our current health system focuses on treating these diseases after they occur, rather than promoting good health and reducing the incidence of disease in the first place. This misguided approach is due, in large part, to disincentives em-

bedded in the system. With no guarantee that an enrollee will remain in a specific insurance plan, insurers have little incentive to invest in keeping that enrollee healthy over an extended period of time. Instead, they simply try to avoid enrolling people who are, or are likely to become, sick.

To ensure that these failings are not perpetuated, we propose a new model for preventive care and health promotion. Preventive services will be carved out of private health insurance, removing the perverse incentives from the current system. In particular, Congress should enact legislation creating a universal preventive benefit. The legislation should provide that:

- The core preventive services to be included in the benefit should be based on current recommendations of the U.S. Preventive Services Task Force.<sup>34</sup>
- The U.S. surgeon general, the Centers for Disease Control and Prevention, the Health Resources and Services Administration, and the U.S. Preventive Services Task Force should work together and with state and local public health officials to carry out the following activities:
  - Develop a process for updating the covered preventive services over time, based on future recommendations from the U.S. Preventive Services Task Force and other evidence-based guidelines.
  - Consolidate and strengthen health promotion activities by creating an aggressive, community-based system to educate individuals about ways to promote health, prevent disease, and manage mild health problems. Preventive care will be available through both the new community-based system and through physicians and other providers, who will continue to deliver both preventive and other medical services as they do today. Irrespective, such care will be reimbursed by the new preventive benefit.
  - Develop population-based measures for delivering preventive care to encourage better immunization rates, earlier detection of disease, and other improvements. Establish reimbursement guidelines for the preventive health benefit that encourage improvement on these measures. Ensure that investments in health information technology improvements (described below) facilitate these data efforts and enable providers to seamlessly integrate preventive care with care for chronic and acute conditions.

*Second, we must develop better information about what constitutes high-quality, high-value care.* Most health research focuses on determining whether a particular medicine or treatment is safe and works. There is little credible information comparing the relative value of one treatment with another. As a result, patients often receive care that drives up costs without improving health outcomes, while forgoing high-quality, high-value care. Federal investment in research on the comparative clinical and cost effectiveness of available treatment options will enable patients, providers, and payers to make sensible health care choices. We recommend that:

- Administratively, the Department of Health and Human Services, through the Agency for Health Care Research and Quality (AHRQ), should pursue an ongoing, vigorous schedule of comparative clinical effectiveness research in compliance with Section 1013 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA).<sup>35</sup> The MMA authorizes AHRQ to conduct and support research on the outcomes, comparative clinical effectiveness and appropriateness of health care items and services, and strategies for improving efficiency and effectiveness of Medicare, Medicaid, and the State Children's Health Insurance Program. AHRQ's initial round of funding has prompted a series of comparative effectiveness reviews that analyze the body of existing research across for a small set of conditions and treatment approaches—including depression and mood disorders, arthritis, and peptic ulcer disease. With the exception of a single draft report, this work is not yet available to the public and health care providers. AHRQ has also identified a network of research centers that will pursue new research on clinical effectiveness, although AHRQ does not disclose which centers are pursuing which studies. This important work should be pursued with as much vigor and openness as possible, and AHRQ should ensure that the results of comparative effectiveness reviews as well as new research is easily accessible and understandable to the public as well as health care providers. In addition, as required by the MMA, HHS should establish a rigorous and independent evaluation of these research activities and their impact on health outcomes and utilization.
- Congress should enact legislation to strengthen the research envisioned in section 1013. Congress originally authorized \$50 million for implementation of section 1013, a very small fraction of the \$1.7 trillion Americans spend on health care each year. Congress initially failed to appropriate even these amounts, however, instead earmarking \$12 million of AHRQ's existing budget for fiscal year 2004. Appropriators also narrowed the research scope from all medical services to pharmaceuticals only. For fiscal year 2005, Congress reaffirmed the full scope of research contemplated in section 1013, but only appropriated \$15 million. Congress should strengthen this research agenda by significantly increasing the amount of dedicated funding for the full scope of research. We also recommend housing this activity under a new, quasi-governmental organization to leverage private funding, facilitate broad public and private participation, and protect controversial findings from political pressure.

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*American adults receive recommended care only about half the time, with under-utilization more common than over-utilization. The mismatch between what we spend and what we get, in terms of the uneven quality of health care, presents a crucial challenge in achieving affordable, valuable health care coverage for all.*

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*Third, we must bring health care out of the information “dark ages” and deliver critical information when and where it is needed. The health care sector has yet to reap the benefits of the information revolution. While doctors’ offices and hospital rooms whirl with exciting new medical technology, information technology is largely absent. Medical equipment churns out volumes of information, most of which is reduced to paper and stuffed in files along with handwritten*

notes. Cutting-edge information technology, structured to safeguard patients' privacy, has the potential to dramatically improve health care quality and produce a better care experience, while reducing total health care costs through administrative and clinical efficiencies. In particular, we recommend:

- Administratively, the Department of Health and Human Services, under the direction of the Center for Medicare and Medicaid Services, should establish Medicare and Medicaid demonstration programs to test reimbursement and programmatic changes specifically designed to encourage the implementation of clinical information technology and evaluate its impact on quality and outcomes, particularly for individuals with chronic conditions such as diabetes and hypertension.
- Congress should enact legislation establishing a health information infrastructure improvement fund to further the widespread adoption of standardized, compatible, and scalable information technology solutions. This fund will make available a combination of grants and loans to health care providers and others implementing technology solutions. The legislation should include specifications on standards and conditions that funding recipients must meet and the agency's priorities for approving grants and loans.

### Sharing Responsibility

Ensuring affordable, valuable health coverage for all is an investment in the nation's health and economic wellbeing from which everyone will benefit. Those who are uninsured will benefit from the health and financial protections afforded by health insurance. Those who have health insurance will benefit from the added security of knowing that no change in work status, health status, or any other unforeseen circumstance will ever jeopardize their coverage. The entire nation will benefit from the reductions in costs from "uncompensated" care (*i.e.*, care that is provided but not paid for and therefore ultimately passed on to those who do pay); the health care quality improvements that result from increasing our emphasis on preventive care and making better use of health care information and information technology; and the productivity and other economic gains from a healthier population. The investment necessary to achieve these benefits is vital. However, any responsible plan for expanding affordable, valuable coverage to all must include a means to pay for that investment. The Center's plan takes on that challenge, calling on individuals and the nation as a whole to share the responsibility for fully funding this effort.

At the individual level, we call on each person to recognize the importance of maintaining health coverage. No one can accurately predict his or her future health or wealth. Even relatively minor illnesses can lead to large, unforeseen expenses. To enable all individuals to access the health care they need, when they need it—without unduly burdening society—it is critical that all individuals have health insurance. Therefore, in exchange for the guarantees of affordability and access, we expect individuals to either sign up for health insurance or pay an annual, income-related contribution to maintaining the health care system. There will be a choice as to which option to select, but individuals who decide not to sign up for health insurance must contribute to the cost of care that they will inevitably use and will have their care reimbursed by Medicaid by default.<sup>36</sup>



At the national level, we recognize that investments in coverage and value will benefit all and should therefore be funded by all. The federal costs of the access, affordability, and value improvements that we recommend, however, will exceed the potential savings of those improvements, at least from the relatively short-term federal budget window perspective. The nation currently faces a dismal federal budget outlook. Even without the current fiscal imbalance, securing affordable health care for all and realigning the system toward value-based health care will require greater federal funding. The premium revenues from newly insured individuals and the contribution from those who fail to sign up for coverage will provide some, but not all, of the necessary revenues.

Accordingly, we propose a broad-based mechanism to fund the necessary investments: a small value-added tax whose revenue is exclusively dedicated to improving the health system. A value-added tax (VAT) is a tax on the value of a good or service added in its various stages of production—effectively the difference between what a business sells and what it buys from other businesses. Currently, the United States has no national sales tax, few federal excise taxes, and state sales taxes that are applied to a relatively narrow set of goods. A broad-based VAT of 3 to 4 percent with targeted exemptions (*e.g.*, exempting small businesses, food, education, religion, and/or health care)<sup>37</sup> will be sufficient to offset the rough annual federal cost of the health care reforms we propose—between \$100 and \$160 billion per year.<sup>38</sup> Revenue from the VAT will go to a trust fund and be used exclusively to finance the plan.

The effect of a VAT on low- and middle-income families will be offset by the reduction of health insurance premiums for precisely those families. In addition, the targeted exemptions from the VAT will reduce its impact on those families. Thus, our proposal, on net, is progressive in its effects. For this reason, other scholars and policymakers have supported the VAT as a way to finance health system improvements.<sup>39</sup> With a history of bipartisan support, the VAT offers the simplest, most logical, least controversial way to fund our plan to extend affordable, valuable health care coverage to everyone in the United States. That said, the use of the VAT matters. Using a large VAT to replace the federal income tax system, for example, would be highly regressive since it would provide tax relief for high-income people rather than health assistance to low-income people and health benefits for all.

Thus, Congress should enact legislation to ensure responsible, sustainable funding of the health system improvements described above. In particular, the legislation should:

- Establish an appropriate contribution from those individuals who fail to select among health coverage options.
- Establish Medicaid reimbursement for services provided to individuals who are not otherwise insured. These additional Medicaid costs will be 100 percent federally financed.

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*Any responsible plan for expanding affordable, valuable coverage to all must include a means to pay for that investment. The Center's plan takes on that challenge, calling on individuals and the nation as a whole to share the responsibility for fully funding this effort.*

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- Establish a VAT that is dedicated to financing the access, affordability, and value improvements included in this health care proposal. The VAT should be broad-based and have targeted exemptions. Revenue from the VAT will go to a trust fund and be used exclusively for investments in health care.

## CONCLUSION

The United States can and must do more to ensure the health of its people by opening the door for all to the incredible benefits of 21st century health care. The crisis in America's health system, in which 45 million people lack health insurance and millions more struggle to pay for their health care and coverage, is neither inevitable nor unsolvable. This problem has been eradicated in virtually all of the leading nations of the world—including a number of nations with significantly less wealth than our own. In the United States, we can take inspiration from our history, which is marked by moments when our nation's leaders and citizens broke through what were then viewed as insurmountable obstacles to achieve what are now considered basic and sacred protections. A similar challenge faces this generation. Ensuring affordable, quality health care for all Americans is not an easy task. But it is an essential one that furthers the promise of justice for all and strengthens the fabric of our society. With conviction and determination, armed with a practical, fair, and responsible plan, this worthy goal can be achieved.

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## A FAIR AND SIMPLE TAX SYSTEM FOR OUR FUTURE:

### A Progressive Approach to Tax Reform

*Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometric progression as they rise.*

—THOMAS JEFFERSON

As a nation, we have established certain fundamental priorities: protecting the safety, security, and health of our citizens; ensuring the right to a world-class education; providing vital public services; and preserving the dignity and basic comfort of our elderly and all individuals who take responsibility for their lives. We have realized throughout our country's history that supporting these priorities requires resources that no individual or small group of individuals could ever hope to raise by themselves. The challenge of tax policy is to generate these resources in a way that is consistent with our values as a nation. Those values can be summarized by three basic principles for our tax code: opportunity, fairness, and simplicity.

These fundamental principles have grown out of our nation's experience. From its beginning, the United States has always valued opportunity. Embedded in our vision of America is the belief that government should never put a limit on the success and wealth of the individual. Indeed, the American culture of innovation and limitless opportunity has been a key ingredient in the economic successes that have driven the great American job machine for generations.

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*We need a tax code that encourages economic and job growth, continues to reward ingenuity and hard work, and expands the American middle class.*

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We need a tax code that encourages economic and job growth, continues to reward ingenuity and hard work, and expands the American middle class. We also need a tax system that raises revenue efficiently—that creates as few economic distortions as possible while still meeting our other national priorities. But large deficits are threatening our nation’s ability to foster opportunity for all Americans. The last four years have seen record budget surpluses turned into massive budget deficits. This is a trend that must be reversed.

At the same time, our tax system has at its foundation a basic notion of fairness—that the most successful among us should contribute a greater share to support the collective services we all enjoy. With the enactment of the Income Tax Law of 1913, the federal government

applied the principle that taxes should be levied based upon ability to pay. This idea of “progressive” taxation grows from the belief that those who achieve the greatest wealth also benefit the most from what our nation provides. Our schools, the stability of our economy, and public investments in research and innovation all contribute to the successes of America. As Andrew Carnegie explained, “[w]here wealth accrues honorably, the people are always silent partners.”

Finally, Americans have always valued a simple, streamlined role for government in their lives. Complexity in the tax code too often breeds waste and abuse, which erode the fairness and efficiency of our tax code.

Unfortunately, while the above principles are fundamental to America, they are far from representative of our current tax code. These principles lead the Center for American Progress to propose a broad package of reforms of the tax system that reduces taxes for millions of middle-class Americans, rewards work, strengthens our economy, and raises the needed revenue to support our vital national priorities. We propose making the system fair by taxing income at the same levels regardless of how that income was generated and by shifting the share of revenue raised away from the regressive payroll tax. We propose simplifying the code by removing loopholes, broadening the corporate tax base, and reducing the number of tax brackets from six to three. By setting our nation on a path of fiscal responsibility, we can ensure ample opportunity for everyone to succeed in a modern economy.

We deserve a better tax system than the one we have now. Fixing our tax code to better reflect our nation’s values while meeting our nation’s commitments in a fiscally responsible manner will require nothing less than a wholesale redesign of the current system.

## CURRENT STATE OF PLAY

Before we can fix the tax code, we must first understand how we arrived at the current state. The Bush tax schemes enacted over the past four years have burdened us with a tax system that has become increasingly unfair, overly complex, and antithetical to opportunity and shared economic growth.

## ERODING FAIRNESS

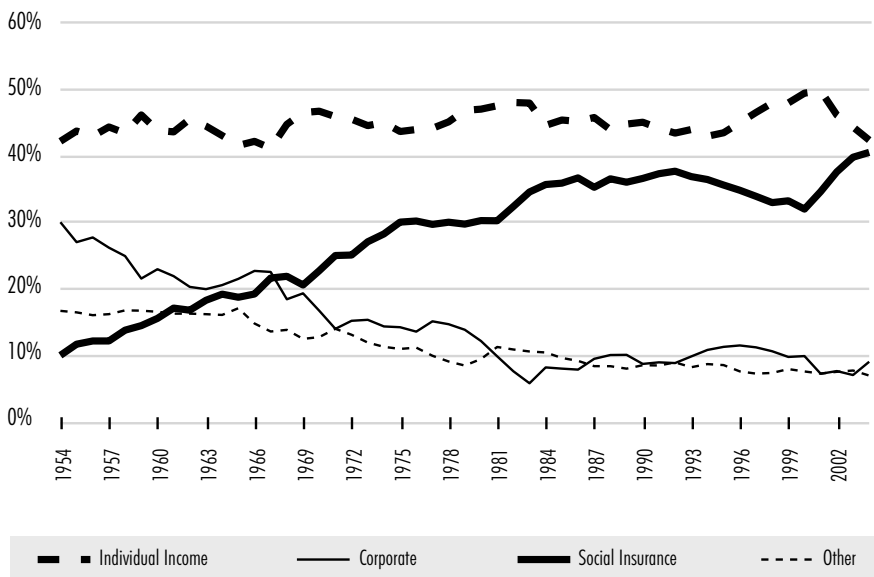
Recent tax policy changes have moved our system away from the basic principle of fairness. This can be most clearly seen in two areas: first, the tax share has shifted away from those who can best afford to pay and onto the middle class; and second, corporations have largely been able to avoid their obligation to pay taxes, often by shifting operations overseas. The result is an increased reliance on a regressive payroll tax, which falls most heavily on lower- and middle-income taxpayers.

## Wealth and Work

Recent tax policy has shifted a large share of taxation away from the passive (*i.e.*, unearned) income of the wealthy and onto the work and wages of middle-class workers. President Bush's effort to eliminate the estate tax, eliminate taxes on capital gains and dividends, and offer new tax-free savings accounts are all intended to eliminate the taxes paid on income from passive wealth. In 2003, billionaire financier Warren Buffett offered a stark example of this effort when he explained that if dividend taxes were eliminated, he would pay a tax rate ten times lower than what his secretary paid.<sup>1</sup>

There is little doubt that the benefits of the Bush tax policy were dramatically skewed toward benefiting the wealthy to the detriment of the typical American worker. In 2004, households making more than \$1 million received an average federal income tax cut of \$123,592, while the average change for those in the middle 20 percent of income was only \$647.<sup>2</sup> At the time the new federal tax laws took effect, many of those in the middle class saw increases in their state and local taxes.<sup>3</sup> In addition, from 2000 to 2003, middle-class incomes fell by over twice

Figure 1. Federal Tax Receipts By Source 1954-2004



Source data: *Tax Policy Center*, available at <http://www.taxpolicycenter.org/Tax-Facts/TFDB/TFTemplate.cfm?Docid=203>. Figures for 2004 are estimates.

the amount of the federal tax benefit.<sup>4</sup> Therefore, the overall economic impact of the Bush plan for middle-class Americans was negative.<sup>5</sup>

Equally important, the tax changes shifted the relative share of taxation onto work and onto the middle class. Fiscally irresponsible anti-tax advocates often justify large tax cuts for the wealthiest on the argument that the wealthy are the ones who earn the most income. However, by focusing many of the tax benefits on passive income from investments, President Bush offered individuals in the top 1 percent income bracket a whopping 34 percent of the benefits from the irresponsible tax cuts.<sup>6</sup> As a result, Bush's tax changes reduced the share of federal taxes paid by the top 1 percent of earners, while increasing the share paid by the middle fifth of workers. These changes thus shifted the tax code to reward wealth at the expense of work.

The focus on tax giveaways to the wealthiest taxpayers has deprived our system of vital income tax revenues that are used to fund our domestic and international priorities. At just 16.2 percent of gross domestic product (GDP), total revenue for fiscal year 2004 was at its lowest level since 1959.<sup>7</sup> Also, as a percent of GDP, revenues from the federal individual income tax fell in 2004 to their lowest level since 1950.<sup>8</sup> In only four years, individual income tax receipts have dropped from 49.9 percent of total tax receipts to only 42.6 percent of receipts (see Figure 1 on page 27).

#### CORPORATE AVOIDANCE

While the middle class is paying a larger share of federal taxes, major U.S. corporations are paying less and less. Though the corporate income tax rate structure maintains a degree of progressivity, it is riddled with loopholes. A recent study found that 82 of the nation's largest corporations paid *zero* taxes in at least one of the last three years, and 28 corporations did not pay taxes in any of the years despite generating pre-tax profits of \$44.9 billion over the period.<sup>9</sup> Part of the increase in corporate tax avoidance is explained by an explosion in the shifting of investment and profits overseas. Profits of foreign subsidiaries of U.S. corporations in major tax havens soared from \$88 billion in 1999 to \$149 billion in 2002. Profits in zero-tax Bermuda tripled over this short period.<sup>10</sup>

Increased avoidance—both overseas and domestically—has sent overall corporate tax revenue to historic lows. In 2003, corporate taxes were only 1.2 percent of GDP—their second lowest level as a share of our economy since 1934 (corporate taxes were 1.1 percent of GDP in 1983).<sup>11</sup> In addition, the role of corporate revenue in meeting our overall revenue needs has fallen in the past four years.

#### INCREASING RELIANCE ON THE PAYROLL TAX

Our tax system has become increasingly reliant on one of the most regressive components of our tax system: the Social Security payroll tax. Beginning with the Social Security Act of 1935, the federal government has imposed a tax on workers' wages to help finance Social Security benefits. From its initial rate of 2 percent—collected equally between employee and employer—the payroll tax has increased steadily over time to meet the growing cost of Social Security. Today, all workers pay a flat 6.2 percent tax on their earnings up to \$90,000 to help finance Social Security, and their employers pay an additional 6.2 percent on their worker's behalf as well.<sup>12</sup> Similarly, workers pay a flat 1.45 percent Medicare payroll tax, which is matched by a 1.45 percent tax paid by their employers to help finance Medicare.<sup>13</sup>



The payroll tax is highly regressive, imposing an effective tax rate that is four times larger for middle-income workers than those in the top 1 percent. (See Figure 2, which shows the effective social insurance tax rate—the amount of taxes paid by each group as a percent of total income.) The payroll tax only accounted for 23 percent of federal revenue in 1970 but now makes up an astounding 40 percent.<sup>14</sup> Unless we make structural changes to our tax system, we are poised to enter the baby boom retirement years increasingly reliant on the regressive payroll tax to cover the revenues our nation needs, thus further shifting the tax share onto the middle class.

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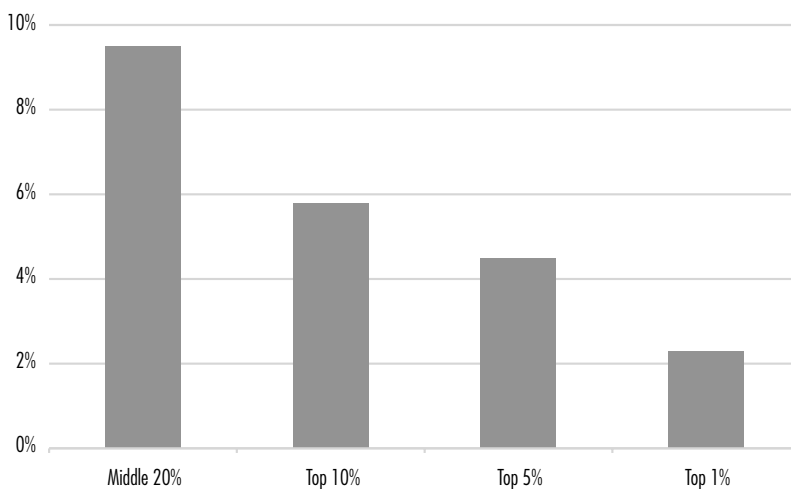
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### Increasing Complexity

Our tax code is too complex. Increased complexity can mean a tax system that is overall less fair as well as less efficient—which ultimately takes a toll on our economy. Costs of compliance, recordkeeping, and the time spent filing taxes can quickly add up.<sup>15</sup> The *Standard Federal Tax Reporter*, the reference point for accountants and other tax professionals, has grown to more than 60,000 pages in length. The process for even paying taxes is so bewildering that H&R Block alone now boasts annual revenues of \$3.8 billion.<sup>16</sup>

Yet while everyone seems to decry the complexity of our tax code, there has been far more appetite for tax cuts for the wealthy than for tax simplification. Indeed, one of the least understood results of President Bush's tax policy is how much complexity it has added to the tax code. After pledging to make things simpler in 2000, President Bush has actually added 10,000 pages to our tax code and related regulations.<sup>17</sup>

Figure 2. Effective Social Insurance Tax Rate



Source: Congressional Budget Office, *Effective Federal Tax Rates, 1979-2001*.

President Bush's tax policies have increased the number of tax filers subject to the Alternative Minimum Tax (AMT). The AMT was first established in 1969 to ensure that the very wealthiest Americans do not avoid paying their fair share. While the AMT only applied to 9,000 people in 1970, its income limits are not indexed to inflation, so the number of individuals subject to the AMT grew to 1.3 million in 2000.<sup>18</sup>

Since then, the number of people affected by the AMT has continued to increase, in part because the Bush tax policies lowered some taxes at the high end, but did not appropriately adjust the AMT. Within the next five years, it is expected that nearly a third of all tax filers will be subject to the AMT.<sup>19</sup>

In addition, complexity is adding to the unfairness of our tax code. Tax complexity for both individuals and corporations can create "gray areas" in which some are able to take advantage in ways not foreseen by the code. This favors those wealthier individuals and corporations who can afford tax accountants and professional tax preparers to exploit holes in the system. For lower- and moderate-income families, the cost of a tax preparer can take a big chunk out of their disposable income. This can result in a situation in which two tax filers in similar situations face very different tax payments. In addition, too many end up not collecting the benefits they are afforded through the code due to complexity.

### Undermining Opportunity and Shared Economic Growth

While "unfair" and "complex" are not words one would hope to use to describe a tax system, some measure of either might be acceptable if it contributed to a tax code that encouraged opportunity and helped spur economic growth and job creation. Unfortunately, the same tax policy changes that have made our tax system less fair and more complex have also undermined opportunity and threaten to undermine our economy's growth potential in the future.

President Bush's tax policies are largely responsible for turning the record budget surpluses that were achieved in the late 1990s into record budget deficits, generating the sharpest deterioration in fiscal conditions under one president in the nation's history.

The drastic downturn in our fiscal situation comes at just the wrong time. In the next few years, the retirement of the baby boom generation will begin to impose enormous costs on Social Security and Medicare. Those costs will only expand in the coming years as more baby boomers retire. As a result, we are facing a dramatic fiscal gap over coming decades—a structural shortfall between the revenues our system will bring in and the already known national commitments (not to mention the unknown future needs for big ticket items such as homeland security). Moving forward without addressing this long-term fiscal gap—projected to be about 5 percent of the size of our economy—is irresponsible.<sup>20</sup> We are driving toward the edge of a cliff, and it is up to us to either take a sharp turn or face the consequences of driving straight off.

Despite recent claims by some that deficits do not matter,<sup>21</sup> deficits *do* matter to the nation's economic health. Deficits reduce national saving, which reduces the resources available for both public and private investments, thereby driving up interest rates, which directly affects us all.<sup>22</sup> Less investment means less productive capacity in the future, which means lower living

standards for American families. Deficits also increase the interest payments that the federal government must pay each year on the national debt, leaving fewer funds for productive public investments such as education, scientific and medical research, and domestic infrastructure.

Deficits also increase the amount of federal debt held outside the United States. At present, 43 percent of the public debt is now held outside the country, almost half of which is held by China and Japan. Specifically, of the \$1.85 trillion of our debt held by foreigners, \$174 billion is held by China and \$720 billion by Japan.<sup>23</sup> This raises the risk that if confidence in the U.S. economy erodes, foreign debt holders will withdraw their investments, causing the value of the dollar to fall and interest rates to rise, perhaps dramatically. The prospects for such a hard landing are real. Former Federal Reserve Chairman Paul Volcker recently said he believes that there is a 75 percent chance of a major financial crisis in the United States over the next five years.<sup>24</sup>

President Bush's tax changes were premised on old supply-side logic that has found little factual support. The radical right-wing applauded these tax changes and the resulting fiscal deterioration under the theory that it would stimulate investment and savings, and would lead to job growth and long-term advances in productivity. As of July 2005, job growth since the 2001 recession has been substantially below the average of past recoveries. While the average post-WWII recovery has seen employment growth of 2.29 percent at this point following the end of a recession, the most recent recovery has seen meager growth of just 0.60 percent.<sup>25</sup> National savings has deteriorated dramatically in the past four years, leaving the economy in worse shape than before the tax changes.

Additional reductions in the top marginal tax rates are simply not an efficient way to stimulate investments—they provide a windfall to high-income individuals, while providing little incentive for additional savings and investments or job creation. Indeed, when a number of independent organizations looked at the long-term impact of Bush's tax scheme—taking into account both the impact of the deficit and the potential growth-enhancing features—they found that the overall impact on growth would be negligible.<sup>26</sup> As the nonpartisan Congressional Budget Office (CBO) explained, “[T]he net effect on economic output could be either positive or negative . . . importantly, regardless of its direction, the net effect on output . . . would probably be small.”<sup>27</sup> We have paid trillions in debt to our future for an ideologically driven tax policy that has failed to help our economy grow.

## A PLAN FOR PROGRESSIVE TAX REFORM

Restoring a fair, simple, and pro-opportunity tax system, while generating the resources necessary to meet our looming challenges, requires moving our tax system in an ambitious new direction. We propose a comprehensive tax reform plan that rewards hard work and promotes shared prosperity.

The comprehensive reform package proposed below restores balance and fairness to our tax code by shifting to a broad-based progressive tax on each source of income—wages, dividends, and capital gains. The plan takes important steps to restore our revenue-generating capacity by reducing the projected ten-year deficit by nearly \$500 billion, while at the same time eliminating the need for the AMT. The plan provides bold new incentives for lower- and

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middle-income families to save and create wealth. And it calls for the elimination of tax loopholes and effects sensible corporate tax reforms that remove incentives for corporations to shift production overseas and that increase compliance to ensure that corporate America once again pays its fair share.

Overall, the plan will increase the take-home pay of most households earning under \$200,000 a year, providing an average tax cut of over \$600. Most of those making more than \$200,000 a year will likely see increased tax responsibility relative to current tax policy.<sup>28</sup>

We recommend that the Congress pass legislation based on the tax reform components outlined below. In addition, the Bush administration and the Congress should work together to convene tax experts to identify corporate loopholes that should be eliminated.

### Restoring Fairness

After four years of policies that have shifted the tax share onto work and the middle class, hardworking families need real reform that improves their after-tax incomes without bankrupting our economy. We propose fundamentally changing the progressivity of our tax structure in three ways. First, under our plan the same tax schedule would apply to income no matter the source—a dollar of income from investment would be treated no differently than a dollar earned through work. Second, the plan would shift the tax share of individuals away from the regressive payroll tax while still maintaining a full commitment to Social Security's guaranteed benefit structure. Third, the plan would raise revenue from only the very top end of the income distribution, while enhancing the take-home pay of the taxpayers who most need help.

*Tax Each Source of Income the Same.* Each source of income—whether from dividends, capital gains, wages or salaries—should be taxed according to the same progressive rate structure. This would reverse the radical direction of our current tax system, and it would ensure that a nurse or firefighter who receives his or her income through hourly work would not face a higher average tax rate than a wealthy investment banker who receives passive income from accumulated or inherited wealth.

It runs contrary to both our values and ability to grow the middle class to favor passive wealth over wages. To encourage savings for those who are not at the very top and who also hold assets for a number of years, we would allow some of the capital gains to be exempt (as described more fully below).

*Reduce the Dependence on Regressive Payroll Taxes.* The payroll tax has played an important role in our tax system by providing revenue to meet our nation's commitment to retirees. Yet, as described above, the payroll tax is also among the most regressive in our overall tax system. We propose removing the employee component of the Social Security payroll tax, immediately reducing by 6.2 percent the tax rate all Americans pay on the first \$90,000 of earnings. At the same time, we propose removing the cap on the payroll taxes paid by employers, making

income above the current cap subject to the employer-side tax, thus making the remaining payroll tax less regressive.

To maintain our full commitment to financing Social Security, we would dedicate a portion of general revenues to the Social Security trust fund. By setting aside 2.25 percent of gross domestic product per year, we would solidify the financial status of the Social Security system. The additional revenue raised by our plan would be sufficient to cover these dedicated funds. (Details can be found in Addendum I, entitled “Protecting Our Commitment to Retirement Security.”)

Our plan protects this revenue by having Congress pass legislation that includes a number of safeguards to prevent Congress from reducing this dedicated stream, including a requirement that any reduction can be made only after a three-fifths majority vote in the Congress, to ensure that this funding is not cut. This reform would be sufficient to replace current Social Security revenue and keeps our full commitment to financing Social Security’s guaranteed benefit structure—but in a fairer, more sustainable manner.

As part of our effort to reduce dependence on the payroll tax, we would also reform the estate tax. The estate tax is the most progressive of federal taxes: it is only paid by multi-millionaires. It raises needed revenue, encourages charitable giving, and affects less than 2 percent of the population—and currently the first \$1.5 million can be passed from one generation to the next tax-free.<sup>29</sup> We would increase the exemption to \$2.5 million; married couples would thus be able to shelter twice this amount, or \$5 million, from estate taxes. This would ensure that virtually all small business owners, farmers, and ranchers could pass on their assets without being subject to the estate tax.<sup>30</sup>

*Increase Opportunity by Enhancing the Take-Home Pay of Lower-Income Taxpayers.* We also propose two specific reforms that are needed to raise the take-home pay of the lowest-income earners in the country. First, to ensure that single working parents who currently receive the Earned Income Tax Credit (EITC) do not risk losing any benefits if they marry, we propose altering the tax code to eliminate this disincentive to marriage. Second, we would reform the Child Tax Credit to make it more generous and ensure that low-income workers with stagnant wages can continue to access the benefit. Because the income threshold for receiving the Child Tax Credit is set at over \$10,000 and indexed to inflation, many working families living at or below the poverty line do not have enough income to qualify for a full or even partial credit. Over half of African-American children and 40 percent of Hispanic children do not receive the full credit under this arrangement. American Progress’s plan would lower the income threshold for receipt of the Child Tax Credit to \$5,000 and eliminate inflation indexing, which would allow millions of working families to access their full or increased benefit. This change will allow low-income families with stagnant wages—which are often determined by the minimum wage, which is not indexed—to receive a greater benefit from the credit than under current law. In addition, over time this would increase the number of people who would receive the full benefit from the credit.

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*We have paid trillions in debt to our future for an ideologically driven tax policy that has failed to help our economy grow.*

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## DISTRIBUTIONAL IMPLICATIONS

Overall, our tax plan will increase the take-home pay of most households earning under \$200,000 a year, providing an average tax cut of \$620. Most of those making more than \$200,000 a year will likely see a tax increase relative to current policy.

The main source of reduction for most taxpayers comes in the form of eliminating the employee side of the Social Security payroll tax. This means an immediate 6.2 percent reduction for most people.

Because of the change in the tax rates on capital gains and dividends, some people who have significant income from wealth but little income from wages may see an increase in their tax share. When the entire tax reform plan is considered, 68.4 percent of all taxpayers would receive a cut. The table below shows the impact of the plan on various income groups.<sup>31</sup>

Table A. Average Tax Change for Income Groups Under Reform Plan

Cash Income Class (thousands of 2003 dollars)	Percent with Tax Cut	Percent with No Change	Average Tax Change (\$)
Less than 10	59.9	29.4	-220
10-20	63.6	19.3	-524
20-30	73.1	6.6	-620
30-40	73.0	3.8	-496
40-50	72.8	2.0	-519
50-75	76.7	0.4	-687
75-100	76.1	0.1	-950
100-200	73.7	0.0	-1,138
200-500	24.1	0.0	12,722
500-1,000	6.8	0.0	64,752
More than 1,000	3.9	0.0	360,646
All	68.4	9.1	793.1

### Simplifying the Tax Code

George Bush's tax scheme has increased the complexity of our system while shifting the tax share to middle-class taxpayers. We would reverse this trend.

*Reduce the Number of Income Tax Brackets.* In addition to taxing each source of income equally, we would cut the number of income tax brackets in half, establishing a simpler, more progressive three-rate structure with rates at 15 percent, 25 percent, and 39.6 percent. The three tax rates would apply to brackets of taxable income of \$0 to \$25,000; \$25,001 to \$120,000; and

\$120,001 and above. These brackets would be indexed for inflation. The standard deduction would be raised slightly to \$10,000 for a married couple and also indexed for inflation.

Combined with the shift away from the employee portion of the payroll tax, most people will see a reduction in their overall tax bill. Households earning less than \$200,000 would see,

## ELIMINATING WASTEFUL CORPORATE TAX LOOPHOLES AND SUBSIDIES

We believe that by reducing the complexity of the corporate income tax code, we can broaden the base of the corporate tax structure and increase revenue while enhancing the overall efficiency of the system and keeping tax rates relatively low. We would eliminate corporate tax loopholes and special giveaways, which by conservative estimates would provide an estimated revenue gain of \$30 billion annually.<sup>32</sup>

In particular, we would propose creating a Bipartisan Commission on Corporate Subsidies. Because of the political challenge to eliminating specific corporate subsidies and tax loopholes, the president should initiate a corporate welfare commission modeled on the federal military base-closing process. Such a commission would give a bipartisan group of senior officials the leeway to identify wasteful loopholes and subsidies and develop a comprehensive proposal to be presented to the Congress for an up-or-down vote. For example, many of the perks included in the recent corporate tax bill have little economic justification and should be reexamined.<sup>33</sup> Senator John McCain has estimated that such a commission could save taxpayers “tens of billions of dollars each year.”<sup>34</sup>

To take just one example of a loophole that could be addressed, Congress should pass an international corporate tax reform bill that removes damaging incentives for companies to shift production abroad. Some of the specific provisions that should be addressed are:

- *Ending deferral.* One of the key provisions that encourages companies to move profits overseas is what is known as “deferral,” which allows U.S. corporations to avoid paying taxes on profits earned abroad as long as those profits are not brought back into the U.S. The Joint Committee on Taxation estimates that ending deferral would raise about \$8 billion a year in revenue.
- *Closing the Bermuda tax loophole.* Today, U.S. firms can move their headquarters to foreign tax havens to avoid paying taxes in the United States. Closing this loophole, known as corporate inversion or the “Bermuda loophole,” would raise about \$2.6 billion a year in revenue.
- *Clarifying the definition of offshore tax shelters.* Currently there is no single definition of “tax shelter,” which forces the Treasury Department and the IRS to disallow them on a case-by-case basis. Clarifying the definition of tax shelters would reduce waste, make it harder for new variants of shelters to be developed, and raise about \$13 billion a year in revenue, according to the Joint Committee on Taxation.

In addition, and just in this past year, there were numerous additional loopholes passed benefiting railroad companies, a few oil companies, and other special interests that need to be addressed.<sup>35</sup>

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*It runs contrary to both our values and ability to grow the middle-class to favor passive wealth over wages.*

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on average, an increase of over \$600 in their take-home pay. (See the text box entitled “Distributional Implications” on page 34 for greater detail.)

In addition, we would also include a \$250 exemption for capital income to simplify tax filing and to reduce the tax share for small investors.

*Close Corporate and Individual Loopholes.* The complexity of the corporate income tax is hurting our competitiveness and encouraging companies to shift production overseas. By broadening the base of the corporate tax structure we can enhance the overall efficiency of the system, keep rates at relatively low levels, and increase revenues.

Eliminating corporate tax loopholes and special giveaways to the wealthy would provide an estimated revenue gain of \$30 billion annually.<sup>36</sup> For example, the recently enacted \$140 billion corporate tax overhaul includes a wide range of specialized credits that should be reexamined. (See the text box entitled “Eliminating Wasteful Corporate Tax Loopholes and Subsidies” on page 35 for greater detail.) In addition, by closing some of the most egregious loopholes, we would ensure that our tax code no longer offers affirmative incentives for wealthy individuals to shelter taxable income or for corporations to shift production outside the United States.

*Eliminate the Need for the Alternative Minimum Tax.* If left in place under the current system, the Alternative Minimum Tax (AMT) will impact 36 million Americans by 2010.<sup>37</sup> The AMT adds a significant layer of complexity to the tax-filing process, essentially requiring tax filers to compute their taxes twice. By overhauling the entire income tax code and eliminating personal income tax loopholes that are currently limited by the AMT, we would eliminate the need for an AMT, and thus address, in a fiscally responsible manner, an important tax challenge facing our country over the next decade.<sup>38</sup>

### Increasing Opportunity and Incentives for Shared Economic Growth

Finally, our reform plan is designed to encourage the kind of sustained economic growth that we saw in the 1990s, and to increase opportunities for more Americans to join the middle class. Unlike the old, failed right-wing trickle-down policies, this plan embodies a new progressive growth strategy based on restoring fiscal discipline, investing in our people, and expanding savings and ownership to the broad middle class.

*Fiscal Discipline.* Restoring confidence and economic growth requires addressing the record deficits generated under the Bush administration, while keeping our country safe and meeting our commitments to our seniors. American Progress’s tax reform plan would put our country back on a path toward closing our fiscal gap, thus increasing confidence in our economic future and allowing for productivity-enhancing investments in education and research that are keys to our nation’s economic success. Significantly, the plan outlined here raises an additional \$478 billion in revenue over the next ten years compared with the president’s FY2005 budget.<sup>39</sup>



While we emphasize the need to restore responsibility by raising additional revenue, our plan does not represent a significant departure from average levels of taxation over the last 25 years. Indeed, as Table 1 on page 38 shows, revenue as a share of GDP over the next five years under the plan would be *lower* than the average under any of the last four presidents. What is important about this reform is that it reverses the course of the current tax structure and begins to raise additional revenue needed to meet our future challenges.

## REVENUE IMPLICATIONS

Record deficits combined with vital domestic and international spending needs necessitate increasing revenue above the current, historically low levels. Our fiscally responsible plan takes important steps to restore our revenue-generating capacity by reducing the projected ten-year deficit by nearly \$500 billion relative to current policy.

While we believe it is necessary to raise revenue levels above where they are today, we realize that many “revenue neutral” proposals—that is, proposals that neither raise nor lower revenue—will be presented in the coming months. In order to create an “apples-to-apples” comparison we have analyzed the impact of making our plan revenue neutral. By doing so, we would be able to raise the threshold for the top tax bracket from \$120,000 to \$170,000, or alternatively we could raise the threshold for the middle tax bracket from \$25,000 to \$33,000. The table below shows the full impact of the revenue neutral plan on various income groups.

Table B. Average Tax Change for Income Groups: Revenue Neutral Options

Cash Income Class (thousands of 2003 dollars)	Revenue Neutral: Top Bracket to \$170,000			Revenue Neutral: Middle Bracket to \$33,000		
	Percent with Tax Cut	Percent with No Change	Average Tax Change (\$)	Percent with Tax Cut	Percent with No Change	Average Tax Change (\$)
Less than 10	59.9	29.4	-221	59.9	29.4	-220
10-20	63.6	19.3	-525	63.6	19.3	-525
20-30	73.1	6.6	-621	73.6	6.6	-703
30-40	73.0	3.8	-497	75.0	3.8	-697
40-50	72.8	2.0	-523	76.2	2.0	-798
50-75	76.7	0.4	-697	79.4	0.4	-1,227
75-100	77.3	0.1	-1,161	79.8	0.1	-1,699
100-200	79.1	0.0	-1,859	76.7	0.0	-1,944
200-500	46.1	0.0	6,581	26.8	0.0	11,902
500-1,000	9.4	0.0	57,981	7.4	0.0	63,939
More than 1,000	5.8	0.0	353,519	4.1	0.0	359,832
All	69.7	9.1	477.9	70.0	9.1	489.5

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*Our reform plan is designed to encourage the kind of sustained economic growth that we saw in the 1990s, and to increase opportunities for more Americans to join the middle class.*

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*Offer Tens of Millions of Americans New Opportunities to Save and Create Wealth.* Today, our tax system is upside-down when it comes to offering incentives to save and create wealth for retirement. Because all retirement savings incentives are provided through up-front tax deductions, higher-income individuals are given generous benefits to save while lower-income individuals are given little to no benefit. An individual in the 35 percent tax bracket gets a 35 cent tax break today on every dollar saved for retirement, and can accumulate interest on that savings tax-free until retirement. Yet someone in the 15 percent bracket gets only a 15 cent incentive to save now, and low-income workers who do not make enough money to owe federal income taxes get nothing for saving.

We propose leaving intact our current retirement savings structure, including Individual Retirement Accounts (IRAs) and 401(k) contribution limits and non-discrimination rules. However, we propose to do away with the upside-down deduction-based incentive and replace it with an across-the-board 25 percent refundable tax *credit* for retirement savings. Whether you are an investment banker or a secretary, you would receive 25 cents for every dollar you can afford to put away in an IRA or 401(k). Similar to the current system, the money you save would accumulate tax-free until retirement.

For the 33 million Americans who currently have no income tax liability and hence receive no tax incentives to save, this reform would, for the first time, offer a generous incentive to build for retirement. For 30 million more Americans in the 15 percent income bracket under our plan, this reform would nearly double the tax incentive to save. This component of the plan is revenue neutral, shifting the current tax expenditures on deductibility for retirement savings into the refundable credit for all Americans.<sup>40</sup>

<b>Reagan</b>	<b>18.1</b>
Reagan I	18.4
Reagan II	17.9
<b>Bush I</b>	<b>17.9</b>
<b>Clinton</b>	<b>19.2</b>
Clinton I	18.3
Clinton II	20.1
<b>Bush II</b>	<b>17.5</b>
Latest year (2004)	16.2
<b>American Progress Tax Plan 2005-2014</b>	<b>17.2</b>
2005-2009	17.1
2010-2014	17.2

Source: Historical data from the Congressional Budget Office; calculations based on revenue and GDP projections from the Tax Policy Center.

In addition, in order to encourage long-term savings and provide additional incentives for retirement savings, we would allow those with incomes under \$1 million to exempt a portion of their appreciated assets from capital gains taxation. For assets held less than a year, the full amount of the gain would be subject to the regular income tax rates as described above. For assets held for more than a year, an increasing percentage of any capital gains would be exempted—beginning with 10 percent after the first year and reaching a maximum of 50 percent after five years. For these long-term holdings, those earning less than \$1 million—which covers more than 99 percent of the population—the top marginal effective rate on capital gains would be below the rates that were in effect during the terms of, among others, Ronald Reagan, George H.W. Bush, and Bill Clinton.

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*Our great nation deserves a sound tax system that enhances economic growth and allows everyone to benefit from the remarkable success of the American economy.*

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Finally, a portion of the nearly \$500 billion set aside for deficit reduction could be used to enhance overall retirement security by financing additional savings incentives. Our vision of what a progressive savings plan should look like is more fully described in Addendum I. “Protecting Our Commitment to Retirement Security.” In conjunction with shoring up Social Security and reducing the deficit, we maintain our commitment to a sound financial future for all Americans, young and old.

Overall, our fiscally responsible proposal would make the tax system fairer and less complex, would efficiently raise additional revenue, and would provide higher after-tax incomes for millions of taxpayers. Our great nation deserves a sound tax system that enhances economic growth and allows everyone to benefit from the remarkable success of the American economy. We strongly encourage the president and Congress to take up the challenge of progressive tax reform.

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## Addendum I.

### PROTECTING OUR COMMITMENT TO RETIREMENT SECURITY

#### Social Security

As a nation, we have developed a variety of policies to ensure the health and wellbeing of older Americans. The most important retirement security programs are Social Security, Medicare, and various tax incentives to save for retirement. While each of these programs has served us well, they can and should be improved.

The funding for Social Security currently relies on the regressive payroll tax, and will have to rely on funding from general revenue, starting in 2019, unless benefits are cut or the payroll tax is increased. According to the Congressional Budget Office, in 2025 more than 0.5 percent of gross domestic product (GDP) will have to be shifted from general revenues, and in 2050 over 1 percent of GDP would be required.<sup>41</sup>

Table C. Securing Revenue for Social Security

	10-year Revenue Impact (\$ billions, 2005-2014)
Eliminate Employee Social Security Payroll tax	-3,663
Remove taxable income cap	686
Dedicate 2.25 percent of GDP	3,398
Total Additional Contribution to the Trust Fund	421

Calculations based on GDP and taxable payroll projections from the Congressional Budget Office, available at [http://www.cbo.gov/Spreadsheet/5530\\_SuppTables.xls](http://www.cbo.gov/Spreadsheet/5530_SuppTables.xls). Revenue from removing the cap on the taxable portion of the employer-side of the payroll tax is from a memorandum to the Social Security Actuaries, available at [http://www.centristpolicynetwork.org/legislative\\_updates/files/OACT\\_taxmax.pdf](http://www.centristpolicynetwork.org/legislative_updates/files/OACT_taxmax.pdf).

To strengthen the financial foundation of Social Security, we would replace the revenue from the employee portion of the payroll tax, which is currently dedicated to Social Security, by eliminating the income cap on the employer share of the payroll tax and by immediately dedicating from general revenues an amount equal to 2.25 percent of GDP each year. The additional revenue raised by our plan would be sufficient to cover these dedicated funds and is accounted for in our revenue and distributional estimates. This amount would replace the revenues lost from the Social Security payroll tax and would provide \$421 billion in additional contributions to the trust fund over the next 10 years (see Table C, above).

In order to protect this dedicated revenue, Congress should pass legislation that commits the equivalent of 2.25 percent of our GDP from our general revenues to funding Social Security. In addition, this legislation should include a number of safeguards to prevent Congress from reducing this dedicated stream, including a requirement that any reduction can be made only after a three-fifths majority vote in the Congress, to ensure that this funding is not cut.

By doing this, we guarantee additional revenue to the Social Security trust fund in the immediate future, and also enhance long-run solvency. Currently, according to various estimates, the Social Security trust fund is projected to run out in 40 to 50 years,<sup>42</sup> and faces a long-run cumulative shortfall over the next 75 years. By dedicating 2.25 percent of GDP to the trust fund annually and eliminating the cap, we are able to cut in half the long-run, 75-year difference between dedicated revenues and outlays.<sup>43</sup>

While other parts of the Social Security system may eventually need to be addressed, our plan enhances our ability to guarantee full benefits to both older and younger Americans. In addition, by reducing the deficit by nearly \$500 billion over 10 years, we are also increasing national savings and enhancing our ability to address other longer-term challenges.

### Retirement Savings Incentives

The current structure of tax incentives to save is upside-down. Since most retirement savings incentives are provided through tax deductions, higher-income individuals are given generous

benefits to save while lower-income individuals are given little to no benefit. Securing the retirement of all Americans in a fair manner requires changing the current approach.

We propose leaving intact the current structure of retirement plans and replacing the current deductions with a flat 25 percent refundable tax credit for retirement savings. This revenue neutral change would mean an increase in the incentives to save for over 60 million Americans, and would provide—for the first time—an incentive for lower-income families to save for retirement.

In addition, we strengthen our commitment to retirement security by providing an additional benefit to lower- and middle-income savers. By raising enough revenue to reduce the deficit by nearly \$500 billion, there would be enough revenue to create additional savings incentives such as providing a matching contribution to retirement savings for low- and middle-income workers. These matching funds and the base contributions would provide an important supplement to Social Security and enhance overall retirement security.

We recommend implementing retirement savings incentives that provide additional matching funds for low-income savers, and then phasing out the match for higher income levels above \$100,000. In addition, we would include a modest automatic contribution for low-income families, who often find it difficult to contribute due to a lack of disposable income. The accounts would be managed in a cost-effective manner that limits personal risk.<sup>44</sup> This enhanced savings and retirement wealth would provide an important supplement to Social Security and enhance overall retirement security.

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## Addendum II.

### THE BUDGET AND BUDGET PROCESS

President Bush and the Republican-controlled Congress with which he has worked so closely for the last four years have racked up an unparalleled record of fiscal irresponsibility. Largely through reckless tax cuts, they have turned the record budget surpluses that they inherited in 2001 into massive budget deficits, generating the sharpest deterioration in fiscal conditions under one president in the nation's history.

Moreover, the president and Republican congressional leaders continue to push for tax and spending policies that, if adopted, would take an increasingly perilous fiscal situation and make it even more dangerous to the nation's economic future, leading to a weaker economy, continued job loss, a wider gap between the rich and poor, unmet needs in education, health care, and other key priorities, and lower living standards for most Americans. Our budget situation brings to mind the first rule of holes: when you're in one, stop digging. That is, with our deficit at a historically high level, the last thing we should do is make it worse.

In addition, the annual process by which the federal government sets overall priorities for the budget is in desperate need of an overhaul. The last few years have seen a flood of missed deadlines, continuing resolutions to keep the government operating, and the use of omnibus

legislation to quickly finish remaining appropriations. The result is a loss of transparency in the process, excessive influence by special interests, and the potential for a variety of abuses. For example, a provision that would have allowed members of Congress or their staffs to snoop on private citizens' tax returns nearly made it into law in the 2004 omnibus passed last December.<sup>45</sup>

We propose a bold change in budget policy that would again place fiscal discipline at the center of the nation's budget policy while continuing to invest in vital domestic and international programs.

Our tax plan would reduce the deficit; however, a lower deficit is not the sum total of a responsible budget policy. While reducing the deficit, we must also set priorities so that we can find the resources to invest in programs that will raise the standard of living and quality of life for Americans in the future. That means more investment in education and health care, in environmental protection and law enforcement, and in our transportation and communications networks so that we can take advantage of cutting-edge technology and boost productivity.

In balancing the needs of deficit reduction and investment, the federal government of the 1990s benefited from budget rules that imposed discipline while providing the requisite flexibility through which members of Congress could make choices. Those rules have since expired, and we propose that Congress amend the budget process to restore them, as described below. We also propose other steps that would help Congress make the difficult choices among programs.

### Responsible Budgeting

We propose several initiatives that will enable the president and Congress to pursue fiscal discipline as well as to find the resources to invest in high-priority programs.

- *Restore PAYGO rules for new tax cuts or entitlements.* For most of the 1990s, the pay-as-you-go, or PAYGO, rules required that if Congress wanted to cut a tax or create or expand an entitlement program, lawmakers had to offset the costs by raising other taxes or cutting other entitlement programs. The PAYGO rules were widely credited with imposing needed discipline while giving Congress the flexibility to make tax and spending changes that it deemed necessary. The rules expired several years ago. We believe Congress should restore them.
- *Prohibit the use of budget reconciliation measures that increase the budget deficit.* Under the congressional budget process, budget reconciliation has been a key step in ensuring that committees follow through on their obligations to find budget savings. It was never supposed to provide a quick avenue for tax cuts or other measures that would increase the deficit. Congress should specifically prohibit the practice.
- *Avoid block-granting of entitlement programs.* Increasingly, Congress has moved towards placing entitlement spending into block-grants to states. This practice allows federal legislators to avoid the hard decisions required when cutting funding by shifting this responsibility onto states. This process can also leave massive unfunded requirements on the heads of state governments, and often means cuts in services.<sup>46</sup>

- *End the use of massive omnibus legislation.* By putting together several spending bills into one massive piece of legislation, the process is left open to excessive influence by a small minority of Congress. Spending needs to be open to public scrutiny, especially in times of excessive deficits. Congress should end this practice.

## ENDNOTES

<sup>1</sup> Warren Buffett, *Dividend Voodoo*, Washington Post, May 20, 2003, at A19.

<sup>2</sup> Joel Friedman, Robert Greenstein & Isaac Shapiro, Are Taxes Exceptionally Concentrated at the Top? Treasury Department Release Creates Misleading Impression about Taxes That High-Income Taxpayers Pay, Apr. 15, 2004, *available at* <http://www.cbpp.org/4-15-04tax.htm> (last viewed Jan. 6, 2005).

<sup>3</sup> From 2001 to the beginning of 2004, “about 30 states have expanded their tax bases or increased tax rates to lessen the decline in revenues.” See Nicholas Johnson, Jennifer Schiess & Joseph Llobrera, State Revenues have Fallen Dramatically: Tax Increases Have So Far Failed to Fill the Gap, November 2003, *available at* <http://www.cbpp.org/10-22-03sfp.htm> (last viewed Jan. 6, 2005).

<sup>4</sup> Average inflation-adjusted incomes for the middle 20 percent of the income scale fell by more than \$1,500 over the most recent three years for which we have data. See U.S. Census Bureau data *available at* <http://www.census.gov/hhes/income/histinc/h03ar.html> (last viewed Jan. 6, 2005).

<sup>5</sup> From 2000 to 2003, the average real (inflation-adjusted) pre-tax income for those in the middle 20 percent of the population fell by \$1,525.

<sup>6</sup> Joint Economic Committee, Democratic Staff Report: New CBO Analysis Confirms That the Bush Tax Cuts are Skewed Toward the Rich, August 2004, *available at* <http://jec.senate.gov/democrats/Documents/Reports/CBOtaxcuts13aug2004.pdf> (last viewed Jan. 21, 2005).

<sup>7</sup> See Congressional Budget Office, The Budget and Economic Outlook: An Update, September 2004; and Center on Budget and Policy Priorities, Official Treasury Report Shows Fourth Year of Deficit Growth, Despite Economic Recovery, October, 2004.

<sup>8</sup> In 2004, individual income tax receipts were estimated at 6.7 percent of GDP. This is the lowest since 1950, when individual income taxes were 5.8 percent of GDP. See Office of Management and Budget, Historical Budget Tables (2004).

<sup>9</sup> Citizens for Tax Justice, Bush Policies Drive a Surge in Corporate Tax Freeloading, Sept. 22, 2004, *available at* <http://www.ctj.org/corpfed04pr.pdf> (last viewed Jan. 6, 2005).

<sup>10</sup> Martin Sullivan, *Data Show a Dramatic Shift of Profits to Tax Havens*, Tax Notes, Sept. 13, 2004, at 1190.

<sup>11</sup> Isaac Shapiro, Federal Income Taxes, as a Share of GDP, Drop to Lowest Level Since 1942, According to Final Budget Data, Oct. 21, 2003, *available at* <http://www.cbpp.org/10-21-03tax.pdf> (last viewed Jan. 6, 2005).

<sup>12</sup> The limit was increased to \$90,000 in 2005 from \$87,900 in 2004. For details, see Internal Revenue Service, Publication 15: Circular E, Employer’s Tax Guide, January 2004, *available at* <http://www.irs.gov/pub/irs-pdf/p15.pdf> (last viewed Jan. 6, 2005).

<sup>13</sup> There is currently no income cap on the Medicare component of the payroll tax.

<sup>14</sup> Tax Policy Center, Historical Percentage of Revenue by Source (2004), *available at* <http://www.taxpolicycenter.org/TaxFacts/TFDB/TFTemplate.cfm?Docid=204> (last viewed Jan. 6, 2005).

<sup>15</sup> One estimate cited the total cost of the tax code’s complexity to be \$100 billion a year. See *Handing it Back: George Bush’s Tax Agenda*, The Economist, Sept. 23, 2004, *available at* [http://www.economist.com/displaystory.cfm?story\\_id=3219759](http://www.economist.com/displaystory.cfm?story_id=3219759) (last viewed Jan. 20, 2005).

<sup>16</sup> H&R Block, Record Annual Revenues and Earnings, *available at* [http://www.corporate-ir.net/ireye/ir\\_site.zhtml?ticker=hrb&script=410&layout=0&item\\_id=580356](http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=hrb&script=410&layout=0&item_id=580356) (last viewed Jan. 6, 2005).

- <sup>17</sup> See *A Boundless Vision, Alas, The Economist*, Sept. 17, 2004, available at [http://www.economist.com/displaystory.cfm?story\\_id=3177067](http://www.economist.com/displaystory.cfm?story_id=3177067) (last viewed Jan. 20, 2005).
- <sup>18</sup> Joint Economic Committee, *The Alternative Minimum Tax for Individuals: A Growing Burden*, May, 2001, available at <http://www.house.gov/jec/tax/amt.pdf> (last viewed Jan. 6, 2005).
- <sup>19</sup> William G. Gale, *Key Points on the Alternative Minimum Tax*, Urban-Brookings Tax Policy Center, Jan. 21, 2004, available at <http://www.brookings.edu/views/op-ed/gale/20040121amt.htm> (last viewed Jan. 6, 2005).
- <sup>20</sup> Concord Coalition, *Current Policy Trends Lead to Large Sustained Deficits*, Sept. 7, 2004, available at [http://www.concordcoalition.org/federal\\_budget/0408PlausBaselinechart.pdf](http://www.concordcoalition.org/federal_budget/0408PlausBaselinechart.pdf) (last viewed Jan. 6, 2005).
- <sup>21</sup> For example, former CEA Chairman Glenn Hubbard argued, “[a]s an economist, I don’t buy that there’s a link between swings in the budget deficit of the size we see in the United States and interest rates. There’s just no evidence.” See Richard Stevenson, *Bush’s Way is Clear to Press His Agenda for the Economy*, *New York Times*, Nov. 11, 2002, at A12.
- <sup>22</sup> William G. Gale & Peter R. Orszag, *Budget Deficits, National Saving, and Interest Rates*, September 2004, available at <http://www.brookings.edu/dybdocroot/views/papers/20040910orszaggle.pdf> (last viewed Jan. 6, 2005).
- <sup>23</sup> See U.S. Treasury, *Table: Major Foreign Holders of Treasury Securities*, available at <http://www.ustreas.gov/tic/mfh.txt> (last viewed Jan. 28, 2005).
- <sup>24</sup> Gillian Tett, *The Gospel According to Paul*, *Financial Times*, Oct. 23, 2004, at 14.
- <sup>25</sup> See Isaac Shapiro, et al., *How Does this Recovery Measure Up?*, Center on Budget and Policy Priorities, Aug. 9, 2005, available at <http://www.cbpp.org/8-9-05bud.htm> (last viewed August 16, 2005). See also Congressional Budget Office, *Employment During the 2001-2003 Recovery*, August 2005, available at <http://www.cbo.gov/ftpdocs/65xx/doc6599/08-05-Jobs.pdf> (last viewed August 16, 2005).
- <sup>26</sup> See e.g., Joint Committee on Taxation, *Macroeconomic Analysis of H.R. 2, The ‘Jobs and Growth Reconciliation Tax Act of 2003.’* Congressional Record, May 8, 2003, at H3831; Macroeconomic Advisors, *A Preliminary Analysis of the President’s Jobs and Growth Proposals*, Jan. 10, 2003; OECD, *Economic Surveys: United States*, April 2004.
- <sup>27</sup> Congressional Budget Office, *An Analysis of the President’s Budgetary Proposals for Fiscal Year 2004*, March 2003, available at <http://www.cbo.gov/showdoc.cfm?index=4129&sequence=0> (last viewed Jan. 6, 2005).
- <sup>28</sup> The revenue and distribution estimations were conducted by the Urban-Brookings Tax Policy Center’s microsimulation model. The estimation was done in December 2004. Comparisons are made against a baseline of current law with the 2001 and 2003 tax legislation extended, and do not include the additional tax reductions due to the savings incentives outlined below. See text box “Distributional Implications,” and note 38 for details.
- <sup>29</sup> United for a Fair Economy, *America’s Wealth Gap and the Case for Preserving the Estate Tax*, available at <http://www.faireconomy.org/estatetax/EstateTaxChartpack.pdf> (last viewed Jan. 6, 2005).
- <sup>30</sup> Congressional Budget Office, *Effects of the Federal Estate Tax on Farms and Small Businesses*, July 2005, available at <http://www.cbo.gov/ftpdocs/65xx/doc6512/07-06-EstateTax.pdf> (last viewed August 16, 2005).
- <sup>31</sup> The calculations do not include the distributional impact of the income exclusion for long-term capital gains. The microsimulation model described in note 28 that was used to generate the distributional implications currently does not have the capacity to simulate the impact of long-term capital gains exclusions of the type described here. As such, the estimates provided above understate the size of the tax cut for those receiving a cut, and overstate the tax increase for those who receive an increase in our plan. When the exclusion for long-term capital gains is included, we estimate tax changes relative to current policy for the various income classes to be: (1) less than \$10,000: -224; (2) \$10-20,000: -533; (3) \$20-30,000: -639; (4) \$30-40,000: -523; (5) \$40-50,000: -568; (6) \$50-75,000: -779; (7) \$75-100,000: -1,127; (8) \$100-200,000: -1,598; (9) \$200-500,000: 10,285; (10) \$500,000: 54,684; (11) more than \$1,000,000: 360,646.
- <sup>32</sup> Senator John McCain, for example, explained in proposing a Corporate Welfare Commission: “There are more than 100 corporate subsidy programs in the federal budget today, requiring the federal government to spend approximately \$65 billion a year. Terminating even some of these programs could save taxpayers tens of billions of dollars each year.” John McCain, *Congressional Press Release*, Apr. 17, 2002, available at [http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content\\_id=378](http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=378) (last viewed Jan. 6, 2005).



<sup>33</sup> Among the special interest tax breaks included in the FSC/ETI corporate tax law passed in October 2004 are \$44 million in tax breaks for importers of Chinese ceiling fans, a new provision to allow foreign gamblers to exclude their dog-track and horse-track winnings from taxation, tax cuts for fishing tackle box makers, and \$339 million in benefits for private debt collectors. These breaks were highlighted in several national newspapers on October 12, 2004. See e.g., Jonathan Weisman, Senate Passes Corporate Tax Bill, *Washington Post*, Oct. 12, 2004, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A25407-2004Oct11> (last viewed Jan. 20, 2005). The FSC/ETI “Jobs” Act was initially designed to avoid European Union tariffs. The EU tariffs were imposed as a response to a World Trade Organization ruling that found the U.S. Foreign Sales Corporation (FSC) and its successor, the Extra-Territorial Income (ETI), to be prohibited export subsidies. However, the revenue that would have been raised by the repeal of the export subsidies and some other revenue provisions were quickly used to finance various additional corporate giveaways.

<sup>34</sup> See note 32.

<sup>35</sup> Citizens for Tax Justice, *Congress Passes \$210 Billion in New Corporate Tax Breaks*, Oct. 13, 2004, available at <http://www.ctj.org/pdf/corp1004.pdf> (last viewed Jan. 6, 2005).

<sup>36</sup> See note 32.

<sup>37</sup> William G. Gale, *Key Points on the Alternative Minimum Tax*, Urban-Brookings Tax Policy Center, Jan. 21, 2004, available at <http://www.brookings.edu/views/op-ed/gale/20040121amt.htm> (last viewed Jan. 6, 2005).

<sup>38</sup> Eliminating the need would be important to place limits on some deductions for very high-income individuals and to limit the ability of high-income individuals to shelter unlimited amounts of income from taxation.

<sup>39</sup> If one includes the AMT reform desired by the administration, the proposal would raise additional revenue relative to the administration’s policy.

<sup>40</sup> According to microsimulation estimates, the revenue lost from the refundable credit is approximately offset by the revenue gained by replacing the deductibility.

<sup>41</sup> Congressional Budget Office, The Outlook for Social Security, June 2004, at 4, available at <http://www.cbo.gov/ftpdocs/55xx/doc5530/06-14-SocialSecurity.pdf> (last viewed Jan. 6, 2005).

<sup>42</sup> According to the Congressional Budget Office, the expected trust fund exhaustion date is 2052. Ibid at 7. According to the actuaries of the Social Security Trust Fund, the date is 2043. See Testimony of James Lockhart, “Social Security’s Future,” before the Social Security Subcommittee of the Committee on Ways and Means, Jan. 26, 2004, available at [http://www.ssa.gov/legislation/testimony\\_012604.htm](http://www.ssa.gov/legislation/testimony_012604.htm) (last viewed Jan. 6, 2005).

<sup>43</sup> The Congressional Budget Office estimates that “if annual Social Security revenues were permanently increased, or annual outlays decreased, by 0.5 percent of GDP beginning immediately, trust fund balances would be sufficient to provide spending authority for all of the benefits scheduled to be paid over the next 100 years.” See Congressional Budget Office, The Outlook for Social Security, June 2004, at 6, available at <http://www.cbo.gov/ftpdocs/55xx/doc5530/06-14-SocialSecurity.pdf> (last viewed Jan. 6, 2005). According to the 2004 trustees’ report on Social Security, the 75-year shortfall (the “summarized balance”) is approximately 0.7 percent of GDP. See Social Security Administration, 2004 OASDI Trustees Report, Appendix F, available at <http://www.ssa.gov/OACT/TR/TR04/tr04.pdf> (last viewed Jan. 6, 2005). The 2.25 percent of GDP that we propose covers the net revenue lost from the reduction in the payroll tax (2.4 percent). The elimination of the income cap would raise an additional 0.45 percent of GDP, which together with the general revenue funding raises the inflow into Social Security by about 0.3 percent of GDP. This amount is sufficient to cover over half of the long-term, 75-year shortfall in Social Security (according to the CBO numbers); and just under half (according to the trustees’ report).

<sup>44</sup> These ideas are similar to those embodied in the USA Accounts proposals from the 1990s.

<sup>45</sup> For an overview of the IRS provision, see Dan Morgan & Helen Dewar, *Tax-Return Provision in Spending Bill Dropped*, *Washington Post*, Dec. 7, 2004, at A4.

<sup>46</sup> For an example of the impact in one area, see Sharon Parrot & Jennifer Mezey, *Bush Administration Projects That The Number of Children Receiving Child Care Subsidies Will Fall By 200,000 During the Next Five Years*, Feb. 5, 2004, available at <http://www.cbpp.org/2-5-03tanf.htm> (last viewed Jan. 6, 2005).



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## BETTER TEACHERS, BETTER SCHOOLS: Ensuring a High-Quality Education for Every Child

*Next in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained.*

– JAMES A. GARFIELD  
Twentieth President of the United States

Progressives have long viewed educational improvement as an important mechanism for promoting fundamental progressive social aims: economic expansion, individual opportunity, social equity, and a strong democracy. But today's progressives can no longer afford to view strengthening education simply as a tool. They must embrace it as a necessity.

The Center for American Progress supports a federal education agenda that builds the capacity of public education to teach all students to higher levels and graduate more of them ready for success in postsecondary education. Investing in our teacher workforce will be a critical component in building that capacity. Of course, we recognize that there are many other pressing educational issues in addition to teacher quality, such as the need for more and better early childhood education and additional time and resources for students who fall behind academically. We focus here on teacher quality because it is time to recognize that teachers are the backbone of high-quality public education, and strengthening the teacher workforce can lay the foundation for fruitful investments in other areas.

The highest caliber and most desirable candidates should be vigorously recruited and effectively trained. Once they are on the job, teachers' skills should be more systematically developed through staged career pathways, with more opportunities to be trained in clinical settings,

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*The factor that matters most in how much students learn is teacher quality.*

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greater support and better evaluation during a residency period, greater choices to advance along a meaningful career ladder as they become more expert over time, and with better pay through competitive compensation structures for all teachers that recognize and reward different roles, responsibilities, knowledge, skills, and, most importantly, positive results. Finally, teachers at every career stage should be supported enough to do their jobs well, with adequate opportunities for ongoing training, sufficient access to high-quality instructional materials and tools, and working conditions that enable them to do their best for students. Most importantly, efforts must be made to ensure that every school has high-quality teachers so that a child's address does not determine whether he or she has access to high-quality instruction.

able them to do their best for students. Most importantly, efforts must be made to ensure that every school has high-quality teachers so that a child's address does not determine whether he or she has access to high-quality instruction.

We recognize that the federal government's investment in and direct influence over public education currently is limited. Responsibility for education has historically been reserved for the states, and the federal government currently provides less than 10 percent of the funds spent on public education in the United States. The recommendations in this chapter have been crafted to provide the maximum possible benefit from federal action within these current constraints, while at the same time promoting the use of the national bully pulpit to rally widespread action concerning the issue of teacher quality and establishing a foundation for progressives to pursue the goals of greatly expanding the investment in teachers and the federal investment in education over the long term.<sup>1</sup>

Fortunately, the time is ripe for federal education policy to focus intensively on building the teaching profession. Strong, private efforts have coalesced around this issue, resulting in bipartisan agreement around key principles. Federal policy already supplies a foothold for efforts to build teacher quality. The No Child Left Behind Act of 2001 requires that states work to ensure that all teachers are highly qualified by 2005-2006. Furthermore, the Act requires schools to make special efforts to ensure that low-income and minority children are not disproportionately taught by less-qualified teachers than their more advantaged peers.

In addition, a new consensus about the importance of teachers has emerged among researchers and policymakers, based on the results of groundbreaking research released over the past decade. Using finer-grained information based on annual growth in individual students' test scores, such research has demonstrated that school factors play a decisive role in how much students learn. The factor that matters most is *teacher quality*. One influential study in Tennessee, for example, found that two groups of students who start out with the same level of achievement can end up 50 points apart on a 100-point scale if one group is assigned three ineffective teachers in a row and the other is assigned three effective teachers in a row.<sup>2</sup> A more recent study in Texas found that the impact of classroom teaching is so great that "having five years of good teachers in a row could overcome the average seventh-grade mathematics achievement gap between lower-income kids and those from higher-income families."<sup>3</sup>

Thus, we now know that teachers—the educational resource that accounts for our biggest annual educational expenditure (nearly \$200 billion per year)<sup>4</sup>—are also the most critical resource for student learning. Clearly, the goal of raising achievement for all students while closing gaps

between groups is within our reach if we can recruit, cultivate, and retain highly trained and motivated individuals and make sure all students have access to their knowledge and skills.

To that end, the president and the Congress should carve out an aggressive leadership role for the federal government in promoting widespread recognition that teachers are the single greatest resource in public education and the key to helping all students reach academic proficiency. The president should work with Congress and direct federal agencies to ensure that federal policies affirm the importance of teacher quality and help drive state and local efforts to strengthen the teaching profession.

Two equally important principles should guide federal policy in this area:

First, the president and the Congress should publicly recognize and act on the premise that teachers are public education's most valuable asset. Federal education policy must make a focused commitment to building a highly qualified, adequately supported, and more professionalized teacher workforce for America's schools. The long-range goal should be to maximize the return on the nation's investment in teachers by systematically and consistently promoting practices that treat teaching as a true "clinical practice profession" much like medicine. This requires competing for talented candidates and giving them rigorous training, providing practicing teachers high-quality professional development and opportunities to earn greater compensation for positive results and their willingness to take on tougher jobs, and ensuring working conditions that enable them to do the job to the best of their abilities rather than hampering their efforts to teach all students to high levels.

Second, the president and the Congress must publicly recognize the injustice and inefficiency of regressive policies and practices that cause the nation's neediest students to bear a disproportionate cost for our historical failure to treat teachers as our most valuable resource, and act swiftly and decisively to wipe out inequitable access to good teachers. The goal should be to use our best teachers more strategically, efficiently, and equitably so as to reduce—and eventually eliminate—reliance on unqualified teachers in hard-to-staff subject areas and schools.

## CURRENT STATE OF PLAY

Unfortunately, education leaders and public policymakers often fail to treat teachers as a resource at all, let alone our most valuable one. Little attention is paid to creating financial incentives and working environments necessary to recruit and retain the best and brightest Americans into teaching. Teacher preparation programs often do not provide teachers with the training they need to do the job well. Hiring practices are slipshod and often needlessly frustrate and repel good teachers rather than delivering them to the job assignments they are best suited for and where they are needed most.

Once in the classroom, teachers find too few opportunities to engage in ongoing professional development that is closely aligned with what they teach, as well as intensive and sustained enough to make a difference. More experienced teachers find few opportunities for career advancement without having to enter administration and leave classroom instruction. Moreover, poor working conditions, especially in schools serving high numbers of poor and minority

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*Efforts must be made to ensure that every school has high-quality teachers so that a child's address does not determine whether he or she has access to high-quality instruction.*

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students, drive too many teachers to look for more amenable environments in other schools or professions. The results of such neglect are predictable and, by now, well documented.

We consistently fail to attract and retain the brightest candidates at every point in the professional pipeline to teaching. For example, young people with high SAT and ACT scores are much less likely to elect teaching as a career, and those who do are twice as likely to leave the profession after only a few years.<sup>5</sup> In high-poverty schools with poor working conditions, rates of overall teacher attrition are disastrously high. Between 2000 and 2001, one out of five teachers in the nation's high-poverty schools either left to teach in another school or dropped out of teaching altogether.<sup>6</sup>

Due to shortages in some subjects and ineffective administrative assignment practices in many schools, large numbers of secondary teachers are assigned to teach classes outside of their areas of preparation. For example, 37 percent of students in grades 7-12 are taught by a teacher who lacks a college major and state certification in the subject being taught.<sup>7</sup> Rates of “out-of-field teaching” are especially high in middle schools, high-poverty schools, and shortage areas such as mathematics. For example, in 2000 a staggering seven in ten math classes in high-poverty middle schools were assigned to teachers who lacked even a college minor in mathematics or a related field.<sup>8</sup>

Making it into the profession, and into the right assignment, is no guarantee of success. In fact, inadequate preparation and thin on-the-job support leave many teachers feeling stranded and result in high teacher attrition rates, particularly in high-poverty schools. In a federal survey conducted in 2000, fewer than half of teachers felt “very well prepared” to implement new methods of teaching and to teach the state or district curriculum, and only about one in four felt very prepared to integrate technology into their instruction.<sup>9</sup>

The impact on students is not benign. For example, poor preparation, low levels of professional support and development, and lack of instructional resources can result in teachers responding to state assessments with ineffective practices such as teaching to the test that can narrow student exposure to a rich curriculum.

To make matters worse, the distribution of less-qualified, less-effective teachers is highly inequitable. No matter how qualifications are measured—by experience, subject matter expertise, academic skills and background, or proven effectiveness in raising test scores—low-income, African American, and Latino children consistently get less than their fair share of good teachers.<sup>10</sup> Many high-poverty and high-minority schools serve as training grounds where younger teachers gain practical experience and skills before moving on to more affluent schools with better working conditions. This revolving door makes low-income and minority students about twice as likely to be assigned to inexperienced teachers,<sup>11</sup> who on average generate far smaller annual learning gains than do more experienced teachers.<sup>12</sup>

Unfortunately, the Bush administration has consistently squandered major opportunities to rectify these problems and improve teaching in America's public schools. It has failed to invest sufficient resources in building teacher quality, just as it has failed to provide sufficient funds for education programs and mandates generally.<sup>13</sup> The administration's budgets have proposed either static funding levels or cuts for the two primary federal programs targeting teacher quality.<sup>14</sup>

Compounding these problems, officials at the Department of Education have failed to communicate, monitor, and enforce crucial teacher quality requirements of the No Child Left Behind Act for states and districts—provisions specifically intended to ensure that students have the teachers they need to achieve at high levels. As a result, many states and districts have lagged in complying with these important provisions and sometimes have simply decided not to comply at all.<sup>15</sup>

Finally, the administration has failed to capitalize on the important power of the bully pulpit to highlight the importance of teacher quality and rally support for making the difficult changes necessary to improve it. Indeed, despite the prominence of teacher quality provisions and programs in the No Child Left Behind Act, the administration has been more zealous in publicizing and pushing for accountability, school choice, privatization, and school prayer than it has teacher quality.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN<sup>16</sup>

### Using Data for Better Decisionmaking

We must work to increase the amount, meaningfulness, and quality of information about America's teacher workforce, and encourage the use of such data for greater accountability and smarter decisionmaking. The federal government should demand better information about America's teachers, and provide enough support to enable school systems to provide it. Improved data with respect to teacher credentials and performance can be used to improve instruction and help rectify inequities in student opportunities for learning.

To offer some examples: in Chattanooga, Tennessee, the district uses value-added data to identify highly effective teachers and then provides them with incentives to teach in the highest need schools.<sup>17</sup> This type of data analysis can also be used to identify a teacher's weaknesses so professional development can be provided in those areas. Conversely, a teacher's strengths can be identified (*e.g.*, data may demonstrate that a particular teacher is exceptionally good at teaching fractions) and that teacher can be used as a resource for teachers needing coaching in those areas.

Remarkably, only a few districts in the country have the capacity to conduct just this kind of simple but crucial analysis. This must change, and the federal government is uniquely positioned to lead a revolution in providing better information on teachers to those who need it. Simply put, better data will make every other recommendation in this report easier to implement and more likely to succeed, especially those related to measuring the effectiveness of teacher preparation programs, the development of more sophisticated career advancement

systems, and more effective and equitable deployment of teachers. Data can also help build the case for larger investments in teachers. To increase the amount, meaningfulness, and quality of information about America's teacher workforce, the Center for American Progress offers the following recommendations.

*The Congress should enact legislation authorizing a council to focus on the supply and distribution of teachers in the United States.* Education experts agree that the nation needs more and better information on teacher supply and demand, yet there has been little effort to generate such data despite successful federal efforts in other fields. For example, in 1986 Congress passed legislation authorizing a Council on Graduate Medical Education (COGME) to engage in ongoing research regarding physician workforce trends, including supply and distribution of physicians across the United States, and to recommend actions to address identified needs.<sup>18</sup> The Congress should incorporate lessons from COGME's work into the design of the teacher workforce council.

*The Congress should pass legislation creating a \$100 million fund for the development of state-wide systems to produce data on the "value-added effectiveness" of classroom teachers in states that agree to use such information—at a minimum—in the evaluation of teacher preparation programs and federally supported professional development programs.* While the data on teacher preparation and qualifications required under current federal law go a long way toward filling gaps in our knowledge about the nation's teachers, they still do not tell us enough. The "value-added" data systems being pioneered in some states and districts offer an important new opportunity to produce information about the actual performance of individual classroom teachers measured in terms of how much improvement in standardized assessment results they obtain from the students in their classrooms. Unfortunately, the development of such systems is expensive, and the spread of this new technology has been slow.

In addition, such legislation should create a clearinghouse that provides technical assistance to those seeking to establish such systems, reports on best practices in collecting and using value-added data, and improves the national research agenda by supporting studies that capitalize on value-added data.

*The president should direct the secretary of education to more vigorously enforce the important data provisions that already exist in federal law.* In particular, the administration should:

- *Enforce requirements for reporting information about teachers to parents and the public at large.* Current federal education laws now require the reporting of a great deal of valuable information related to teacher quality.<sup>19</sup> Several independent studies have found that states have done an uneven and, in many cases, poor job of complying with such requirements, too often reporting data to parents and/or the Department of Education that are incomplete, inconsistent, or highly suspect.<sup>20</sup> The Department of Education is falling far short of its charge to provide clear guidance on reporting requirements and ensuring that states report accurate and reliable data related to teacher quality.<sup>21</sup> The department must conscientiously and accurately communicate such requirements to states, districts, and higher education institutions. The president should insist that the provisions in the No Child Left Behind Act giving parents the "right to know" their



children’s teachers’ qualifications are thoroughly enforced, and should monitor the extent of compliance with national surveys of teachers and parents.

- *Ensure that states are not abusing flexibility under the law in how they define teacher quality.* Under a provision called “high, objective, uniform state standard of evaluation (HOUSSE),” the No Child Left Behind Act gives states considerable flexibility in how they ensure that existing teachers are “highly qualified,” and there is evidence that some states are taking inappropriate advantage of this leeway in their annual reporting of teacher qualifications.<sup>22</sup> The president should direct the secretary of education to conduct a study of how states take advantage of the so-called HOUSSE flexibility under section 9101(23)(C)(ii) to determine how states define and are reporting information on teacher quality and in particular to determine whether states are watering down requirements for teachers to demonstrate subject-matter proficiency.
- *Ensure that federal efforts to collect data on the nation’s teachers occur in a timely and efficient manner.* In particular, the president should direct the commissioner of education statistics to craft a plan for administering the *U.S. Schools and Staffing Survey* biennially rather than every four years, including a plan for releasing results within one year of the completion of data collection. The federal *Schools and Staffing Survey* has proven to be an invaluable source of comparable, objective information on teacher qualifications across the states, and can become even more valuable as an independent check on information states must report under the No Child Left Behind Act.

*Finally, to provide for efficient coordination of all of these efforts, the president should direct the secretary of education to create an inter-office task force on teacher quality.* This task force should be charged with ensuring that the department is working in a coordinated, conscientious, and efficient manner to ensure wider public access to better information on America’s teaching workforce. Furthermore, the task force should monitor whether state and local reporting requirements are clearly communicated and enforced while ensuring that the federal government produces and publishes teacher-related information in a more timely and accessible manner.

### Enriched Career Advancement Structures

The federal government should support the development of enriched career advancement structures that treat teaching as a clinical practice profession like medicine. Providing a carefully staged and supported entry for beginning teachers and differentiated career options for experienced teachers with competitive compensation structures that reward knowledge, skills, responsibilities and positive results would positively impact education in many ways. In particular, it would make teaching more attractive to our best and brightest young people; it would help to retain a greater number of high-quality teachers in the profession and closer to the classroom; and it would directly improve student achievement by helping new teachers

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*Teachers—the educational resource that accounts for our biggest annual educational expenditure (nearly \$200 billion per year)—are also the most critical resource for student learning.*

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become more effective more quickly and spreading the benefits of expert teachers' knowledge and skills to students outside of their own classrooms via the teachers they would mentor and assist.<sup>23</sup> These efforts can be particularly helpful in high-poverty schools, where new teachers often need additional support and experienced teachers need incentives to remain. In addition, compensation systems that recognize the value of teachers, coupled with career advancement systems that more effectively reward good performance—based on results—and respond to poor performance, will make larger investments in teacher salaries more politically viable and maximize the returns on such investments.

*The Congress should create a \$1 billion program to invest in differentiated career pathways in at least five states and twenty school districts that will serve as large-scale demonstrations that such career structures can enhance the status of the profession,<sup>24</sup> improve teacher performance and retention, and raise student achievement.* Such new avenues of advancement would offer expert teachers the opportunity to pursue a variety of positions throughout their careers, while never having to leave classroom teaching altogether, depending on their demonstrated skills and professional interests and predicated on an exchange of greater responsibilities and leadership for corresponding increases in compensation. To be eligible for such a grant, applicants must commit to incorporating the following components in their plans:

- A career ladder of at least four stages: new teachers (in residency or induction programs); career teachers, mentor teachers; and master teachers.<sup>25</sup>
- Expanded roles for mentor and master teachers that are directly tied to teaching and learning, including providing support, professional development, and meaningful evaluation for other teachers; sharing responsibility for school-wide instructional leadership with administrators; and developing curricula, model lessons, and aligned benchmark assessments.
- A rigorous, transparent, and fair system for evaluating teachers at all levels, including both qualitative measures (*i.e.*, a portfolio and/or at least six classroom observations that must be evaluated based on a standard rubric describing good teaching and scored by trained mentor or master teachers) and quantitative measures (*i.e.*, measurable growth in student achievement on standardized assessments), with advancement to mentor and master status based on such evaluations.<sup>26</sup>
- Significantly increased compensation commensurate with responsibilities of mentor teaching, master teaching, and any other advanced categories.
- A student testing system and data collection and analysis capacity sufficient to generate fair and accurate data that can be used to measure growth in student academic achievement.
- A system for recognizing successful classroom teaching through bonus pay based on evaluations that include both qualitative and quantitative measures, with significant weight given to measures of growth in student academic achievement attributable to an individual teacher, as well as school-wide, department-wide, or grade-level-wide measures of growth in student learning.<sup>27</sup>

- Restructuring of the school calendar to allow more time for collaboration among teachers, at least 90 minutes per week to be used primarily for activities directly related to student instruction, led by mentor or master teachers.

*The Congress should create a fund for the development of coordinated, staged preparation and induction programs targeted toward partnerships of higher education institutions, schools, and local education agencies, with priority given to high-need school districts and partnerships that have access to value-added data on teacher effectiveness.* At an average cost of \$1.5 million per city, establishing such partnerships in 50 American cities would cost a total of only \$75 million per year. The partnership programs should be required to incorporate components reflective of two stages in teacher preparation. The first would entail the creation of close functional relationships between the teacher preparation program and local elementary and secondary schools, with such schools providing the settings enabling teacher candidates to spend greater amounts of supervised time working with students and practicing teachers. The second would include a partnership between the program and one or more local school districts, which would agree to require a residency period for new teachers.<sup>28</sup> The residency period must

include intensive support via master teachers and higher education faculty, specialized professional development opportunities for new teachers, time for collaboration with other teachers, reduced class sizes, and ongoing evaluation that culminates in an assessment of effectiveness as a condition of “graduating” from the residency program.

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### Teacher Recruitment and Preparation

While Congress made important strides when it reauthorized the Higher Education Act in 1998, the Congress should spearhead a renewed federal effort to improve teacher recruitment and preparation, especially in institutions of higher education.

In the long term, recruitment efforts—especially in high-poverty schools—will receive a much needed boost if prospective teachers believe they will benefit from a career advancement and compensation structure that rewards good results, is commensurate with the responsibilities that a teacher assumes, and is competitive with other employment options. In addition, the two-tiered clinical preparation and residency program described in the section above will go a long way toward improving the quality of teacher preparation. Such a model can be especially important to those entering the profession through alternative programs (with fewer courses in pedagogy) by providing them with opportunities to demonstrate competency and to continue to improve teaching skills with support from more experienced staff.

But there is more that can be done to address this issue and to ensure that preparation programs are effective, including increasing accountability for teacher preparation programs and creating more efficient and focused recruitment efforts. The following three recommendations should be implemented.

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*We must work to increase the amount, meaningfulness, and quality of information about America's teacher workforce, and encourage the use of such data for greater accountability and smarter decisionmaking.*

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*First, the president should convene a summit with university presidents to challenge them to take greater responsibility for ensuring that teacher preparation programs supply adequate numbers of highly qualified teachers for the nation's schools.* Teacher education schools have traditionally functioned as low-cost, low-quality “cash cows” for many universities, which channel surplus funds from tuition paid by their numerous education majors into ensuring quality in more prestigious professional training programs, such as law, engineering, architecture, and medicine.<sup>29</sup> This practice undermines national and state efforts to improve the quality of teacher preparation programs and increase the supply of highly qualified teachers. During the summit, institutions implementing successful models in this area should present their strategies and data to the larger group. For example, the Texas A&M University System has seen promising results from an ambitious plan to raise the quantity while assuring quality in its production of teachers.<sup>30</sup>

*Second, policymakers should tighten and more clearly define provisions in federal law that require teacher training programs and the institutions supporting them to be held accountable for producing good teachers.* Section 208 of the Higher Education Act requires states to establish an accountability system for identifying and providing assistance to institutions of higher education with low-performing teacher preparation programs. However, the systems most states have put in place are too weak to drive the improvements in teacher preparation the law was aiming for. Forty-six states did not identify even a single program as low-performing in 2003. Of the four states that did identify any programs as low-performing, only a total of six programs—out of approximately 1,200 institutions with teacher preparation programs nationally—were identified as low-performing.<sup>31</sup> Moreover, only 19 additional programs were identified as being “at risk” for low performance.

The Congress should propose amending the Higher Education Act to strengthen accountability for teacher preparation programs—both traditional and alternative route—by requiring such accountability systems to incorporate: (1) quantitative outcomes-based data, including the passing rates of program completers on state certification exams, such as are currently required to be reported under section 207; (2) progress on teacher production goals, including the overall number of program completers, completers in shortage areas within the state or region, completers who take jobs in hard-to-staff schools, and the number of minority and/or second-language completers; and (3) information on the actual effectiveness of graduates in improving the achievement of students after they begin teaching.<sup>32</sup> The Higher Education Act should also require teacher preparation programs to demonstrate that they incorporate courses and measures for assessing competence in key areas, including using assessments and student achievement data and technology to inform and enhance instruction, effective classroom management, and instructional techniques focused on addressing special needs and diverse groups of students.

The secretary of education should identify and propose solutions to technical loopholes in current law that can undermine efforts to improve accountability for teacher quality in higher education. For example, section 207 of the Higher Education Act requires states and institu-

tions of higher education to report the percentage of teacher preparation program completers who pass state licensure exams. However, the reported rates have been inflated in many cases because about half the states and many institutions require applicants to education schools to pass a basic skills test as a prerequisite for acceptance into teacher training or as a prerequisite to program completion. While the use of basic skills exams as screening mechanisms is not inappropriate *per se*, only exams taken by program *completers* should be used for reporting on program performance under this section. The president should direct the secretary of education to promulgate a regulation to close this loophole.

*Third, the president and the Congress should ensure that federal dollars to improve teacher recruitment, preparation, licensing, and on-the-job support are adequate to the challenge and targeted toward strategies that are most effective.* In particular:

- Title II of the Higher Education Act provides for competitive Teacher Quality Enhancement Grants enabling states and institution-district partnerships to work for improvements in these areas. Though the Higher Education Act authorizes \$300 million for such grants, the Bush administration requested only \$89.9 million for FY 2005. The president should request full funding for these grants. The president also should reinstate the program initiated during the Clinton administration (and zeroed out during the Bush administration) designed to prepare teachers to use and integrate technology into their instruction.
- The president also should ensure that these programs are focused on the most successful strategies in these areas.<sup>33</sup> For example, the president should give a priority in funding grant applicants under section 204 of the Higher Education Act, which supports teacher recruitment efforts, for efforts to put in place university-wide recruitment and improvement plans like the one described above. Under section 203, which seeks to support partnerships between states, institutions of higher education and local districts, priority should be given to partnerships designed to develop enhanced career advancement programs like those described above in the first section and those seeking to develop value-added data systems as described below in the last section regarding working conditions.
- The president should ensure that funds are going to support efforts to take on the politically more challenging task of raising standards for entry to the profession. For example, funds under section 202 of the Higher Education Act should be directed toward states seeking to raise teaching licensing standards and improving licensing tests.<sup>34</sup> In addition, the president should seek to reserve \$10 million in funding under Title II of the Higher Education Act for an independent body—such as the National Academy of Sciences—to develop national standards for teacher quality with respect to content and pedagogy.

### Equitable and Efficient Distribution of Teachers

The president and Congress should provide incentives, enforce rules, and narrow barriers to decrease inequities in access to qualified teachers and to optimize the distribution of teachers according to their skills and student needs. Over the past several decades, the federal govern-

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*Providing a carefully staged and supported entry for beginning teachers and differentiated career options for experienced teachers with competitive compensation structures that reward knowledge, skills, responsibilities and positive results would positively impact education in many ways.*

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ment has worked to address the maldistribution of physicians and shortage of adequate medical care providers by specialty area and geographic region, spending billions of dollars to ensure greater access to good health care in urban and rural areas. The effort has been sustained and vigorous, and, according to the Council on Graduate Medical Education, “many of these programs have been absolutely critical to enhancing access for underserved populations in the United States.”<sup>35</sup> It is time to engage in a similar federal effort in K-12 education. Again, implementation of the career advancement system described above can be helpful in this context as new teachers will receive greater support and experienced teachers seeking mentor and master teacher positions will have incentives to work in high-poverty schools for greater pay. The following seven recommendations also should be implemented:

*First, the Congress should provide \$800 million for a program of service scholarships and forgivable loans allocated on the basis of academic merit, targeted toward shortage areas, and awarded in exchange for teaching in high-poverty and high-minority schools for at least five years.*<sup>36</sup> As noted above, rates of out-of-field teaching have reached epidemic proportions in the nation’s middle schools, particularly in subjects such as math and science. Not coincidentally, the middle grades are where U.S. students begin to fall seriously behind their international counterparts in math and science.<sup>37</sup> Therefore, a priority should be given for awards to individuals who agree to teach these subjects in shortage areas at the middle school level.

*Second, the Congress should amend Title II, Part A of the Elementary and Secondary Education Act (“ESEA”) to authorize \$1 billion for a new competitive grant program that would enable districts to experiment with salary supplements to place well-qualified and effective teachers in the highest-needs schools.* While districts such as Charlotte-Mecklenburg, North Carolina, and Chattanooga, Tennessee, are beginning to demonstrate that such programs can provide positive benefits for low-income students,<sup>38</sup> a 2002 *Education Week* survey of 30 large school districts found that only two or three offer concrete incentives clearly targeted to hard-to-staff schools.<sup>39</sup>

*Third, the president should ensure that teacher equity provisions that currently exist in federal law are vigorously enforced.* For example, section 1111(b)(8)(C) of the ESEA requires state plans under Title I to:

describe the specific steps the state educational agency will take to ensure that . . . schools provide instruction by highly qualified staff . . . including steps that the State educational agency will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures that the State educational agency will use to evaluate and publicly report the progress of the State educational agency with respect to such steps.

The Department of Education has failed to recognize, communicate and enforce this requirement adequately, and last year ruled that states need not submit such plans to the department. As a result, many states have not developed or published such plans.<sup>40</sup>

The president should direct the secretary of education to promulgate a new regulation requiring that states demonstrate they have complied with this requirement. States should be required to demonstrate compliance by publishing such plans on their Web sites, along with descriptions of the measures they plan to use to evaluate progress on these steps and target dates for public reporting of progress. In the reported plan, the state should include a description of the steps that it has taken to eliminate disparities in resources and working conditions between schools that lead to disparate levels of experienced and qualified staff. It also should describe efforts to address other conditions that discourage highly qualified teachers from working at certain schools.<sup>41</sup> The president should also direct the secretary to prioritize the monitoring and enforcement of this provision.

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*The president should ensure that funds are going to support efforts to take on the politically more challenging task of raising standards for entry to the profession.*

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*Fourth, the Congress should create a \$20 million competitive demonstration grant program to enable five large- and medium-sized urban districts to overhaul outdated, ineffective hiring and recruitment practices.* Cumbersome hiring and placement practices in urban districts constitute a significant and needless barrier to recruiting highly qualified teachers who are willing to teach in high-poverty and high-minority schools. The New Teacher Project has found that, counter to the prevailing notion that good teachers do not want to teach in urban districts, many qualified teachers can be recruited to teach in such schools. However, hiring and placement in such districts take so long that many of these qualified, willing teachers are forced to accept jobs in suburban districts instead.<sup>42</sup> Additional funds should be allocated to support evaluation of these efforts and report best practices that other districts might consider for reforming their hiring and placement policies.

*Fifth, the president and Congress should capitalize on opportunities to more directly address other district practices that reinforce inequities in access to experienced teachers.* For example, districts typically spend much less to staff their higher-poverty schools because such schools find it harder to attract and retain more experienced teachers, who command higher salaries. The differences in teacher experience can result in massive inequities in actual dollars spent across schools within a district, yet financial reports hide such inequities because they misleadingly use the district's average teacher salary to report school-by-school spending.<sup>43</sup> For decades the ESEA's fiscal requirements have actually *abetted* such dishonest accounting practices by prohibiting the use of actual salaries when districts provide written assurances that they offer "comparability of services" across schools. The Congress should amend section 1120A(c)(2)(B) of the ESEA section to require districts to use actual salaries when complying with the comparability of services requirement of Title I.<sup>44</sup>

*Sixth, the president should reduce barriers that make it hard for teachers to move to states that have bigger workforce shortages.* Section 2151(f) of the ESEA authorizes the secretary of education to establish a National Panel on Teacher Mobility to conduct a study on increasing salutary mobility and employment opportunities for highly qualified teachers in order to fill vacan-

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*The Congress should amend the ESEA to require districts to use actual salaries when complying with the comparability of services requirement of Title I.*

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cies in hard-to-staff schools and districts. However, the current administration has failed to act on that authority. The president should direct the secretary to establish this panel and support it in conducting the study. In addition to the activities described in section 2151(f), the panel should explore ways the federal government might stimulate public-private partnerships to assist existing efforts toward developing common certification standards and improving pension portability across states.

### Working Conditions

The president and the Congress should work to improve instructional environments so teachers experience positive working conditions that maximize their effectiveness and reduce teacher turnover in high-poverty schools. Again, the Center for American Progress supports creating a more sophisticated career advancement model that incorporates team teaching, greater support from master teachers, and greater opportunities for planning and collaboration as an important step toward creating healthier working environments for teachers. Teachers in high-poverty and high-minority schools are much more likely to report a lack of instructional support and resources, problems with student behavior, a greater number of students unprepared to learn at grade level, and greater worries about losing their jobs due to school performance on state assessments,<sup>45</sup> all of which make teaching harder and lead to greater rates of teacher turnover in such schools. Harvard researchers studying a group of beginning teachers in Massachusetts found that those who sought jobs in other schools “looked for schools that made good teaching possible” by providing good curriculum guidelines and sufficient resources, better approaches to dealing with student discipline, and more opportunities to learn from and share with colleagues.<sup>46</sup> The federal government can help local schools and districts address these issues by supporting efforts to monitor working conditions in schools, increasing instructional support, improving discipline and safety, and alleviating pressure to narrow instruction in order to improve performance on standardized assessments. The following recommendations should be adopted:

*The president and Congress should encourage states to do a better job monitoring school conditions that make it hard for teachers to do their jobs well.* North Carolina recently recognized the importance of environmental factors on teacher retention and effectiveness by creating a set of state standards related to the key components of positive working conditions for teachers. Teachers there are surveyed on an annual basis with respect to these factors and the results are provided to school and district leaders so they can use the data to inform decisionmaking. The Congress should amend the Improving Teacher Quality State Grant program under Title II of the ESEA to allow states to use grants to set up similar programs.

*The president and Congress should adopt the following measures to ensure that teachers, particularly beginning teachers in hard-to-staff schools, have adequate access to instructional support, direction, and resources:*

- The Congress should increase funding for research-based professional development and class-size reduction in high-poverty schools under Title II, Part A of the ESEA. Teachers want high quality professional development and smaller class sizes and both can improve



instruction and outcomes. Congress should strengthen provisions related to the quality of professional development requiring school districts to eliminate one-shot professional development sessions at both the district and school levels and requiring states to develop professional development plans that identify and align all sources of state and federal professional development funds that they administer.

- The Congress also should create a \$100 million fund to support development of instructional tools, including a uniform curriculum and standardized assessments that teachers can use to inform their instruction. States or consortia of districts and regional education agencies would be eligible. Research shows that urban districts making the greatest gains in student achievement provide a uniform curriculum or learning benchmarks aligned with state standards and tests, aligned model lessons, aligned benchmark assessments teachers or schools may administer at regular intervals, and prompt data on student performance under those diagnostic assessments.<sup>47</sup> Researchers studying beginning teachers have found that they often feel “lost at sea” because they are not given enough guidance on what to teach and lack access to curriculum materials aligned with state assessments.<sup>48</sup>

- The president should ensure that existing policies do not hamper states, districts, and schools from using assessments that serve as instructional tools. The No Child Left Behind Act requires assessment systems to provide information on whether a school has made sufficient progress, but nothing in the law or regulations should prevent (indeed the Congressional Conference Report language encouraged) a complementary effort to develop assessments that help classroom teachers use results in real time to identify areas of student weakness. The president should direct the secretary of education to review the Elementary and Secondary Education Act (which was amended by the No Child Left Behind Act), regulations, and departmental guidance in order to determine whether they promote state efforts to implement assessments of student progress that can inform instruction and identify barriers to the development and use of such systems.
- The president should propose dedicating \$50 million under Title II, Part A of the ESEA grants to states and districts willing to develop comprehensive and intensive induction programs for beginning teachers. High-quality induction programs and enhanced career advancement structures (described in the first section of this chapter) are important components of a positive working environment for teachers. Until such career advancement structures are in place, the federal government should support high-

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quality induction programs in every state so new teachers are provided with important support and skill development opportunities. One recent study using federal data on teacher turnover found that beginning teachers who received no mentoring or formal induction activities were twice as likely to leave as those who received a full, intensive complement.<sup>49</sup> Recipients should be required to include a combination of elements of induction that research shows to be most strongly related to improved teacher retention, including mentoring by an expert colleague who teaches in the same field (if one can be found without sacrificing overall quality); common planning time or regularly scheduled collaboration with teachers in their subject area; special seminars for beginning teachers; reduced workloads or help from instructional aides; and opportunities to participate in teacher networks external to the school.

- Finally, studies show that high-quality leadership directly impacts school performance, as well as improving the working environment for teachers. However, many high-poverty schools find it just as difficult to attract, retain, and support good principals as they do teachers. The Congress should provide increased funding for the national principal recruitment program authorized under Title II of the ESEA, which would provide financial incentives and mentors to recruit and develop new principals in high-need districts, as well as professional development programs in instructional leadership and management.<sup>50</sup>

*The president and the Congress should help teachers and administrators create safer and more orderly learning environments.* Important mechanisms for achieving this goal are the creation of smaller, more personalized learning environments in schools and the provision of training in classroom management. The Center for American Progress recommends:

- The president should request and the Congress should provide full funding for the smaller learning communities grants authorized under section 5441 of the ESEA. (President Bush's 2005 budget request proposed eliminating these grants.) The creation of high-quality smaller learning environments can decrease discipline and safety problems.
- Teachers also need training with respect to the best practices for managing their students' behavior. The president should propose dedicating \$25 million of professional development funding under Title II, Part A of the ESEA to programs designed to help teachers master effective classroom management techniques, as well as programs designed to help school administrators establish more effective schoolwide discipline strategies based on substantial collaboration with teachers. An ongoing study of new teachers in the Boston Public Schools found that those who felt unprepared to tackle the demands of classroom teaching were less likely to plan to stay in the profession and, according to the authors, "The most commonly expressed frustrations were with student behavior, classroom management, and discipline issues."<sup>51</sup>

*The president and the Congress should ensure that statewide assessments and accountability systems required under the No Child Left Behind Act are fair, accurate, and positive tools for improving student achievement.* We must ensure that assessments and accountability are tools for improved instruction, not tools for narrowing instruction and demoralizing teachers. Specifically:

- The president should request and the Congress should provide increased funding for the state assessment grants authorized under sections 6111-13 of the ESEA so states can develop high-quality, valid, and reliable assessment systems that can inform instruction and that test a broad range of knowledge and skills.
- The administration should dedicate \$100 million of professional development funding under Title II, Part A of the ESEA to research-based programs that help teachers master instructional strategies aligned with accountability goals and mechanisms in order to reduce pressure to “teach to the test.” Such instructional strategies include, for example, techniques for pacing instruction, using more frequent checkpoint assessments, and finding and using curriculum materials that are aligned with state standards and assessments.
- Finally, the president should direct the secretary of education to disseminate information about instructional practices that use diagnostic assessments and data to improve instruction and avoid year-end cramming and teaching to the test. Furthermore, the Department of Education should work with the Institute for Educational Studies to develop an agenda for further research in the area.

## ENDNOTES

<sup>1</sup> For example, Matthew Miller, a nationally syndicated columnist and senior fellow at the Center for American Progress, has proposed an ambitious \$30 billion federal program to raise teacher salaries by 50 percent and create additional merit raises for successful inner city teachers who choose to remain in urban schools. See Matthew Miller, *The Two Percent Solution: Fixing America’s Problems in Ways Liberals and Conservatives Can Love*, (2003), at 114-137. See also The Teaching Commission, *Teaching at Risk: A Call to Action*, 2004, at 28 (proposing \$30 billion investment in teacher salaries).

<sup>2</sup> William L. Sanders & June T. Rivers, “Cumulative and Residual Effects of Teachers on Future Student Academic Achievement,” University of Tennessee Value-Added Research and Assessment Center, 1996, at 3.

<sup>3</sup> Eric A. Hanushek & Steven G. Rivkin, *How to Improve the Supply of High-Quality Teachers*, *Brookings Papers on Education Policy: 2004*, (2004). Estimates based on research using data from Texas described in National Bureau of Economic Research, “Teachers, Schools, and Academic Achievement,” Working Paper No. 6691, revised July 2002, at 21.

<sup>4</sup> National Center for Education Statistics, *Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2000-2001*, May 2003 (estimating salaries and benefits for instructional staff to be \$194 billion).

<sup>5</sup> Education Week, *Quality Counts 2000*, Editorial Projects in Education, Jan. 13, 2000, available at <http://counts.edweek.org/reports/qc00/templates/chart.cfm?slug=intro-c3.htm> (last viewed Nov. 30, 2004).

<sup>6</sup> Richard M. Ingersoll, *Is There Really a Teacher Shortage*, Center for the Study of Teaching and Policy, University of Washington, September 2003, at 15; Richard M. Ingersoll, *Why Do High Poverty Schools Have Difficulty Staffing Their Classrooms with High Quality Teachers*, Center for American Progress, November, 2004, available at <http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/Ingersoll-FINAL.pdf> (last viewed Nov. 30, 2004).

<sup>7</sup> Education Week, *Quality Counts 2003*, Editorial Projects in Education, Jan. 9, 2003, available at <http://counts.edweek.org/reports/qc03/templates/article.cfm?slug=17divide.h22> (last viewed Nov. 30, 2004).

<sup>8</sup> Craig D. Jerald & Richard M. Ingersoll, *All Talk No Action: Putting an End to Out-of-Field Teaching*, The Education Trust, August 2002, at 7.

<sup>9</sup> National Center for Education Statistics, *Teacher Preparation and Professional Development: 2000*, June 2001, at v.

<sup>10</sup> Kevin Cary, *The Real Value of Teachers*, The Education Trust, Winter 2004, at 36-37.

<sup>11</sup> National Center for Education Statistics, *Monitoring School Quality: An Indicators Report*, December 2000, at 13-14.

<sup>12</sup> Eric A. Hanushek & Steven G. Rivkin, *How to Improve the Supply of High-Quality Teachers*, *Brookings Papers on Education Policy: 2004*, (2004), at 16.

<sup>13</sup> In March 2004, the National Conference of State Legislatures reported that states faced a \$29 billion tab to pay for federal mandates, of which more than half is education related. See National Conference of State Legislatures, *Mandate Monitor*, Mar. 31, 2004.

<sup>14</sup> The two major programs focused on teacher quality are the Teacher Quality State Grants under the No Child Left Behind Act and the Teacher Quality Enhancement Grants under the Higher Education Act. The president also has proposed elimination of the Higher Education Act program directed at ensuring that teacher preparation programs incorporate technology into their programs, so that teacher graduates are prepared to use technology to enhance their instruction.

<sup>15</sup> See The Education Trust, *In Need of Improvement: Ten Ways the U.S. Department of Education Has Failed to Live Up to Its Teacher Quality Commitments*, August 2003; see also *Telling the Whole Truth (or Not) About Teacher Quality*, December 2003; Association of Community Organizations for Reform Now, *Leaving Teachers Behind: How a Key Requirement of the No Child Left Behind Act (Putting a Highly Qualified Teacher in Every Class) Has Been Abandoned*, June 2003.

<sup>16</sup> Many of the policy recommendations presented in this paper as originally released in December 2004 were incorporated into the Teacher Excellence for All Children Act of 2005, which was introduced June 9, 2005, in the U.S. House of Representatives by Representative George Miller and in the U.S. Senate by Senators Edward Kennedy and Richard Durbin.

<sup>17</sup> Kevin Cary, *The Real Value of Teachers*, The Education Trust, Winter 2004.

<sup>18</sup> Council on Graduate Medical Education, *2002 Summary Report*, U.S. Department of Health and Human Services, June 2002.

<sup>19</sup> For example, section 207 of the Higher Education Act requires states and institutions of higher education to publish information about teacher preparation, including data on the percentage of education school graduates passing state licensure and certification tests; section 1111 of the Elementary and Secondary Education Act requires states to issue report cards containing information on the professional qualifications of teachers in the state as well as inequities in teacher distribution; and section 1119 requires states and districts to report on annual progress in meeting the goals the state has set for ensuring all teachers are highly qualified by 2005-2006. Recognizing the special importance of such data to parents, section 1111 requires districts to maintain data on the training and licensure of their students' classroom teachers, inform parents of their right to request such information, and actively inform parents at the beginning of the year if their child has been assigned an under-qualified teacher.

<sup>20</sup> See e.g., The Education Trust, *Interpret With Caution: The First State Title II Reports on the Quality of Teacher Preparation*, June 2002; *Telling the Whole Truth (or Not) About Highly Qualified Teachers*, December 2003.

<sup>21</sup> Association of Community Organizations for Reform Now, *Leaving Teachers Behind: How a Key Requirement of the No Child Left Behind Act (Putting a Highly Qualified Teacher in Every Class) Has Been Abandoned*, June 2003; The Education Trust, *In Need of Improvement: Ten Ways the U.S. Department of Education Has Failed to Live Up to Its Teacher Quality Commitments*, August 2003.

<sup>22</sup> The Education Trust, *Telling the Whole Truth (or Not) About Highly Qualified Teachers*, December 2003, at 7-8.

<sup>23</sup> A small but growing number of schools and districts are already testing such models, and their experiences can provide a basis for crafting federal policy in this area. For example, more than 70 schools in eight states are in various stages of implementing the well-regarded Teacher Advancement Program (TAP) developed by the Milken Family Foundation. In September 2004, Minnesota Governor Tim Pawlenty announced that federal dollars would be used to support TAP in several Minneapolis schools and on a districtwide basis in Waseca. See *Teachers Are Trying Out Performance Pay System*, *St. Paul Pioneer Press*, Sept. 14, 2004.

<sup>24</sup> According to polling conducted by Public Agenda for the Teaching Commission, "almost seven out of 10 young college graduates think teachers do not have good opportunities for advancement and leadership." See The Teaching Commission, *Teaching at Risk: A Call to Action*, 2004, at 28.

<sup>25</sup> The career ladder could have more stages. For example, in a recent article, Arthur Wise described the creation of teaching teams with a lead teacher, a senior teacher to assist with team management, novice teachers, underprepared teachers (student teachers or transitioning professionals), and part-time teaching interns. Arthur Wise, *Teaching Teams: A 21<sup>st</sup> Century Paradigm for Organizing America's Schools*, *Education Week*, Sept. 29, 2004, at 32, 44. The Milken Family Foundation's TAP program (see note 22 above) includes a ladder comprised of "career," "mentor," and "master" teacher stages.

<sup>26</sup> This description of teacher evaluation is based closely on the evaluation component of the Milken Family Foundation's TAP program. For a detailed description, see Jennie Weiner, *Choosing a Measure of Accountability*, *What's On Tap*, Spring 2004, at 19, available at [http://www.mff.org/tap/pdf/whatsontap\\_v2n1.pdf](http://www.mff.org/tap/pdf/whatsontap_v2n1.pdf) (last viewed May 6, 2005).

<sup>27</sup> While some view compensation systems with links to student performance with some degree of skepticism, there is evidence that sophisticated proposals such as the one advanced here are beginning to gain favor within union ranks. For example, in March 2004, Sandra Feldman, then president of the American Federation of Teachers, wrote: "Along with significantly raising pay across the board, on top of the current schedules, we would have to find a way to reward different roles, responsibilities, knowledge, skills and, yes, results. . . . [R]ewarding teachers who significantly raise achievement, either individually or as a team, can work." See Sandra Feldman, "Rethinking Teacher Compensation," *American Teacher*, March 2004, available at [http://www.aft.org/pubs-reports/american\\_teacher/mar04/AT\\_wws.html](http://www.aft.org/pubs-reports/american_teacher/mar04/AT_wws.html) (last viewed Nov. 30, 2004).

<sup>28</sup> See Carnegie Corporation, *New Teachers for a New Era*, July 2001, for a more comprehensive discussion of the ideal design principles for such a program. For example, the report suggests that proven, experienced teachers from partner schools should receive some form of faculty appointment in the institution of higher education and be given titles such as clinical faculty, professor of practice, or adjunct professor.

<sup>29</sup> John Merrow, *The Teacher Shortage: Wrong Diagnosis, Phony Cures*, *Education Week*, Oct. 6, 1999, at 64 & 48. Merrow quotes Stanford University professor Linda Darling-Hammond as saying, "If you are preparing to be a teacher, you can expect about half of the tuition money you put into the till to come back to support your preparation."

<sup>30</sup> Texas A&M University System, "Press Release: A&M System Universities Continue Their Push to Increase State's Teacher Education Pipeline and Focus on Quality of Teachers Graduated," Dec. 18, 2002. Over a two-year period, the system increased total production of teacher candidates by 20 percent, African American candidates by 116 percent, and candidates in shortage areas such as math, science, special education, and bilingual education by significant percentages as well, all while ensuring that the pass rate on the state's certification exam did not decline. The University of Texas also has obtained significant results from a university-wide initiative to increase the number of math and science teachers. See The Teaching Commission, *Teaching at Risk: A Call to Action*, 2004, at 37.

<sup>31</sup> U.S. Department of Education, *Meeting the Highly Qualified Teachers Challenge: The Secretary's Third Annual Report on Teacher Quality*, July 2004, at 28.

<sup>32</sup> While very few states currently come close to including the full range of such information in teacher preparation accountability systems, these recommendations are not without precedent. For example, several years ago Louisiana began including teacher quality indicators of each kind described above, and the state recently began pilot-testing a newly developed Value-Added Teacher Preparation Program Assessment Model. See [http://asa.regents.state.la.us/TE/value\\_added\\_model](http://asa.regents.state.la.us/TE/value_added_model) for a detailed description of that effort.

<sup>33</sup> The GAO recently released a report raising concerns about the difficulty in assessing the effectiveness of Title II grants due to the wide range of activities allowed under the current program. See Government Accountability Office, *Activities Underway to Improve Teacher Training, but Information Collected To Assess Accountability Has Limitations*, October 2002.

<sup>34</sup> The U.S. Department of Education's annual reports on teacher quality have found that most states set minimum passing scores for teacher licensure exams "so low as to screen out only the lowest-performing individuals." See U.S. Department of Education, *Meeting the Highly Qualified Teachers Challenge: The Secretary's Third Annual Report on Teacher Quality*, July 2004, at 22. See also Ruth Mitchell & Patte Barth, *Not Good Enough: A Content Analysis of Teacher Licensing Exams*, The Education Trust, Spring 1999.

<sup>35</sup> Council on Graduate Medical Education, *Tenth Report: Physician Distribution and Health Care Challenges in Rural and Inner-City Areas*, February 1998, at 1.

<sup>36</sup> According to Linda Darling-Hammond and Gary Sykes, \$800 million would provide incentives of up to \$20,000 each for the estimated 40,000 new teachers and meet the nation's needs in shortage areas. Linda Darling-Hammond & Gary Sykes, *Meeting the 'Highly Qualified Teacher' Challenge*, Education Policy Analysis Archives, at 14, available at <http://epaa.asu.edu/epaa/v11n33/> (last viewed Nov. 30, 2004).

<sup>37</sup> National Center for Education Statistics, *Highlights from TIMSS: The Third International Mathematics and Science Study*, March 1999.

<sup>38</sup> Kevin Cary, *The Real Value of Teachers*, The Education Trust, Winter 2004.

<sup>39</sup> Education Week, *Quality Counts 2003*, Editorial Projects in Education, Jan. 9, 2003, available at <http://counts.edweek.org/sreports/qc03/reports/17district-t1b.cfm> (last viewed Nov. 30, 2004).

<sup>40</sup> See Association of Community Organizations for Reform Now, "Leaving Teachers Behind: How a Key Requirement of the No Child Left Behind Act (Putting a Highly Qualified Teacher in Every Class) Has Been Abandoned," June 2003; see also The Education Trust, *In Need of Improvement: Ten Ways the U.S. Department of Education Has Failed to Live Up to Its Teacher Quality Commitments*, August 2003, at 5-6.

<sup>41</sup> For research identifying these conditions, see Richard M. Ingersoll, *Why Do High Poverty Schools Have Difficulty Staffing Their Classrooms with High Quality Teachers*, Center for American Progress, November 2004, available at <http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/Ingersoll-FINAL.pdf> (last viewed Nov. 30, 2004).

<sup>42</sup> See Jessica Levin & Meredith Quinn, *Missed Opportunities: How We Keep High-Quality Teachers Out of Urban Classrooms*, The New Teacher Project, 2003; see also Moore Johnson, et al., *The Support Gap: New Teachers' Early Experiences in High-Income and Low-Income Schools*, Education Policy Analysis Archives, October 2004.

<sup>43</sup> Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools to Fail*, Brookings Papers on Education Policy: 2004, (2004).

<sup>44</sup> Section 1120A(c)(2)(B) currently requires that "in the determination of expenditures per pupil from State and local funds, or instructional salaries per pupil from State and local funds, staff differentials for years of employment shall not be included in such determinations."

<sup>45</sup> Education Week, *Quality Counts 2003*, Editorial Projects in Education, Jan. 9, 2003, at 17. Education Week conducted a special analysis of data from the *U.S. Schools and Staffing Survey*, a massive federal survey of tens of thousands of teachers, which found that teachers in high-poverty schools were twice as likely as their colleagues in low-poverty schools to report problems with parent involvement, theft, physical conflicts among students, and teacher absenteeism, among other factors. A report commissioned by the Center for American Progress and the Institute for America's Future demonstrates that teachers in high-poverty schools report discipline problems as one of the top reasons for leaving their schools and the profession. Richard M. Ingersoll, *Why Do High Poverty Schools Have Difficulty Staffing Their Classrooms with High Quality Teachers*, Center for American Progress, November 2004, available at <http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/Ingersoll-FINAL.pdf> (last viewed Nov. 30, 2004).

<sup>46</sup> Susan Moore Johnson & Sarah E. Birkeland, *The Schools That Teachers Choose*, Educational Leadership, May 2003.

<sup>47</sup> See Jason Snipes, et al., Foundations for Success: Case Studies of How Urban School Systems Improve Achievement, Council of the Great City Schools, September 2002; Wendy Togneri & Stephen E. Anderson, *Beyond Islands of Excellence: What Districts Can Do to Improve Instruction and Achievement in All Schools*, Learning First Alliance, 2003.

<sup>48</sup> D. Kauffman, et al., "Lost at Sea": *New Teachers' Experiences with Curriculum and Assessment*, Teachers College Record, March 2002. These findings also are expanded on with case study examples in Susan Moore Johnson and the Project on the Next Generation of Teachers, *Finders and Keepers: Helping New Teachers Survive and Thrive in Our Schools*, 2004.

<sup>49</sup> Thomas M. Smith & Richard M. Ingersoll, *What Are the Effects of Induction and Mentoring on Beginning Teachers Turnover?* American Educational Research Journal, Fall 2004.

<sup>50</sup> The program is authorized by and described in section 2151(b) of the ESEA. In FY04, Congress allocated \$12.4 million; the Bush administration has consistently sought to eliminate funding for the program.

<sup>51</sup> See Maria McCarthy & Ellen Guiney, *Building a Professional Teaching Corps in Boston: Baseline Study of New Teachers in Boston's Public Schools*, Boston Plan for Excellence, April 2004, at 5; see also Richard M. Ingersoll, *Why Do High Poverty Schools Have Difficulty Staffing Their Classrooms with High Quality Teachers*, Center for American Progress, November 2004, available at <http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/Ingersoll-FINAL.pdf> (last viewed Nov. 30, 2004).

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## TOWARD A MORE PERFECT UNION: Racial Equality in America

*In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.*

—HARRY A. BLACKMUN  
United States Supreme Court Justice

At the core of the American psyche is the absolute belief that America is about moving forward, about striving and making progress. America has often been described as an “idea” or “experiment”—beyond the geography of 50 states and a political system, we are a work in progress, a study in motion. We are a growing nation of diverse peoples struggling to live up to certain ideals, to the universal truth that we are all created equal and endowed by our creator with certain inalienable rights.<sup>1</sup> The issue of race has too often been at the center of this struggle, and it remains the essential challenge to our ideals and to our own narrative regarding the uniqueness of America.

At the dawn of the 21<sup>st</sup> century, America is once again a nation of new promise, with the opportunity to thrive as a truly multiracial, multiethnic democracy. Today, approximately one in three residents self-identify as either African American, American Indian/Alaska Native, Asian/Pacific American, or Latino.<sup>2</sup> But with our new promise we have been presented with a challenge even greater, in some respects, than what W.E.B. DuBois prophetically identified in 1903 as “the problem of the color line.”<sup>3</sup> By the middle of this century—in our lifetime—there will be no single majority race in this country<sup>4</sup> and the majority of the population will be composed of people of color.<sup>5</sup> It is therefore essential that America redouble its efforts to ensure that our belief in equality of opportunity becomes a reality for the growing multiracial, multi-

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*While we have made significant strides in eradicating overt racism over the past half century, we have done so imperfectly and incompletely.*

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ethnic population that we are becoming. Progressives must lead in presenting an agenda on racial equality that will help display America's diversity as a source of great pride and strength so that America can serve as a powerful example for the rest of the world of the benefits of a pluralistic society.

Most of the lingering issues of race that America faces today are deeply rooted in our history. Race has been the text or the subtext of virtually every major social conflict in America. And while we have made significant strides in eradicating overt racism over the past half century, we have done so imperfectly and incompletely. This year, we marked the 40<sup>th</sup> anniversary of the Voting Rights Act of 1965. Last year witnessed the 40<sup>th</sup> anniversary of the Civil Rights Act of 1964 and the 50<sup>th</sup> anniversary of the Supreme

Court's unanimous decision in *Brown v. Board of Education*, which banned racial segregation in public schools and determined that separate but equal is "inherently unequal."<sup>6</sup> People of color are represented among the top ranks of wage earners in our society—from CEOs of Fortune 500 companies to entertainment stars. At the same time, too many people of color have become further marginalized, trapped in an abyss of economic immobility and a debilitating cycle of violence. The lingering issues of inequality combined with changing demographics present us with new issues as we continue to struggle with too many unresolved issues of the past.

It is unquestionably the case that the issues children born today will face with regard to racial equality are significantly different from the issues their parents and grandparents faced. But in many ways, the problems that remain have gotten harder to solve. *Brown v. Board of Education* eliminated legally sanctioned segregation, yet our public schools remain segregated.<sup>7</sup> The federal government addressed the wrong of Japanese internment camps of the 1940s, yet many communities of color still live in segregated isolation on the margins of society. As a nation, we have managed to get everyone a seat at the lunch counter, but we still have not figured out how to ensure that everyone can afford to pay for the meal. To some extent, the difficulties we face today are the result of the progress that has been made. Because rampant and open discrimination has been largely ostracized, many people do not believe the problem of discrimination still exists. Because some people of color have managed to achieve the "American Dream," the artificial barriers that exist for others are not as recognizable. Of course, to anyone who examines the facts fairly and takes a deeper look at equality of opportunity today, it becomes clear that race sadly remains a reliable proxy for economic and social disadvantage and there is much unfinished business in the quest for true racial justice in America.

Notwithstanding the enduring effects of past and present discrimination, as the public's focus in racial equity recedes, the government's ability to take forceful and effective action against discrimination has become more limited. For example, the Supreme Court has interpreted the Constitution in such a way as to severely limit race-conscious approaches to ongoing race problems. But more than this, there are limits to how effectively the government can legislate away problems of bigotry, prejudice, and stereotyping—even though these problems insidiously affect our ability to make progress. Of course, personal responsibility is a part of the equation and people of color must also act to narrow disparities. Values matter and they can have a profound



impact on life choices. But it is also clear that individual responsibility alone is not enough. Although the government may not be able to immediately change our collective cultural norms on race, it still has a key role to play in leading the nation toward achieving racial progress.

Thus far, the policies of the current administration have exacerbated lingering gaps in equality. Indeed issues of race have practically been driven from public view. Perhaps the best that can be said about the administration in this regard is that it has succeeded in making a few high-profile and historic personnel appointments—the first Latino attorney general and the first African-American secretary of state and national security advisor. This is significant. Beyond that, however, it has merely offered the catch-all rhetoric of “compassionate conservatism” to make some political inroads into communities of color.<sup>8</sup> The administration’s failure to enforce antidiscrimination laws and its embrace of policy priorities that are often hostile to the interests of many people of color—such as opposition to affirmative action and cuts in programs that benefit the disadvantaged—have closed the door to opportunity for many. Indeed, the Bush administration has gone to great lengths to avoid open dialogue on race, avoiding interaction with minority interest groups to an extent that is unprecedented.<sup>9</sup>

It may be that the president’s position on race reflects a larger national fatigue on the issue and the belief by too many white Americans that efforts to promote racial equality are no longer necessary.<sup>10</sup> Such attitudes are reflected in a coarsening of rhetoric on race, particularly on the right.<sup>11</sup> There is an element of denial associated with these attitudes—as if the problem of race is ignored long enough, it will eventually go away. Unfortunately, ongoing and stark racial disparities and high-profile race-related incidents—such as the post-Katrina images of African Americans left abandoned in a flooded New Orleans, the shooting of unarmed black males by Cincinnati police officers that led to rioting in 2001,<sup>12</sup> the voter-disenfranchisement issues of the 2000 and 2004 presidential elections,<sup>13</sup> and the ongoing intransigence of Alabama voters to bring their laws into the 20<sup>th</sup> century (let alone this one)<sup>14</sup>—abound. Ignoring the problem is not an option.

Progressives must take the lead in reinvigorating and reshaping a national dialogue on race to examine both where we are and where we are going. Of course, dialogue alone will not address an issue that former President Bill Clinton once described as the most difficult and important domestic challenge facing America.<sup>15</sup> Even President Clinton’s own race initiative fell short of its goals of promoting a healthy dialogue on race relations and developing concrete solutions to ongoing problems.<sup>16</sup> That arguably the most gifted politician of our time, who likely understood the issue of race better than any of his presidential predecessors, was able to achieve only limited success in addressing the issue speaks volumes about the real challenges that lie ahead.

A progressive agenda on racial equality must be built around the promotion of meaningful opportunity. There are few ideas that have broader support among Americans than the notion that no American should be limited in his or her opportunities. The essence of our freedom is having opportunity—to explore, to create, to learn, to succeed, and to fail. The pursuit of opportunity underlies our nation’s strength and has driven its growth and broad success. In the fight for racial justice, a point of genuine consensus has been the idea that there should be “equal opportunity for all”—regardless of race, ethnicity, gender, or national origin. Recent public opinion polling has indicated that a solid majority of Americans continue to support

## A WORD ON RACIAL AND ETHNIC CATEGORIES

The concepts of race and ethnicity lack precise and universally accepted definitions. Science has not identified a set of genes that correspond with social conceptions of race and scientists disagree about whether any meaningful distinctions among contemporary groups can be derived from a biological notion of race.<sup>18</sup> Accordingly, race is a complex concept that is best viewed as a subjective social construct based on observed characteristics (*e.g.*, skin color) that become socially significant when members of a society routinely divide people into groups based on these characteristics. The distinction between the concepts of race and ethnicity is not clear-cut, although cultural factors, such as language, religion, and nationality, have more often been used to refer to ethnicity (as in groups of people who share a common cultural heritage, such as various European immigrant groups in the United States).

Because race and ethnicity are social constructs, creating racial and ethnic categories can be complex and controversial. The ever-changing racial categories used by the U.S. government in collecting statistics underscore the fluid and socially influenced nature of racial and ethnic classification. They also reflect the difficulty of presenting consistent statistical data on race in a historical context. The Office of Management and Budget (OMB), which creates the classification standards for collecting and reporting data on race and ethnicity, currently defines the following five racial categories: (1) American Indian or Alaska Native; (2) Asian; (3) black or African American; (4) Native Hawaiian and other Pacific Islander; and (5) white. In addition, for federal data collection purposes, there are two ethnic categories, which may be of any race: (1) Hispanic or Latino; and (2) Not Hispanic or Latino. The OMB standards recommend distinct questions to ascertain race and ethnicity separately, but allow agencies to use a combined question in which Hispanic is treated as a race.<sup>19</sup> Since 1997, in recognition of the nation's growing diversity as a result of immigration and intermarriage, OMB's standards allow respondents to the U.S. census to select more than one racial category.

These distinct categories have questionable scientific basis and they will no doubt change in the future to accommodate new social and scientific realities. The Center recognizes that categories oversimplify what are for many complex issues of self-identity. Because nearly all of the information available and discussed in this chapter relies to some degree on these categories, the Center does too, even as we note their imprecision. Despite this necessary generality, as the discussion in the next section indicates, there are significant and enduring social and economic consequences to belonging to one group versus another.

equal opportunity as a core American value and believe that the role of the federal government should be to ensure equal opportunity for everyone.<sup>17</sup>

Progressives must put forward an affirmative, future-oriented opportunity agenda. This agenda must begin with the basics: current antidiscrimination laws must be vigorously enforced to remove illegal barriers to advancement. Congress can support this effort by providing adequate financial resources to and attentive oversight of the federal antidiscrimination enforcement agencies. Next, experts and researchers should be encouraged to create an "opportunity metric" to help identify the elements of meaningful opportunity and so that the existence of opportunity can be mapped nationally. Such an effort would help provide guidance in determining what policies should be implemented to create real opportunity for all of our people and dimin-

ish the vexing disparities that have persisted. Thereafter, renewed and substantial investments must be made to address the ongoing disparities, equalize opportunity, and enhance our American human capital.

The issues surrounding race in America have always been complex. There are no simple solutions and emerging issues and dynamics often undermine old approaches. While no single chapter on race could ever address with appropriate nuance the myriad complexities our nation faces, let alone hope to solve them, the ideas and recommendations presented in this chapter, and in relevant places throughout this volume, represent what could be the start—another start—toward diminishing the disparities that exist and creating meaningful opportunity for all of our people.

## CURRENT STATE OF PLAY

The minority voter disenfranchisement that occurred during the 2000 presidential elections was not auspicious for the cause of equal opportunity during the beginning of a new presidential administration. Indeed, the state of racial equality in America over the past five years has been one of misplaced priorities and missed opportunities. Racial disparities have persisted—and in some areas increased—and presidential leadership in promoting positive racial dialogue has been lacking. Even worse, the administration has put a despairingly low priority on stopping *actual* discrimination—what Berkeley Law School Dean Christopher Edley has called “simple justice”: enforcing the laws already on our books.<sup>20</sup>

### Ongoing Racial Disparities

Race continues to play a primary role in ordering the social and economic lives of many Americans, and racial disparities persist along key socioeconomic indicators. For the most part, these disparities cannot be resolved in isolation; they are interrelated and a solution to addressing any one will likely impact the dimensions of another. For example, educational outcomes impact earnings potential over time and the ability to accumulate wealth. Housing conditions tend to correlate with the quality of schools one attends, proximity to good jobs, and access to high-quality health care and public services. Of course, one’s economic status has an impact on virtually everything. Fortunately, making progress on any one indicator often creates synergistic effects on others.

Unfortunately there are few, if any, significant indicators that do not reveal disparities in status along racial lines. Race continues to be a reliable proxy for socioeconomic status. For illustrative purposes only, the paragraphs that follow outline disparities in economic status, education, health care, and incarceration rates. While this list is only a limited snapshot, it does provide a representative picture of the progress we have made on racial equality and the opportunity deficits that still remain.

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*It is unquestionably the case that the issues children born today will face with regard to racial equality are significantly different from the issues their parents and grandparents faced. But in many ways, the problems that remain have gotten harder to solve.*

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*To some extent, the difficulties we face today are the result of the progress that has been made. Because rampant and open discrimination has been largely ostracized, many people do not believe the problem of discrimination still exists.*

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## ECONOMIC STATUS

Economic inequality is on the rise in America and the persistence of racial disparities in key economic indicators—such as family income, wealth, employment, and poverty rates—demonstrates this.

Family income is one of the most important indicators of the economic wellbeing of families. African-American and Latino family incomes have consistently lagged behind those of whites. In 1973, the median family income was \$45,170 for whites, \$31,255 for Latinos, and \$26,069 for African Americans (all in 2003 dollars).<sup>21</sup> From 1995 to 2000, both African-American and Latino median family incomes actually grew during the strong labor market in the thriving economy. During this time, there was a narrowing of the gap for African Americans, although the gap actually grew for Latinos.<sup>22</sup> In 2000, the median family income had grown to \$56,645 for whites, \$35,972 for African Americans, and \$36,790 for Latinos. From 2000 to 2003, however, the recession and weak labor market reversed the income gains

for all families, and Latino and African-American families were particularly hard hit. African-American family income actually went down by 4.5 percent over this period, and Latinos lost a whopping 6.8 percent of their income. White families, which were already making more than 50 percent more than African Americans or Latinos, lost only 1.5 percent of their income over this period.<sup>23</sup>

Disparities in wealth along racial lines are also striking. One significant reason for this, of course, is that wealth is determined in part by income trends over time. If income is unequal, wealth is likely to be as well. Homeownership is also a key component of family wealth. Increases in homeownership across the demographic spectrum from 1989 to 2001 provide a hopeful sign that the wealth gap is narrowing. During this period, homeownership increased 4.8 percent among African Americans and 7 percent among Latinos.<sup>24</sup> Nonetheless, large disparities in homeownership persist. Even today, less than half of people of color own their own home, while 72.1 percent of whites do.<sup>25</sup> Unfortunately, the gains in homeownership rates from 1989 to 2001 failed to substantially close the wealth gap.

Stock holdings, another aspect of household wealth, increased dramatically during the 1990s stock boom, but it had little impact on closing the wealth gap, as increases in stock ownership were highly concentrated among those with the most wealth. About 75 percent of the stock market growth from 1989-2001 went to the wealthiest 10 percent of households.<sup>26</sup> In 2001, the average financial wealth of African American households was only about 12 percent of the average for white households. Median financial wealth for African Americans was just \$1,100—less than 3 percent of the corresponding figure for whites.<sup>27</sup>

With respect to unemployment, people of color are unemployed at higher rates than whites. In 2003, the unemployment rate was 10.8 percent for African Americans, 7.7 percent for Latinos, and 6.0 percent for Asians, compared to 5.2 percent for whites. African Americans appear to have a permanent 2-to-1 ratio disadvantage in unemployment rates in comparison to whites.

In April 2000, African Americans had cause for celebration because their unemployment rate was 7.0 percent—the lowest rate ever recorded for African Americans; the white unemployment rate that month was 3.4 percent. In the post-war history of the United States, the highest unemployment rate experienced by whites was 9.7 percent in December 1982, and it fell back to 6.9 percent in January 1984. Except for that one-year period, whites have never experienced unemployment rates as high as the rates that African Americans have celebrated as their lowest. Moreover, to complete the comparison, for the 23-year period between May 1974 and June 1997, African Americans never experienced monthly unemployment rates below 9.7 percent—the same level as the record one-month high for whites.

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*To anyone who examines the facts fairly and takes a deeper look at equality of opportunity today, it becomes clear that race sadly remains a reliable proxy for economic and social disadvantage.*

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A snapshot of the racial composition of families living in poverty reveals similar trends. In 2003, 8.1 percent of white families were living in poverty, while 22.3 percent of African-American families and 20.8 percent of Latino families were living in poverty.<sup>28</sup> All together, people of color accounted for 65.7 percent of all Americans living in poverty in 2003.<sup>29</sup> As a measure of absolute progress, the percentage of African-American families living in poverty has fallen since 1967, but when that progress is measured relative to whites, the ratio of African-American to white median family income has risen slightly from 59 cents on the dollar in 1967 to 64 cents on the dollar in 2000.

#### EDUCATION

Disparities in educational outcomes between different racial groups have always been great. Children begin school with gaps in their readiness and these gaps become progressively greater as students move through the education pipeline. While experts disagree about definitions of school readiness, a useful measure is the proportion of pre-kindergarten three- to five-year-olds who have gained at least three of the four literacy school readiness skills—the ability to recognize letters, count to 20 or higher, write their names, and read or pretend to read. In 1999, only 39 percent of children had gained at least three of these four skills. However, there were disparities among children of different races and ethnicities. Forty-two percent of white children and 48 percent of Asian students<sup>30</sup> had gained at least three of the literacy school readiness skills, while only 35 percent of African-American and 25 percent of Hispanic children had done so.<sup>31</sup>

Disparities are even greater once children reach elementary and secondary school. Progress was made in closing achievement gaps during the 1970s and 1980s, but thereafter started to widen again. The 2003 National Assessment on Educational Progress (NAEP) found great variation among proportions of students in the fourth grade who were “proficient”<sup>32</sup> in reading, with only 13 percent of African-American students reading at the proficient level, 15 percent of Latino students, and 16 percent of American Indian students, compared with 38 percent of Asian students and 41 percent of white students.<sup>33</sup> Indeed, less than half of African-American, Latino, and American Indian students have achieved the “basic”<sup>34</sup> level in reading by fourth grade, compared with 70 percent of Asian and 75 percent of white students.<sup>35</sup> And it only gets worse. According to the 2004 NAEP scores, in both reading and math African-American and

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*A progressive agenda on racial equality must be built around the promotion of meaningful opportunity. . . . The essence of our freedom is having opportunity—to explore, to create, to learn, to succeed, and to fail. The pursuit of opportunity underlies our nation’s strength and has driven its growth and broad success.*

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Latino 17-year-olds have been taught to the same level as 13-year-old white students.<sup>36</sup>

There is also a wide disparity in the high school graduation rates of white students and students of color. In 2002, about 78 percent of white students graduated from high school with a regular diploma, compared with 56 percent of African-American students and 52 percent of Latino students.<sup>37</sup>

Progress through college reflects similar gaps. For every 100 white kindergarten students, 65 complete some college and 33 obtain a bachelor’s degree. For every 100 African-American kindergartners, 50 complete some college and 18 obtain a bachelor’s degree. For every 100 Latino kindergartners, 32 complete some college and 11 obtain a bachelor’s degree. For every 100 American Indian/Alaskan Native kindergartners, 58 graduate from high school and 7 obtain at least a bachelor’s degree.<sup>38</sup>

Much of the gap in achievement and progress through the education pipeline is because students of color are disproportionately poorer and tend to receive fewer public resources and less support.<sup>39</sup> Because education is largely funded at the local level with taxes based on real estate values, historical and ongoing discrimination in housing patterns have placed students of color at

a distinct disadvantage when it comes to funding their elementary and secondary education. For example, in 35 of 48 states, districts enrolling the highest proportion of students of color have much fewer state and local dollars per student than districts with the lowest percentage of students of color.<sup>40</sup> Schools with high populations of students of color get fewer experienced teachers. And more math courses in schools with higher populations of students of color are taught by teachers lacking a major in the field than in schools with lower populations of students of color.<sup>41</sup>

## HEALTH

Good health is essential to overall quality of life. Without health, students are unable to attend school to learn and adults are unable to go to work to support themselves and their families. Tragically, racial disparities in health in America remain distressingly large. Although there are many reasons for this, one of the most significant is the greater lack of access to health insurance among racial minorities. Health insurance is the portal to our health system. Without it, even routine health care services can be out of reach, resulting in prolonged illnesses and worse health outcomes.<sup>42</sup> In the United States, people of color make up a third of the population but account for 52 percent of the uninsured, or 23 million out of the 45 million Americans who remain uninsured. With a national rate of non-elderly uninsured at 18 percent of the population, whites have the lowest rate at 12 percent, while Latinos have the highest rate at a staggering 35 percent.<sup>43</sup> While expanding health insurance coverage is critical to reducing disparities in health outcomes for people of color, health insurance coverage alone is not always the “great equalizer” in the health care system. Racial disparities in the quality of care still exist when comparing patients with similar insurance coverage and income level.<sup>44</sup> Persistent disparities in

access to care—the availability of medical providers in a community and the quality of the available care—significantly limit the health care choices for people of color, even among the insured.

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*Progressives must put forward an affirmative, future-oriented opportunity agenda.*

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As a result of these disparities in health insurance coverage and health care access, people of color face crushing disparities in health outcomes. Although whole reports could be written on the evidence of disparities in health outcomes along racial lines, we note only a few here. One of the more stark disparities appears when comparing mortality rates across racial lines. In 2001, the infant mortality rate for African-American infants was more than twice the rate for white infants. For American Indians/Alaska Natives, the death rate was 70 percent higher than for whites. While the infant mortality rate for Latino infants was less than that for white infants in 2001, within the Puerto Rican subgroup, the rate of infant deaths from Sudden Infant Death Syndrome (SIDS) is 1.5 times higher than whites. The SIDS rate for African Americans was 2.2 times that for whites.<sup>45</sup>

While there has been some narrowing of the black-white gap in mortality rates over time—the homicide rate is one such example—African Americans' life expectancy remains a full decade shorter than that of whites. For the two leading causes of death—heart disease and cancer—African Americans have lost considerable ground relative to whites. African-American death rates from heart disease were comparable to whites in 1950, but by 2000, the African-American death rate was 30 percent higher than whites. For cancer death rates, African Americans went from having a lower death rate than whites in 1950 to having a rate that was 30 percent higher than whites in 2000.<sup>46</sup>

What if we were equal? Former Surgeon General David Satcher examined that question in a recent study of U.S. mortality rates for African Americans and whites between 1960 and 2000 and found that 40.5 percent more blacks died each year than would have been expected if they were white. These premature deaths add up to 83,570 African-American deaths each year due to the racial disparity.<sup>47</sup>

#### INCARCERATION

A look at the numbers leads one to the conclusion that we have an epidemic of incarcerated minorities in this country. The racial disparities in the application of criminal justice seem to confound America's fundamental belief in equal justice for all. African Americans and Latinos are disproportionately populating our nation's prisons. At the end of 2003, there were more black males than white males among state and federal inmates, despite the fact that there are nearly six times more white males in the general population than black males.<sup>48</sup> Together, black and Hispanic males make up 63.1 percent of the male prison population.

From 1980 to 2000, the female prison population nearly doubled in size. Of that increase, African-American women made up a shocking three-fourths of the record-setting population. While female incarceration rates still remain substantially lower than male incarceration rates, there are similarities in the racial and ethnic disparities. In 2003, an African-American woman was five times more likely to be incarcerated than a white woman and two times more likely than a Latina woman.<sup>49</sup>

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*The state of racial equality in America over the past five years has been one of misplaced priorities and missed opportunities.*

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### Civil Rights Enforcement

Under the Bush administration, enforcement of antidiscrimination laws has not been a priority. While the number of complaints received by the Justice Department has remained constant, federal prosecution of criminal violations of civil rights laws fell by nearly 50 percent between 1999 and 2003, with prosecutors filing formal charges in only 5 percent of all of the civil rights cases referred to them.<sup>50</sup> This decline, coupled with the erosion of enforcement funding at federal agencies tasked with the responsibility of enforcing antidiscrimination laws, has resulted in lackluster federal enforcement efforts.<sup>51</sup>

Moreover, voting irregularities in the 2000 and 2004 presidential elections disenfranchised hundreds of thousands of voters (an estimated 1.9 million votes went uncounted in 2000 alone), and left little doubt that our election process is deeply flawed and desperately in need of repair.<sup>52</sup> Yet President Bush has refused to push for election reform legislation that would address the faulty voting machines, the poor procedures, and the partisan state election officials that were at the heart of the problem. Furthermore, the Justice Department has allowed partisan politics to compromise voting rights enforcement in significant cases. For example, during consideration of the 2002 Mississippi congressional redistricting plan, the Justice Department failed to act, going so far as to disregard the recommendations of career department lawyers. Contravening its own stated distaste for judicial rulemaking, the administration preferred to allow a three-judge federal appeals court panel approve a plan that diluted the strength of the African-American vote for the benefit of a white Republican candidate in a heavily contested district.<sup>53</sup>

In addition to the lack of antidiscrimination enforcement, the Bush administration also has worked to undermine affirmative action, even in the crucial opportunity-enhancing area of higher education. From opposition to the University of Michigan's affirmative action cases before the Supreme Court, to the appointment of affirmative action opponents to key positions in civil rights enforcement, to the appointment of right-wing ideologues to the federal bench, the administration has consistently made decisions that are contrary to the promotion of a just, fair and inclusive society, the very principles that underlie the purpose of affirmative action.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

While there is no limit to the number of innovative ideas and creative policy proposals that could be advanced to help address our ongoing issues related to race, the debate on how to achieve racial justice in our country has gone quiet. It must be rejoined. A progressive policy agenda on race and equality should begin with two simple but important proposals: first, halt ongoing actual discrimination through vigorous enforcement of existing antidiscrimination laws; and second, promote policies that enhance opportunity for all. Many of the recommendations suggested below are ideas that require further exploration and development. Over the course of the coming year, the Center for American Progress will explore many of them in greater detail as we work to promote ideas that will enhance the wellbeing and opportunity of all.



## Enforce the Civil Rights Laws We Have

Discrimination, though much reduced from a generation ago, remains an obstacle for too many people of color in employment, housing, access to credit, voting, education, and other areas. For example, a significant study found that African Americans were more than twice as likely to be turned down for a conventional home mortgage as white applicants, and Latinos were rejected one and a half times more often than whites. Worse, more qualified upper-income African Americans are more likely to be denied a conventional home mortgage than middle-income whites.<sup>54</sup>

In order to enforce the laws on the books, the president should send a clear message to his appointees leading the enforcement agencies that stopping actual discrimination is important to him—and crucial for the country—and that he expects the law to be enforced. Of course, this means that the president will have to break with his past practice and appoint individuals who actually believe in the laws they are charged with enforcing. Very simply, the president will need to demonstrate leadership in eradicating discrimination.

In addition, the president should propose, and the Congress should support, significant funding increases for the civil rights enforcement offices within the executive branch. Not only can such funding be used to increase the number of complaints that are acted on for enforcement, but it can be invested in efforts to root out more insidious and hard-to-identify discrimination in areas like lending, which often relies on complicated automated lending programs that have the effect of discriminating based on race. Oversight of financial institutions can better identify possible redlining, as well as uncover discriminatory interest rates and other costs associated with loans, and allow for more robust investigation and prosecution of lending abuses.

Enhancing enforcement efforts should include broader deployment of so-called “testers” to identify discrimination in the areas of housing, employment, and lending. By comparing the outcomes of equally qualified applicants of different races, it is easier to determine when race has been a factor in the denial of a benefit. This is important to enforcement efforts, of course, but it can also help make decisionmakers aware of their own unconscious discrimination.

Beyond enhancing traditional enforcement, increased funding can support efforts to avoid problems before they develop—through more aggressive outreach, education, and technical assistance by the civil rights offices and agencies. Enhanced data collection on race is essential to these efforts and can play an important role in actual enforcement. In addition, performance targets and measures should be established that effectively evaluate progress, with an emphasis on outcomes.

Congress also has a role. If the executive is not sufficiently forceful in promoting antidiscrimination practices and enforcement, Congress should exercise greater oversight of the federal antidiscrimination enforcement agencies. In addition to holding more public hearings designed

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to determine their effectiveness in combating discrimination, Congress can use the power of the purse to reward those agencies and efforts that are effective in performing their enforcement responsibilities. At a very basic level, Congress should resist flat funding proposals forwarded by the administration. In addition, Congress has a bully pulpit of its own. In public hearings Congress can review policies in the areas where racial disparities are the most stark and determine where resources and reforms are needed to help inform the American public about the persistence of discrimination in this country.

While greater congressional involvement would be welcome in many areas of civil rights, specific focus in particular areas should include:

**Federal Sentencing Policy.** A recent report by the U.S. Sentencing Commission assessing whether the federal sentencing guidelines had accomplished the original goal of reducing unfair racial disparities in federal sentencing found that the guidelines had actually made disparities worse.<sup>55</sup> The constitutionality of federal sentencing guidelines was recently called into question in *United States v. Booker*, a case in which the Supreme Court held that the current federal sentencing guidelines would be advisory instead of mandatory.<sup>56</sup> Policies such as mandatory minimum sentences have played a significant role in exacerbating disparities and must be the subject of congressional reform.

**Racial Disparities in Health Care.** A landmark study by the Institute of Medicine of the National Academy of Sciences assessed the extent of disparities in the types and quality of health services received by racial and ethnic minorities and non-minorities and explored the factors that contribute to inequities in care.<sup>57</sup> The study's recommendations provide a framework for a federal response to eliminating disparities in health and health care and should be evaluated by Congress as a part of any comprehensive solution to the problem. Because access to health insurance is so crucial to health outcomes, Congress should act to establish universal access to health insurance.<sup>58</sup>

**Federal Housing Policy.** Congress must embrace policies and programs that affirmatively reverse existing patterns of racial discrimination and segregation in housing. At present, recipients of Department of Housing and Urban Development (HUD) funding are merely required to certify that they are in compliance with fair housing laws. This certification is insufficient to ensure that meaningful steps have been taken to address racial segregation. Promoting and paying for policies by HUD and the Treasury Department to require housing program recipients to measure and report the impact of their programs on racial equity would make an important contribution. Moreover, the administration should also expand initiatives like the "Moving to Opportunity" program that give individuals renting in areas of concentrated poverty the opportunity to move into more economically diverse communities. Such initiatives have been shown to yield economic and social gains for low-income families and children.

**Voting Rights.** Congress should act to preserve the Voting Rights Act of 1965 by extending two critical provisions that are set to expire in 2007.<sup>59</sup> Section 5, which applies to specifically identified jurisdictions that have a history of discriminatory voting practices, requires that any proposed change to voting or election procedures be “pre-cleared” by either the Department of Justice or the United States District Court for the District of Columbia.<sup>60</sup> Section 203 requires bilingual voting assistance be provided to covered language minorities.<sup>61</sup> As the United States becomes more diverse, ensuring that language minorities are able to meaningfully exercise their right to vote is essential not only for the preservation of their rights, but also for our democracy.

In addition, Congress should create federal standards to preserve the right of ex-offenders—who have served their terms and reentered society—to vote. The current regime allows states to enact a patchwork of laws that have had the effect of disenfranchising a disproportionate number of people of color. Unfair sentencing policy has exacerbated this dynamic and Congress should set standards that preserve the right to vote for all citizens.

**Electoral Reform.** While Congress took an important step forward with the Help America Vote Act of 2002,<sup>62</sup> the problems that arose in the 2004 presidential election in both the election process and voting technology demonstrate that additional reform is needed to secure the right to vote. Congress should implement the following reforms for all future federal elections:

- Guarantee a voter-verified paper audit trail to ensure the security and accuracy of electronic voting.
- Amend the Help America Vote Act to provide a private right of action to allow private plaintiffs to challenge actions that are in violation of the law.
- Create federal standards to enable states to achieve the goal of universal voter registration.
- Remove partisan election officials from the administration of elections.
- Create uniform standards for counting provisional ballots that emphasize counting votes.
- Expand the federal role—including the authority of the United States Election Assistance Commission—to ensure that all eligible citizens are registered to vote and provide a statewide system to allow citizens to verify their registration prior to the vote.
- Ensure that the allocation of voting machines is sufficient to facilitate shorter waiting periods to cast votes.
- Fully fund the Help America Vote Act to provide support to states and localities for pre-election activities that will better prepare them for election day.

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- Expand access to early voting to ensure that voters have ample opportunities to exercise their right to vote.

**Addressing Past Racial Injustice.** There are specific instances of racial injustice in our past that are so egregious that they demand contemporary redress.<sup>63</sup> While other countries have taken important steps to uncover difficult truths from their past and address them with a contemporary response, the U.S. government has yet to undertake a sufficient effort to address specific racial harms of the past. The South African Truth and Reconciliation Commission can serve as a model to us. The president and Congress should establish a bipartisan commission tasked with reviewing specific cases of racial injustice and making recommendations regarding appropriate responses to them. Such a process could be essential to reconciling the tragedies our past and help us to prepare to address the challenges ahead.

### Enhance Opportunity

In addition to taking steps to eliminate discrimination through vigorous enforcement of and education about our civil rights laws, it is essential that the federal government make every effort to enhance opportunity for all.

#### CREATE AN “OPPORTUNITY METRIC”

While no government can guarantee equal *outcomes* for all, there is a broad consensus that equal *opportunity* is fundamental to our democratic system, and that efforts to expand opportunity are a good thing. Despite this consensus, questions remain regarding the substantive factors that create or correlate with opportunity. What does it mean to have opportunity? What elements must we have to take advantage of opportunity? What are the obstacles to obtaining maximum opportunity? If we can use technology to map crime with the pinpoint precision of a city block, why can't we employ technology to help us determine the existence or lack of opportunity in a particular area?

The Congress should appropriate funding for a rigorous federal study, undertaken by a commission of academics and experts under the auspices of the National Academy of Sciences, to identify effective measures or proxies for opportunity. Such a study could help us determine which neighborhoods, areas, and regions have more or less opportunity. An opportunity metric would help the government determine where and how it can invest resources to enhance and equalize opportunity. While the study would be race neutral, it should include a compilation of socioeconomic indicators that identify disparities in each category. The study would update our knowledge of the state of opportunity in America, educate the public on existing opportunity deficits, and provide a race-neutral rationale for spending government resources to assist those Americans most lacking in opportunity.

#### RATCHET UP FEDERAL LEADERSHIP FOR EDUCATION

Education is the font of all other opportunity; without education, the value of other opportunities is diminished. Therefore, education is the linchpin to our ability to take complete advantage of other opportunities. Moreover, by providing meaningful educational opportunity to our children, we prepare them to benefit from all of the other opportunities that our country offers. Education certainly has been the gateway to opportunity and social mobility for

people of color. Despite this, there is nearly universal agreement that not only is our current education system failing students of color, it is failing in the goal of creating a productive and engaged citizenry, leaving the United States at a competitive disadvantage in the global knowledge-based economy in which students from New Brunswick and Baltimore are in competition with themselves and students from New Delhi and Bangkok. Therefore, the federal government must take immediate action to provide the necessary resources to improve the overall quality of our educational system and, in so doing, eliminate the racial disparities that continue to exist in education.

To address this national problem, Congress must significantly increase the investment in education, committing the resources necessary to equalize opportunity from preschool through college. In particular, resources need to be marshaled to extend learning time by having students spend more time in school. Although funding alone will not solve all of the problems, more resources must be committed to prevent American students of all races from falling further behind. In addition, the nation needs to set high expectations for students' learning through voluntary national standards and accountability measures. A top priority must be rigorous oversight of the distribution of qualified teachers with revised compensation systems and financial incentives for teachers to work in more challenging schools so that all students have equal access to quality teachers. Furthermore, Congress should work with state and local education authorities to consider new and creative ways to address funding disparities between schools and school districts and to eliminate ongoing segregation in public education—both between schools and within them (through, for example, tracking systems that tend to segregate students based on race as much as ability).

Finally, to improve access to higher education for students of color, the Department of Education's Office of Civil Rights (OCR) should create a minimum "safe harbor" policy for colleges and universities striving to formulate affirmative action plans that meet the standards of the Supreme Court's decision in *Grutter v. Bollinger*, the recent University of Michigan Law School case that affirmed the use of race in the admissions process.<sup>64</sup> Such guidance should not limit the flexibility of colleges and universities to achieve compliance under the new standard through different approaches, but rather to set a minimum "safe harbor" standard that would protect colleges and universities from future OCR enforcement actions in this area.

#### ENHANCE ECONOMIC OPPORTUNITY

Because economic status is so correlated with other aspects of opportunity—such as the quality of housing, access to good jobs, the affordability and availability of adequate health care, and the quality of public services one receives, most especially public schools—the president and Congress should implement a package of economic "opportunity enhancement" policies. Several ideas that should be pursued and developed include:

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*The debate on how to achieve racial justice in our country has gone quiet. It must be rejoined.*

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**Raise the Minimum Wage and Index it to Inflation.** Many families of color are among the working poor who struggle to make ends meet in minimum-wage jobs. In 2003, the number of Americans living in poverty increased to 35.9 million, or 12.5 percent, up 1.3 million from 2002.<sup>65</sup> Congress should raise the federal minimum wage and index it to inflation after that. The federal minimum wage is not currently indexed to inflation and it has not been raised since 1997, when it was last lifted to its current level of \$5.15 per hour. This means that over time, the amount of goods and services that people can buy on a

minimum-wage salary decreases. Moreover, new legislation is required every time Congress wants to raise the minimum wage. The proper policy response is to raise the minimum wage immediately and then index it to prevent its erosion over time.

**Reform the Tax Code.** Reforming two provisions of the tax code, the Child Tax Credit and the Earned Income Tax Credit (EITC), would have a significant impact on struggling families, who are disproportionately people of color. In order to qualify for the Child Tax Credit, family income must be over \$10,000. Because this level is so high (and because it is indexed for inflation), many working families living at or below the poverty line do not have enough income to qualify for the full or even partial credit. As a result, over half of African-American children and 40 percent of Latino children do not receive the credit under current law. By reforming the Child Tax Credit to reduce the income threshold to \$5,000 and eliminating indexing for inflation, millions of families would qualify for the full credit or an increase in benefits under the credit. Also, by reforming the Earned Income Tax Credit to eliminate the marriage penalty, single low-income parents currently receiving the EITC would not risk losing any benefits under the credit if they marry.<sup>66</sup>

**Enhance Access to Jobs.** Congress, with the support of the president, can support a variety of policies that stimulate job development and that increase minority access to jobs that currently exist. The following proposals should be part of an agenda designed to build the population of people of color in the middle class:

- *Extend and Expand Empowerment Zones and Enterprise Communities.* Congress should build on the success of empowerment zones and enterprise communities by extending their authorization and expanding their scope. In essence, these programs provide a tax credit for each job created by a business in an empowerment zone or enterprise community that employs a resident of that zone or community who performs substantially all of his or her employment services within the zone or community. Congress should pass legislation to ensure the longevity of these programs and analyze whether the current tax credit structure is sufficiently generous to create an incentive for businesses to move their firms to the zones or communities.<sup>67</sup>
- *Enhance Transportation Assistance to Jobs.* Programs such as the Job Access Grants and Reverse Commute Program,<sup>68</sup> which provides grants to address transportation challenges faced by welfare recipients and other low-income persons seeking

to obtain and retain jobs, are excellent efforts designed to address access barriers to jobs. These programs should be reauthorized and funded at levels sufficient to improve job access.

- *Support Regional Planning Incentives.* Scholars have recognized the importance of regional planning in ending the isolation of communities of color in urban areas and managing metropolitan growth to avoid sprawl.<sup>69</sup> The federal government should provide incentives for regional planning to foster the infrastructure needed to connect people of color concentrated in central cities and older inner suburbs to the jobs in the outer suburbs; revitalize urban areas (by creating pathways back into cities); and create a more equitable distribution of resources. An emphasis on regional planning will help policymakers recognize changing development and shifting employment patterns and move toward reversing prior government policies that institutionalized segregation and concentrations of poverty in urban areas and which disproportionately affected people of color.<sup>70</sup>
- *Expand Federal Contracting Opportunities.* The federal government has been an important catalyst to small and minority businesses through its contracting program. Although a third of the U.S. population are racial minorities, only 7 percent of all federal contracts go to minority-owned firms. At present, the government-wide procurement goal for small and disadvantaged businesses is “no less than 5 percent” of the total value of all prime contracts.<sup>71</sup> While this has helped to increase the share of federal contracting and subcontracting dollars going to minority-owned firms, more can be done. Congress should increase support for federal minority business development programs by enhancing minority outreach and education about the programs. Furthermore, Congress should create capacity-building programs that assist small or new firms seeking to break into the federal contracting domain.

**Enhance Homeownership and Improve Housing Opportunities.** Congress should create a National Affordable Housing Trust Fund that would provide a trust fund for states, localities, and non-profit organizations to build affordable housing units in mixed-income locations; increase the supply of affordable housing for low-income citizens by 1 million units over the next ten years; and provide rental subsidies to low-income individuals.<sup>72</sup> In addition, Congress should expand funding for the Section 8 housing program, which provides housing assistance through rental vouchers to over 2 million low-income families and children, the elderly, and the disabled.<sup>73</sup> The program has become an endangered species under the Bush administration, with proposed cuts in funding and a block grant proposal that would significantly diminish the purchasing power of the vouchers. Instead, Section 8 should be increased by \$1 billion to restore the value vouchers lost over the past four years.

## ENDNOTES

<sup>1</sup> The Declaration of Independence, The Unanimous Declaration of the Thirteen United States of America, July 4, 1776.

<sup>2</sup> Population Division, U.S. Census Bureau, *Table 3: Annual Estimates of the Population by Sex, Race and Hispanic or Latino Origin for the United States: April 1, 2000 to July 1, 2004*, June 9, 2005, available at <http://www.census.gov/popest/national/asrh/NC-EST2004/NC-EST2004-03.xls> (last viewed Aug. 9, 2005).

<sup>3</sup> W.E.B. DuBois, The Souls of Black Folks, at 1 (Chicago: A.C. McClurg & Co. 1903).

<sup>4</sup> U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin*, Mar. 18, 2004, available at <http://www.census.gov/ipc/www/usinterimproj> (last viewed Aug. 9, 2005). The Census projects that by 2050, the white non-Hispanic population will have declined to 50.1 percent of the U.S. population.

<sup>5</sup> For the purpose of this chapter, the term “people of color” is defined to include African Americans, Latinos, Asian/Pacific Americans, and American Indian/Alaska Natives. Scientific and cultural definitions of race and ethnicity are complicated, evolving, and poorly understood. This is discussed in greater detail in the text box, “A Word on Racial and Ethnic Categories.” In this chapter, whenever the words “race” or “racial” are used, they should be read to include Hispanics—or Latinos—even though “Hispanic” typically refers to ethnicity.

<sup>6</sup> *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

<sup>7</sup> Chungmei Lee, Is Resegregation Real?, (Report of the Harvard Civil Rights Project), October 2004, available at <http://www.civilrightsproject.harvard.edu/research/reseg03/mumfordresponse.pdf> (last viewed Aug. 9, 2005); see also Gary Orfield & Chungmei Lee, Brown at 50: King’s Dream or Plessy’s Nightmare?, October 2004, available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf> (last viewed Aug. 9, 2005).

<sup>8</sup> David D. Kirkpatrick, *Black Pastors Backing Bush Are Rare, But Not Alone*, N.Y. Times, Oct. 5, 2004, at A15, available at <http://www.nytimes.com/2004/10/05/politics/campaign/05church.html?ex=1254715200&en=5b2403740ed21c1e&ei=5088&partner=rssnyt> (last viewed Aug. 9, 2005). Bush’s narrative on faith-based initiatives succeeded in drawing limited support from African-American ministers. See Joe Davidson, *Black Vote Strong; More Back Bush*, Focus (magazine of the Joint Center for Political and Economic Studies), Nov./Dec. 2004, available at <http://www.jointcenter.org/publications1/focus/FocusDetail.php?recordID=462>, (last viewed Aug. 9, 2005) (“In Ohio, which proved to be the state on which the election hung, African Americans gave 16 percent of their votes to Bush, a seven point jump from last time.”).

<sup>9</sup> Darryl Fears, *Bush Again Turns Down Invitation to Address NAACP Convention*, Washington Post, July 9, 2004, at A20. After addressing the NAACP Convention as a candidate in 2000, Bush declined four consecutive invitations to address the nation’s largest and oldest civil rights group, making him “the first sitting president since Warren G. Harding not to address the NAACP.” After attending the 2000 Convention of the National Council of La Raza (the largest Hispanic civil rights organization), Bush turned down four consecutive invitations to address the group.

<sup>10</sup> A national survey conducted by The Washington Post, the Henry J. Kaiser Family Foundation, and Harvard University found that “40 percent to 60 percent of all whites say that the average black American is faring about as well and perhaps even better than the average white” in terms of their jobs, incomes, schooling and health care. In all four areas, black Americans lag behind white Americans. Nonetheless, “seven in 10 whites hold at least one of these misperceptions and a majority—56 percent—held two or more.” Richard Morin, *Misperceptions Cloud Whites’ View of Blacks*, Washington Post, July 11, 2001, at A1.

<sup>11</sup> Although we choose not to repeat any of her invective here, see just about anything that Ann Coulter has said or written on race, for example.

<sup>12</sup> For three days in April 2001 black citizens of Cincinnati protested the death of an unarmed 19-year-old black man who was killed by the Cincinnati police. The death of Timothy Thomas marked the second time that year that an African-American male had been killed by the Cincinnati police and was the twelfth such death in four years. Weeks before the death of Timothy Thomas, the ACLU and members of the black community of Cincinnati filed a lawsuit against the Cincinnati police department accusing the police of racial profiling.



<sup>13</sup> Disparities in the rates of residual or spoiled (and ultimately, uncounted) ballots constituted “the most important race-related civil rights problem identified from November 2000,” according to a report released by The Civil Rights Project at Harvard University. A voter living in a predominantly black county was much more likely to have his or her ballot go uncounted than a voter in a predominantly white county. The correlation between racial composition and spoilage rates persists even when predominantly black counties are compared with counties of identical income, education, and other factors. The Civil Rights Project, *Democracy Spoiled: National, State, and County Disparities in Disfranchisement Through Uncounted Ballots* (July 2002), available at [http://www.civilrightsproject.harvard.edu/research/electoral\\_reform/residual\\_ballot.php](http://www.civilrightsproject.harvard.edu/research/electoral_reform/residual_ballot.php) (last viewed Aug. 9, 2005). See also The Century Foundation, et al., Transcripts from *Voting in 2004: A Report To The Nation On America's Election Process*, Dec. 7, 2004, available at <http://www.tcf.org/list.asp?type=EV&pubid=132> (last viewed Aug. 9, 2005) (stating that the November 2004 election was beset by “systemic flaws, administrative incompetence, and intentional acts of voter disenfranchisement” across the nation.).

<sup>14</sup> Although Alabama managed to repeal the century-old ban on interracial marriages in 2000, in November 2004, Alabamans voted against repealing state constitution provisions for the poll tax and school segregation, handing a victory to those nostalgic for segregation. See Manuel Roid-Franzia, *Alabama Vote Opens Old Racial Wounds*, *Washington Post*, Nov. 28, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A16443-2004Nov27.html> (last viewed Aug. 10, 2005). May 2005 marked a further embarrassment to fair-minded Alabamans as the state legislature, bogged down in debate about judges and taxes, failed to pass a version of the amendment before the end of the legislative session. See Bob Johnson, *Racist Language Remains in State Constitution*, *Decatur Daily News*, May 17, 2005, available at <http://www.decaturdaily.com/decaturdaily/news/050517/racist.shtml> (last viewed Aug. 10, 2005).

<sup>15</sup> Council of Economic Advisers, *Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin*, at 1, September 1998 (“I believe the greatest challenge we face . . . is also our greatest opportunity. Of all the questions of discrimination and prejudice that still exist in our society, the most perplexing one is the oldest, and in some ways today, the newest: the problem of race. Can we fulfill the promise of America by embracing all our citizens of all races. . . . In short, can we become one America in the 21<sup>st</sup> century?”).

<sup>16</sup> Jeanne Meserve, *Critics Say Progress Scant in Clinton Race Initiative*, *CNN.com*, June 14, 1998, available at <http://www.cnn.com/US/9806/14/race.commission> (last viewed Aug. 9, 2005). Rep. John Lewis urged President Clinton to extend the initiative mandate, stating, “I think it's going to take more than a year or a year and a half to remove the scars and stains of racism from American society.”

<sup>17</sup> Sixty-seven percent of likely voters explicitly supported the notion that the government has an important role in ensuring equal opportunity for everyone and 70 percent supported the concept implicitly in the form of guaranteeing quality education for everyone. See Stanley B. Greenberg & Anna Greenberg, *Taxes, Government and the Obligations of Citizenship*, Nov. 12, 2003, available at [http://www.greenbergresearch.com/publications/reports/pip\\_m111203.pdf](http://www.greenbergresearch.com/publications/reports/pip_m111203.pdf) (last viewed Aug. 9, 2005).

<sup>18</sup> Committee on National Statistics, National Academies, *Measuring Racial Discrimination*, at 26 (2004).

<sup>19</sup> *Ibid.* at 32.

<sup>20</sup> Christopher Edley Jr., *Leading the Races*, *American Prospect*, August 2004, available at <http://www.prospect.org/web/page.w?section=root&name=ViewPrint&articleId=8146> (last viewed Aug. 10, 2005).

<sup>21</sup> According to data compiled by the Economic Policy Institute. See Table: Families by Median and Mean Income by Race of Householder, 1947 to 2003, available at [http://www.epinet.org/datazone/05/am\\_med\\_inc.pdf](http://www.epinet.org/datazone/05/am_med_inc.pdf) (last viewed Aug. 13, 2005).

<sup>22</sup> In 1973, African-American median household income was 57.7 percent of whites' median household income. By 2000, African Americans had narrowed the gap with an increase to 63.5 percent of whites' median household income. The gap for Hispanic households increased over this period, moving from 69.19 percent of whites' median household income in 1973 down to 64.95 percent in 2000. Calculations made by the Center for American Progress based on figures compiled by the Economic Policy Institute. *Ibid.*

<sup>23</sup> Calculations made by the Center for American Progress based on figures compiled by the Economic Policy Institute. *Ibid.*

<sup>24</sup> See Economic Policy Institute, *Facts & Figures on Wealth*, (derived from Lawrence Mishel, et al., *The State of Working America 2004/2005*), available at [http://www.epinet.org/books/swa2004/news/swafacts\\_wealth.pdf](http://www.epinet.org/books/swa2004/news/swafacts_wealth.pdf) (last viewed Aug. 13, 2005).

<sup>25</sup> *Ibid.*

- <sup>26</sup> Lawrence Mishel, et al., *The State of Working America 2004/2005* at 290 (2005); see also *Facts & Figures on Wealth*, available at [http://www.epinet.org/books/swa2004/news/swafacts\\_wealth.pdf](http://www.epinet.org/books/swa2004/news/swafacts_wealth.pdf) (last viewed Aug. 13, 2005).
- <sup>27</sup> See Economic Policy Institute, *Facts & Figures on Minorities*, (derived from Lawrence Mishel, et al., *The State of Working America 2004/2005*), available at [http://www.epinet.org/books/swa2004/news/swafacts\\_minorities.pdf](http://www.epinet.org/books/swa2004/news/swafacts_minorities.pdf) (last viewed Aug. 13, 2005).
- <sup>28</sup> See Economic Policy Institute, *Facts & Figures on Poverty*, (derived from Lawrence Mishel, et al., *The State of Working America 2004/2005*), available at [http://www.epinet.org/books/swa2004/news/swafacts\\_poverty.pdf](http://www.epinet.org/books/swa2004/news/swafacts_poverty.pdf) (last viewed Aug. 13, 2005).
- <sup>29</sup> Lawrence Mishel, et al., *The State of Working America 2004/2005* at 316 (2005).
- <sup>30</sup> Child Trends DataBank, *Early School Readiness*, available at <http://www.childtrendsdatabank.org/indicators/7EarlySchoolReadiness.cfm> (last viewed Aug. 8, 2005).
- <sup>31</sup> *Ibid.*
- <sup>32</sup> The National Center for Education Statistics, which administers the National Assessment of Educational Progress (NAEP), defines “proficient” as “solid academic performance for each grade assessed. Students reaching this level have demonstrated competency over challenging subject matter, including subject-matter knowledge, application of such knowledge to real-world situations, and analytical skills appropriate to the subject matter.” See National Center for Education Statistics, *The Nation’s Report Card: Reading Highlights 2003*, November 2003, at 2, available at <http://nces.ed.gov/nationsreportcard/pdf/main2003/2004452.pdf> (last viewed Aug. 13, 2005).
- <sup>33</sup> *Ibid* at 14.
- <sup>34</sup> The National Center for Education Statistics, which administers the NAEP, defines the “basic” achievement level as denoting “partial mastery of prerequisite knowledge and skills that are fundamental for proficient work at each grade.” *Ibid* at 2.
- <sup>35</sup> *Ibid* at 14.
- <sup>36</sup> See National Center for Education Statistics, *NAEP 2004: Trends in Academic Progress*, July 2005, at 33 & 35, available at <http://nces.ed.gov/nationsreportcard/pdf/main2005/2005464.pdf> (last viewed Aug. 13, 2005).
- <sup>37</sup> Jay P. Greene & Marcus A. Winters, *Public High School Graduation and College-Readiness Rates: 1991–2002*, February 2005, available at [http://www.manhattan-institute.org/html/ewp\\_08.htm](http://www.manhattan-institute.org/html/ewp_08.htm) (last viewed Aug. 9, 2005).
- <sup>38</sup> All statistics cited in this paragraph come from Kati Haycock, Education Trust, *Improving Academic Achievement and Closing Gaps Between Groups*, slides 39-42, available at <http://education.byu.edu/media/haycock.pdf> (last viewed Aug. 9, 2005). For American Indian/Alaska Native students, data on the number of kindergartners who completed some college was not available.
- <sup>39</sup> Council of Economic Advisers, *Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin*, at 13, September 1998.
- <sup>40</sup> Kevin Carey, *The Funding Gap 2004* (2004), available at <http://www2.edtrust.org/NR/rdonlyres/30B3C1B3-3DA6-4809-AFB9-2DAACF11CF88/0/funding2004.pdf> (last viewed Aug. 9, 2005).
- <sup>41</sup> Kevin Cary, *The Real Value of Teachers, Thinking K-12* (a publication of the Education Trust), Winter 2004, at 36-37, available at <http://www2.edtrust.org/NR/rdonlyres/5704CBA6-CE12-46D0-A852-D2E2B4638885/0/Spring04.pdf> (last viewed Aug. 13, 2005). For more on this topic see *Better Teachers, Better Schools* in this volume.
- <sup>42</sup> For more on the need for health insurance and a plan to get universal health coverage for all, see *Progressive Prescriptions for a Healthy America* in the volume.
- <sup>43</sup> Kaiser Family Foundation, *Key Facts: Race, Ethnicity, and Medical Care*, June 2003, at 12, available at <http://www.kff.org/minorityhealth/upload/Key-Facts-Race-Ethnicity-Medical-Care-Chartbook.pdf> (last viewed Aug. 13, 2005).
- <sup>44</sup> Institute of Medicine of the National Academies, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (2003), available at <http://www.iom.edu/report.asp?id=4475> (last viewed Aug. 9, 2005).
- <sup>45</sup> All of the previous statistics in this paragraph are based on U.S. Department of Health and Human Services’ Initiative to Eliminate Racial and Ethnic Disparities in Health, *Fact Sheet: Minority Health Disparities at a Glance*, July 12, 2004, available at <http://www.omhrc.gov/rah/glance.htm> (last viewed Aug. 9, 2005).
- <sup>46</sup> David R. Williams & Pamela Braboy Jackson, *Social Sources of Racial Disparities in Health*, 24 *Health Affairs* No. 3 at 325 (2005).
- <sup>47</sup> David Satcher et al., *What If We Were Equal? Comparison of The Black-White Mortality Gap in 1960 and 2000*, 24 *Health Affairs* No. 2 at 459 (2005).

- <sup>48</sup> Population Division, U.S. Census Bureau, *Table 3: Annual Estimates of the Population by Sex, Race and Hispanic or Latino Origin for the United States: April 1, 2000 to July 1, 2004*, June 9, 2005, available at <http://www.census.gov/popest/national/asrh/NC-EST2004/NC-EST2004-03.xls> (last viewed Aug. 9, 2005).
- <sup>49</sup> Paige M. Harrison & Allen J. Beck, *Prisoners in 2003*, Bureau of Justice Statistics Bulletin at 9, November 2004, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf> (last viewed Aug. 9, 2005).
- <sup>50</sup> The number of criminal prosecutions of civil rights violations fell from 159 in 1999 to 84 in 2003. See Trac Reports, *Civil Rights Enforcement by Bush Administration Lags*, available at <http://trac.syr.edu/tracreports/civright/106/> (last viewed Aug. 9, 2005).
- <sup>51</sup> Wayne Washington, *Black Lawmakers See Retreat on Civil Rights*, Justice Dept.'s Boyd Accused of Inaction, Boston Globe, June 20, 2002, at A3; Darryl Fears, *Civil Rights Agency Cuts Budget by 9%*, Washington Post, Apr. 9, 2005, at A3.
- <sup>52</sup> See e.g., The Harvard Civil Rights Project, Democracy Spoiled: National, State, and County Disparities in Disfranchisement Through Uncounted Ballots, July 2002, available at [http://www.civilrightsproject.harvard.edu/research/electoral\\_reform/residual\\_ballot.php](http://www.civilrightsproject.harvard.edu/research/electoral_reform/residual_ballot.php). See also The Century Foundation, et al., *Transcripts from Voting in 2004: A Report To The Nation On America's Election Process*, Dec. 7, 2004, available at <http://www.tcf.org/list.asp?type=EV&pubid=132> (last viewed Aug. 9, 2005).
- <sup>53</sup> All three judges were appointed by Republican presidents. See Edward Walsh, *Supreme Court Upholds Mississippi Redistricting Plan: State Democratic Leader Charges Federal Judiciary Favors GOP in Replay of 2000 Election Ruling*, Washington Post, Apr. 1, 2003, at A5; Thomas B. Edsall, *Supreme Court Rejects Redistricting Appeal: Democrats Accuse Judges, Justice Dept. of Favoritism in Mississippi Conflict*, Washington Post, Mar. 2, 2002, at A4.
- <sup>54</sup> U.S. Department of Housing and Urban Development, Office of Policy Development and Research and the Urban Institute, *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions*, April 2002, available at <http://www.huduser.org/Publications/PDF/aotbe.pdf> (last viewed Aug. 14, 2005); see also Margaret Austin Turner & Felicity Skidmore, eds., *Mortgage Lending Discrimination: A Review of Existing Evidence*, June 1999, available at <http://www.urban.org/urlprint.cfm?ID=6407> (last viewed Aug. 14, 2005).
- <sup>55</sup> United States Sentencing Commission, Fifteen Years of Guidelines Sentencing, November 2004, available at [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm) (last viewed Aug. 9, 2005). The report found that while the average federal sentence for African-American offenders was five months longer than whites in 1984, by 2001, the average sentence for African-American offenders was 20 months longer than for white offenders.
- <sup>56</sup> *United States v. Booker*, No. 04-104 (Jan. 12, 2005), available at <http://a257.g.akamaitech.net/7/257/2422/25jan20051650/www.supremecourt.us/opinions/04pdf/04-104.pdf> (last viewed Aug. 9, 2005).
- <sup>57</sup> Institute of Medicine of the National Academies, Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care (2003), available at <http://www.iom.edu/report.asp?id=4475> (last viewed Aug. 9, 2005).
- <sup>58</sup> For more detailed recommendations on the establishment of a universal health insurance program, see *Progressive Prescriptions for a Healthy America* in this volume.
- <sup>59</sup> The Voting Rights Act of 1965 is codified at 42 U.S.C. 1973-1973aa-6.
- <sup>60</sup> Section 5 covers all of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas; it also covers most of Virginia, four counties in California, five counties in Florida, two townships in Michigan, 10 towns in New Hampshire, three counties in New York, 40 counties in North Carolina, and two counties in South Dakota. A formula designed by Congress applies Section 5 to any state or county where a literacy test was used as of November 1, 1964, and where a participation rate of under 50 percent by eligible voters in the 1964 presidential election showed the test had a racially discriminatory basis. The pre-clearance process requires covered jurisdictions to submit a letter to the Justice Department demonstrating that any change in voting procedures does “not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or membership in a language minority group].” The process also allows citizens to submit comments to the Justice Department on how they believe the proposed change will impact their community. The Justice Department then has 60 days to respond by either objecting to the change or pre-clearing the proposed change. An objection would bar the jurisdiction from implementing the change. An appeal of an objection may be sought through pre-clearance by the United States District Court for the District of Columbia. Alternatively, a jurisdiction may seek to pre-clear its proposed changes directly by petitioning this court.

<sup>61</sup> Section 203 of the Voting Rights Act requires the provision of bilingual voting assistance if more than 5 percent of the voting age population in the jurisdiction belong to a single language minority group and have limited English proficiency, or where more than 10,000 voting-age citizens in a jurisdiction belong to a single language minority community and are limited English proficient and the illiteracy rate of the citizens in the language minority group is higher than the national illiteracy rate.

<sup>62</sup> The Help America Vote Act is codified at 42 U.S.C. 15301-15545 (2002).

<sup>63</sup> One such example is the 1921 Tulsa Race Riot in which a white mob deputized by the Tulsa police chief killed as many as 300 African Americans from the thriving black community of Greenwood. The victims of these riots have been denied relief in state and federal courts. See Scott Ellsworth, *Death in a Promised Land* (1982); see also Oklahoma Commission To Study The Tulsa Race Riots of 1921, *Tulsa Race Riot*, Feb. 28, 2001, available at <http://www.ok-history.mus.ok.us/trrc/freport.pdf> (last viewed Aug. 14, 2005).

<sup>64</sup> *Grutter v. Bollinger*, No. 02-241, (2003), available at <http://a257.g.akamaitech.net/7/257/2422/23jun 20030800/www.supremecourt.us/opinions/02pdf/02-241.pdf> (last viewed Aug. 14, 2005).

<sup>65</sup> Lawrence Mishel, et al., *The State of Working America 2004/2005*, at 311 (2005).

<sup>66</sup> For more information on comprehensive tax reform that would make the tax code more progressive, see *A Fair and Simple Tax Code for our Future: A Progressive Approach to Tax Reform* in this volume.

<sup>67</sup> For more information about these programs, see U.S. Department of Housing and Urban Development, *Tax Incentive Guide for Businesses in the Renewal Communities, Empowerment Zones, and Enterprise Communities*, (2003), available at <http://www.hud.gov/offices/cpd/economicdevelopment/library/taxguide2003.pdf> (last viewed Aug. 14, 2005).

<sup>68</sup> The Job Access and Reverse Commute Program was established in 1996 as part of the Transportation Equity Act for the 21st Century (TEA-21).

<sup>69</sup> See e.g., Bruce Katz, ed., *Reflections on Regionalism* (2000).

<sup>70</sup> Earlier Federal Housing Administration programs implemented policies intended to segregate people based on race. More recent findings of HUD's complicity in promoting policies that perpetuate segregation are described in *Thompson v. HUD*, No. MJG-95-309 (D. Md. 2003)(a Statement of Facts is available at <http://www.aclu-md.org/aTop%20Issues/Fair%20housing/StatementofFacts.pdf> (last viewed Aug. 14, 2005)). See also John Powell, *Addressing Regional Dilemmas for Minority Communities*, in *Reflections on Regionalism* edited by Bruce Katz (2000).

<sup>71</sup> See Federal Procurement Data System, *Report: FY 2003* available at <http://www.fpsc.gov/fpsc/FPR2003a.pdf> (last viewed Aug. 9, 2005). During FY 2003, government purchases from small disadvantaged businesses totaled \$19.4 billion, or 7.01 percent of all federal procurement.

<sup>72</sup> For more on this idea, see The National Housing Trust Fund Campaign, *Proposal for Legislation*, available at <http://www.nhtf.org/pdf/proposal.PDF> (last viewed Aug. 14, 2005).

<sup>73</sup> Millennial Housing Commission, *Meeting Our Nation's Housing Challenges, May 2002*, available at <http://www.mhc.gov/MHCReport.pdf> (last viewed Aug. 9, 2005).

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## INNOVATING AMERICA: Creating an Innovation Infrastructure to Renew Our Economy

*The first Americans were innovating when they made the decision to leave an established life for the perils of an unknown world. They were innovating before we had government, a functioning economy, an educational system or national defense. In short, if Americans stop innovating, we stop being Americans.*

—COUNCIL ON COMPETITIVENESS<sup>1</sup>

America's unparalleled economic success has been rooted in the creativity and imagination of the American people and the ability of U.S. businesses to adapt and innovate. Although there have been times when sectors of the American economy have not been as creative as other countries' (consider the auto industry in the 1980s, for example), by and large the United States has been a hothouse for innovation. The industrial revolution raised living standards for workers and increased corporate profits. The post-World War II boom did much the same and in the process created a true middle class in America. More recently, the Internet and the high-tech sector fueled an innovative economic force that led to yet another wave of productivity and opportunity for Americans.

Our ability to rebound from the current economic trends—such as the weak recovery that followed the 2001 recession, the ongoing offshoring of jobs Americans need, and the massive trade and budget deficits—depends upon our ability to remain a leader in innovation. This is

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increasingly true as global integration pushes countries toward greater specialization. It is for this reason that the Center for American Progress focuses here on innovation—a crucial if not fully understood driver of economic growth. Although innovation is not a cure for every economic problem, without it our economy will not be as strong as it needs to be for a prosperous future.

There are many ways to define innovation. The National Innovation Initiative defines innovation as “the intersection of invention and insight, leading to the creation of social and economic value.”<sup>2</sup> Economists commonly understand it as a “process [that] develops and utilizes productive resources to generate higher quality and/or lower cost products than had previously been available at prevailing prices.”<sup>3</sup> This process enables firms and workers to create the new goods and services that make our lives better. And Charles Vest, the former president of the Massachusetts Institute of Technology, has argued that “Innovation is the key to increasing productivity, and therefore to

jobs, health, security and quality of life.”<sup>4</sup> Many economists share this view. It is estimated that innovation generated the productivity that accounted for half of U.S. Gross Domestic Product (GDP) growth over the past 50 years.<sup>5</sup>

The United States will need to do two things if it wishes to specialize in the innovative products, services, and processes that should form the foundation of our economy. First, government policies must encourage innovation by investing in the research, development, and educational infrastructure necessary to foster an innovative economy. Second, these policies must create an environment that makes it easy to introduce technological progress on a broad and economically viable basis.

Innovation is more than just disembodied technological change; indeed, policymakers should understand that fostering innovation requires preparing and encouraging our workforce to enhance the economy’s creative capacity. In the coming years, specialization will require higher-skilled workers. We must improve our education and retraining system if we want to be able to take advantage of future opportunities. Although some of our recommendations to help create such a workforce do not constitute innovation per se (e.g., fostering the role of unions as workforce intermediaries and reforming the unemployment insurance system), they would help create an overall innovation infrastructure in our country by helping to optimize the role of workers in fostering innovation. For example, properly supporting and training workers throughout their careers—and especially during periods of unemployment—enables entrepreneurs to take the risks required to invest in a new business product and allows employees time to find the job that best matches their skills, rather than taking unsuitable work out of financial necessity.

In this chapter, the Center presents a broad vision for change in three areas where government policies can have a positive impact on the innovation, productivity, and workforce of the U.S. economy. First, the government should make substantial investments in technology and in re-

search and development (R&D). Second, the government should stress the importance of and provide robust support for education in order to create the workforce necessary to develop an innovative economy. In addition to fostering talent at home, current immigration and visa policies should be reexamined in light of our need to encourage the world's brightest students and innovators to come to the United States. Finally, we address necessary reforms for the institutions that shape the "innovation infrastructure"—those that regulate patents, the labor market, and other areas that impact the existence of an environment conducive to innovation.

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## CURRENT STATE OF PLAY

The U.S. economy has experienced a number of challenges over the last several years. The recession of 2001 was followed by a weak recovery that failed to produce the number and type of jobs that Americans need. The offshoring of services jobs has increased anxiety among workers across the United States, many of whom fear that the jobs that were supposed to be the future of the economy are now going overseas. Trade and budget deficits have reached historic proportions. Together, all of these developments cause concern about the long-term health of the American economy. Although many American businesses have adapted to globalization and are flourishing, some are succumbing to new economic pressures. These trends are leading some to question the fundamental strength of the American economy.

One approach to address these concerns is to implement public policy that encourages innovation and transforms it into real economic growth for middle-class families. Unfortunately, the current administration has not chosen this path. Instead, it has cut funding for critical investments in research and science, failed to support policies that meet our educational needs, and weakened the institutions that encourage technological development. As a result, American institutions and investments are inadequate to create and sustain the innovation that is needed to secure our place as a leader of the global economy.

### Lack of Investment

There are disturbing signs that the American economy is less innovative than it once was and that other countries are catching us in terms of innovative capacity. China graduates three times as many college graduates a year as the United States does.<sup>6</sup> Worse, in engineering, China's graduates will exceed 600,000, compared to only about 70,000 U.S. engineering graduates.<sup>7</sup> Over the last four years, America has dropped from fourth to sixteenth in broadband penetration—not only behind high-income countries like Germany and Sweden, but also middle-income countries like South Korea.<sup>8</sup> Patents can serve as another measure of the potential for job creation. The United States' share of industrial patents registered with the U.S. Patent and Trademark Office (USPTO) has fallen steadily for years; at present, merely 52 percent of industrial patents registered with the USPTO are from U.S. entities.<sup>9</sup>

These trends are especially troubling because the U.S. economy is currently benefiting from critical investments made years ago, but we are not making those same investments now. For

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this to happen, public policy must reverse current trends by encouraging investments in innovation. First and foremost, this requires investing in research and development. Even as business spending on research and development has leveled off, federal investment in critical areas of R&D has also been sharply cut.<sup>10</sup> The decline, which began in the 1960s when federal funding for research peaked at 2 percent of GDP, has been especially precipitous in the last few years.<sup>11</sup> The president recently proposed to cut R&D funding for all but three federal agencies (the Department of Defense, the Department of Homeland Security, and NASA).<sup>12</sup> Congress has not helped matters: its FY 2005 omnibus appropriations bill slashed \$105 million from the National Science Foundation (NSF) budget.<sup>13</sup>

Meanwhile, the recent politicization of stem cell research, climate change, and other scientific issues has seriously damaged America's reputation among scholars and researchers worldwide. Some states have tried to pick up the slack by addressing education, science, and environmental concerns, but they alone are unable to address sufficiently what is truly a nationwide problem.

#### Poor Efforts to Create and Tap Talent

America's innovators are part of what can be called the creative sector. These scientists, engineers, educators, and other knowledge workers now encompass more than 30 percent of the U.S. workforce and account for approximately half of all wage and salary income.<sup>14</sup> Over the course of only one generation, their vision has made America a leader in the information technology, biotechnology, and health sciences industries. America has reaped these benefits because it has successfully recruited foreign talent to our shores as well as fostered it at home.

For more than a century, a linchpin of our nation's economic growth has been an openness to new ideas. Historically, this openness has attracted the world's brightest minds to our education system and has been essential to permitting the United States to harness their creative energies.<sup>15</sup> It has resulted in an economy defined by constant innovation in every field—from manufacturing to services to cutting-edge computer technology. In the aftermath of September 11, however, our immigration system has become more closed. The tightening of the visa application process has made it unnecessarily difficult for law-abiding foreign persons to enter the country to study or work. Applications for student visas are dropping; in a recent survey, 60 percent of universities cited the recent changes in the visa process as the reason for the decline in international enrollment at their schools.<sup>16</sup>

In addition to restrictions on foreign students, we are shortchanging our own students as our investments in "human capital" are lagging behind the rest of the world. Inadequate science and mathematics training in our public schools and soaring college tuition costs have conspired to discourage students from pursuing careers in these fields. As a result, the percentage of 24-year-olds in America who hold natural science or engineering degrees has fallen steadily: the United States is now thirteenth in the world in this regard.<sup>17</sup> Furthermore, other aspects of education and training have also not kept pace with growing need. The Trade Adjustment



Assistance (TAA) program, designed to provide retraining assistance for those who have lost their jobs due to international trade, was poorly created and inadequately funded at its inception, and now faces increasingly heavy demand.<sup>18</sup> At present, thousands of workers around the United States are on waiting lists for retraining.<sup>19</sup>

### A Weak Innovation Infrastructure

Innovation does not happen in a vacuum. It requires resources and spaces for research and development, institutions that reward risk-taking and promote collaborative creativity, and policies that encourage the development of technologies. In short, innovation requires an environment—an infrastructure—designed to promote the development and flourishing of new ideas.

Some aspects of our current innovation infrastructure, however, inhibit the wide dissemination of new ideas. For instance, patent laws were originally designed to create incentives for innovation by providing a temporary monopoly on new inventions. Yet in many cases the patent system now stifles creativity. New technologies, software applications, and in some instances, business processes, can all be patented now. As a result, companies have an incentive to patent as much as possible, making it difficult for outside firms or individuals to improve upon existing products. Reforms are necessary to create an intellectual property framework in which hard work and ingenuity are rewarded and new developments are not stifled.<sup>20</sup>

In addition, an economic infrastructure designed to encourage innovation requires both temporary support for and retraining of workers during transitional periods in order to encourage risk-taking for innovation by employers and employees alike. The composition of employment in the United States is changing: although many of today's most innovative enterprises continue to have large permanent workforces, there are a growing number that eschew this structure in favor of partnering with other firms as needed and using contingent workers on a temporary, project-by-project basis. One study demonstrated that "the new economy may entail a possibly significant and long-lasting increase in contingent and alternative employment relationships."<sup>21</sup> These employment relationships provide businesses with far more flexibility and enable them to access skills when and where they are needed to take advantage of opportunities as they are presented, without the cost of creating a long-term, permanent employment relationship.

Of course, providing employers with maximum labor market flexibility is not always in the best interest of the workers, who require a degree of stability and security as they seek to support themselves and their families. Though the modern economy presents workers with a host of new opportunities, workers must be able to overcome certain challenges to take advantage of them. For instance, the jobs available to contingent workers routinely lack the characteristics typically associated with full-time, permanent employment: standard pay raises, career advancement opportunities, training, and health benefits. Most contingent workers are ineligible for unemployment compensation if they lose their jobs, despite the fact that 30 percent of the

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U.S. workforce is now employed in this type of non-standard work (classified as part-time, part-year, or temporary).<sup>22</sup> This means that these workers are unable to provide for themselves during frequent periods of unemployment between projects.

Moreover, current U.S. labor law makes it exceedingly difficult for unions to organize and represent non-traditional workers that need intermediaries the most. In November 2004, for example, the National Labor Relations Board (NLRB) overturned the *M.B. Sturgis* decision, the 2000 NLRB decision that strengthened the ability of temporary workers hired through staffing agencies to join with permanent workers to form unions and negotiate contracts with their employers. By overturning the ruling, the Board reinstated an obsolete policy permitting temporary workers to join with permanent employees only if the employer agrees—effectively ending the ability of temp workers to be represented by a union.

The United States should foster the development of unions as labor market intermediaries to help provide immediate access to a stable, highly trained, and motivated workforce in an era that requires innovative companies to move rapidly to seize new opportunities. Although this may be counterintuitive, the argument is sound. In an economy requiring a flexible and educated workforce with constantly updated skills, unions can provide the workers that employers need and, at the same time, provide those workers with the necessary support and retraining to become employed in the sectors that need them the most. They can also assist with placement services and health benefits.<sup>23</sup> Until we address these problems and ease the formation of such intermediaries, America's workforce will be limited in its ability to help fuel innovation in the economy.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

Cultivating innovation to help jump-start the economy requires collaboration between the public and private sectors. To ensure that the United States does not lag in technological innovation, the federal government must improve its education, research and development, technology, and innovation policies. In some cases this means increasing direct government investment. More than that, though, America needs to adjust federal policies, regulations, and tax incentives creatively to foster an environment that nurtures and rewards innovation. Accordingly, the Center for American Progress makes the following recommendations.

### Investing in Innovation

#### INCREASE SUPPORT FOR TECHNOLOGY AND RESEARCH AND DEVELOPMENT PROGRAMS

The United States can no longer take its scientific and technological leadership for granted. To maintain America's technological edge, the president should propose and Congress should support sustained increases in the federal government's investment in research and development. Such investments pay significant long-term dividends.

The highest priority should be to increase federal support for the physical sciences and engineering. Although the budget of the National Institutes of Health (NIH) was doubled from 1998 to 2003, support for the physical sciences and engineering has been flat or down.<sup>24</sup>

This is a serious problem for two reasons. First, these disciplines are important in their own right, and provide the foundation for much of the innovation in high-tech sectors such as semiconductors and information technology. Second, progress in biomedical research is often dependent on advances in the physical sciences and engineering. As Nobel Laureate and former NIH Director Harold Varmus put it, “Medical advances may seem like wizardry. But pull back the curtain, and sitting at the lever is a high-energy physicist, a combinational chemist, or an engineer.”<sup>25</sup>

The president should address inadequate support for the physical sciences and engineering by doubling the budget of the National Science Foundation over a five-year period. Furthermore, the president and Congress should work immediately to address the recent omnibus spending bill that cut the budget by over \$100 million.<sup>26</sup> These cuts specifically targeted the research and education portions of the NSF and will have serious consequences for an organization that supports basic scientific research and fuels economic growth.

The president should also increase the budget of other key science agencies such as the Department of Energy’s Office of Science, the National Institute of Standards and Technology, and the Defense Department’s basic and applied research programs<sup>27</sup> (known as the “6.1” and “6.2” accounts). Some of this increase should support “curiosity-driven” research. This is important because of the serendipitous nature of scientific and technical breakthroughs. For example, fundamental research on the phenomena of nuclear magnetic resonance led to the development of Magnetic Resonance Imaging, which has become the preferred diagnostic tool for detecting tumors and internal tissue damage. Some of the increase, however, should be targeted to areas of R&D that address national priorities, and which are likely to spur economic growth, higher productivity, and job creation. Specific examples include:

- Creating the scientific and technological foundations for affordable, carbon-free energy sources that will scale to terawatts. This will reduce our dependence on foreign oil and help address the threat of global warming.
- Expanding investments in information technology (IT) and nanotechnology research, and the convergence of bio-, info- and nano-technology. For example, using nanotechnology, we may be able to develop smart anti-cancer therapeutics that recognize tumors, deliver drugs only to diseased cells, and report back on cell death.
- Increasing R&D for breakthrough semiconductor manufacturing. A significant fraction of U.S. productivity growth is attributable to the ability of the semiconductor industry to double the number of transistors on an integrated circuit every 12-18 months. The current technology for semiconductors will soon encounter fundamental physical

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limits. We need to invest now to explore revolutionary alternatives, such as spintronics, quantum computing, biologically based computing, and molecular electronics.

- Investing in learning science and technology so that we have a rigorous and cumulative understanding of what educational interventions improve student performance and so that we can create technology-based learning environments that approach the effectiveness of a one-on-one tutor.
- Invest in research designed to reveal new and better organizational and managerial practices. Research could shed light on when new technologies and changes in organizational/managerial practices lead to sustained increases in productivity.
- Exploring non-health applications of biotechnology. Currently, NIH dominates U.S. government investments in biology and the life sciences, and there are only a few programs exploring non-health applications of biotech. Examples include bacteria that can remove or break down toxins from the environment—such as heavy metals or radioactive contaminants—and bioenergy derived from wood, plants, or residue from agriculture or forestry.
- Expanding our investment in “E-science,” by harnessing advances in high-performance computing, large databases, modeling and simulation, optical networks, networked scientific instruments, sensors, and software tools for collaboration and analysis to accelerate the pace of discovery in all science and engineering disciplines.

We have an opportunity to use the Internet and other information and communications technologies to transform our society and improve our quality of life. In the same way that IT has revolutionized the way businesses compete in the global marketplace, it could also play a much greater role in improving our health care system, expanding access to life-long learning, and making government more responsive and efficient. To accomplish this, the president and Congress should re-fund the National Telecommunications and Information Administration’s Technology Opportunities Program (TOP), which is a competitive, merit-based grant program that supports demonstrations of how new telecommunications and information technologies can provide educational, health care, or public information in the public and non-profit sectors. In the past, these funds have been incredibly useful. TOP grantee programs speed up the introduction of new technologies and provide incentives for private sector hiring. Unfortunately, Congress did not appropriate any funds to TOP for FY 2005.<sup>28</sup> The president should propose and the Congress should support significant increases for the program, approaching \$200 million annually within the next three years.

#### USE TAX CREDITS AND OTHER INCENTIVES TO ENCOURAGE BROAD-BASED TECHNOLOGICAL INNOVATION

Congress should make the research and experimentation tax credit permanent. The credit has been a cornerstone of American economic growth for years, but because of its temporary status it has had to be extended ten times by Congress since it was originally passed in 1981. The uncertainty surrounding this stimulus for investment and income growth makes it harder for firms to develop new products because they have no guarantee that the tax incentives they are using for research and development will be there in the future, thus hindering investment in long-term projects.<sup>29</sup> Because it is targeted almost exclusively at wages and salaries paid to em-

ployees engaged in direct U.S.-based R&D, the credit promotes the creation of new, high-skilled jobs.

In addition, the president should propose and Congress should fund new technology tax credits focused on low-income, underserved, and rural areas. Specifically, tax policies should provide a 10 percent tax credit for deployment of current generation broadband networks in underserved and rural areas and a 20 percent credit to next-generation broadband service. Such tax credits would allow firms and employees to take advantage of technology in rural areas. The spread of new technologies, while not innovative in itself, will make the development of innovative products and services much more likely.

### Creating and Tapping Talent

In order to increase the innovation talent pool, the United States must increase its investment in America's educational system, it must make extra efforts to attract minorities and women to innovative fields such as math and science, and it must reform its immigration policies to attract and keep the world's brightest and most ambitious people in America.

#### ENSURE ACCESS TO AND INVESTMENT IN HIGH QUALITY EDUCATION AND TRAINING

America's higher education system is world-class. Unfortunately, it is also very expensive. Federal policy should make access to higher education a national imperative because it is at the heart of innovation. Of the 20 fastest growing occupations over the next ten years, ten are associated with at least a bachelor's or associate's degree, and ten demand strong IT skills.<sup>30</sup> Because the price of college has risen substantially over the last four years, however, thousands of qualified young people have been priced out of attending a four-year public university. And since federal and state budget deficits have strained investment, higher education is not receiving the funding it needs. The president and Congress should work together to ensure that higher education is properly funded and accessible to students.

The government should start by offering a fully refundable tax credit of up to \$5,000 of tuition for every year of college for students from families of limited means. This would make it easier for lower- and middle-income students to receive higher education. Congress should also create a college completion fund to reward colleges that enroll and graduate lower- and middle-income students. The fund should be based on institutions' success in increasing the number of Pell Grant students they graduate, providing an incentive for colleges to both accept and graduate students from families with modest incomes.

The federal government should also work with the states to ensure that public colleges and universities are properly funded. In 1988-89, state appropriations made up 40 percent of funding at public universities. By 1998-99 that number had dropped to 32 percent.<sup>31</sup> These cuts

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have generally resulted in increased tuition costs for students, making higher education even less accessible than it would be otherwise.<sup>32</sup>

Finally, education is not only a problem for the young. In order to maintain their marketability in a rapidly changing economy, workers of all ages must continuously update and improve their skills. Community colleges are an integral part of the higher education system and are an excellent place for such improvement. They are extremely accessible and are a valuable resource for worker retraining. In addition to the training steps outlined below in the labor market intermediary section, the federal government should also expand the National Science Foundation's

Advanced Technological Education program. This program provides funds for partnerships between community colleges and employers to promote improvement in the education of science and engineering for high-tech careers.<sup>33</sup> President Bush has proposed cutting this budget, even though this would, according to the NSF, "preclude the program from supporting additional activities in core mathematics and science in community colleges."<sup>34</sup>

#### ATTRACT UNTAPPED TALENT TO INNOVATIVE FIELDS

Research and development is more than an issue of investment. It takes innovative, creative, and educated people—such as mathematicians, scientists, and researchers—to create the technology of tomorrow. The United States needs to take advantage of undeveloped domestic talent and encourage untapped populations toward high-skill training in research and development.

A recent report from the National Action Council for Minorities in Engineering (NACME) and the American Association for the Advancement of Science (AAAS) concluded that "in the particular context of science and engineering education, this country's under-utilization of its African American, Hispanic American and Native American human resources is a problem of critical proportion that will, if ignored, seriously impinge on the national and economic security interests of this country."<sup>35</sup> Currently, women account for less than 20 percent of engineering graduates and African Americans and Hispanics combined account for less than 12 percent.<sup>36</sup> Charles Vest, who was until recently the president of M.I.T., says that he finds that students in these demographic groups with similar test scores and intellectual abilities as their white and Asian counterparts are still less likely to enroll in science and math programs at the university level. He concludes that programs targeted towards attracting talented individuals in these groups to math and science are beneficial to the science community as a whole because they tap an otherwise fallow resource.<sup>37</sup>

Improving access to technical and higher education for these groups by supporting programs designed to attract women and minorities into science, technology, and engineering will enable us to draw more and better homegrown talent into these fields. At a minimum, the president should openly support and defend diversity policies in higher education. With few exceptions, colleges and universities today universally recognize the value of diversity and a host of Fortune 500 companies have publicly asserted that affirmative action policies benefit their businesses.<sup>38</sup> There is no reason the president should not do the same. Even more, the president should work with the

Congress to support appropriate educational programs and scholarships designed to attract and support underrepresented groups to these crucial fields.

Finally, to ensure that female and minority students are effectively taught math and science skills early enough in life, the president should create a federal grant program through the Department of Education that targets these groups at a young age and encourages them to pursue math, science, technology, and engineering studies. In addition, the funding could pay for teacher training that encourages all children, including girls and racial minorities, to pursue these fields.

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*Congress should  
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#### REFORM IMMIGRATION POLICIES

Although the United States has always been a leader in attracting high-skilled foreign-born students, that trend is now dropping at a dangerous rate.<sup>39</sup> For decades, such students and innovators have studied in the United States. One study found that these immigrants contribute \$13 billion to the economy annually.<sup>40</sup> In addition, many stay in the country after graduation and make impress g their resources and knowledge to other countries, primarily in Europe.<sup>43</sup>

The president should work with the academic and scientific communities to undertake comprehensive immigration reform that would better allow international students to pursue their educations here. Proper immigration security measures are certainly necessary, but these precautions should not cause paralyzing delays that hamper our ability to take advantage of the intellectual and scientific firepower that can assist in innovating our economy.

#### Enhancing our Innovation Infrastructure

In addition to increased investment in R&D and in creating and tapping a larger innovation talent pool, the United States must improve the infrastructure that helps support an innovative economy. For example, the U.S. patent system must be reformed. In addition, in a fast-changing economy characterized by significant outsourcing of U.S. jobs, it is essential that the United States improve the support programs that help workers adjust to and remain competitive during changing labor market dynamics. Changes to the unemployment insurance system and the role of unions as labor market intermediaries can help advance the cause of an innovative economy.

#### REFORM AND UPGRADE THE U.S. PATENT SYSTEM

America's patent system is broken. More and more applications are submitted each year, but by many accounts their quality is diminishing.<sup>44</sup> The U.S. Patent and Trademark Office (USPTO) is overrun with unprocessed patent applications; the patent process lacks the necessary transparency to foster innovation, and the current system is ill-suited to protecting certain new technologies, such as open source software.

At present, the wait for a decision on a patent is over 27 months and there is a backlog of over a half million applications awaiting evaluation.<sup>45</sup> The patent office does not have the necessary specialists to sort through many of the complex and technical applications that are submitted. Experts have gone so far as to describe the system as "sand rather than lubricant in the wheels

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of American progress.”<sup>46</sup> Even the director of the Patent Office has asked, “At what point will venture capitalists feel like it’s no longer useful to invest in certain technologies because they don’t know that they’re going to get a patent and actually get a return on their investment?”<sup>47</sup>

The federal government’s first reform should be to stop siphoning off funding intended for the patent office.<sup>48</sup> In the early 1990s, the financial burden of granting patents was shifted from taxpayers to patent applicants through the establishment of application fees. But these fees have become tempting for Congress to spend elsewhere; since they were established, \$650 million worth has been spent on government functions completely unrelated to the patent office.<sup>49</sup> As a result, there

are too few patent examiners to keep up with new patent applications, let alone overcome the current backlog. The Congress should authorize the funds to allow the USPTO to substantially increase the number of qualified patent examiners.

Patent applications should also be made available for public comment. Although nearly every other country in the world has such an open system, for supposed proprietary reasons, the process for making applications public in America is subject to restrictions and can only occur after 18 months have passed since the date of original filing.<sup>50</sup> More transparency would discourage frivolous patents, ease some of the burden on overworked patent employees, and encourage those companies that oppose the application to submit evidence that could be used to judge it more fairly.<sup>51</sup> The goal is to enhance innovation by only protecting truly new inventions and preventing the patent process from stifling the innovative use of ideas properly available in the public domain.

A new system could potentially benefit everyone. For example, the open source software industry has been growing by leaps and bounds over the last decade. Developers are often not compensated for their work, but perform it for personal reasons (such as a non-monetary interest in innovation or in the application of computer code, and the inherent satisfaction of seeing an invention become widely used).<sup>52</sup> A growing number of companies—including IBM and Oracle—have used this approach to develop software because they get a better product at a cheaper cost. Consumers benefit because the broader creative abilities of the user base are put to work to develop better software.<sup>53</sup> Unfortunately, the current patent system does not adequately recognize this new form of innovation and it runs the risk of stifling it.

The president, with support from the Congress, should undertake to significantly overhaul the U.S. patent application and protection process. To start this reform, the president and Congress should jointly appoint an independent commission of innovators, business leaders, and patent officials to study and make recommendations regarding a wide array of proposals on how to completely update the patent system with the explicit goal of enhancing innovation to help revitalize our economy.



## IMPROVE THE UNEMPLOYMENT INSURANCE SYSTEM

America's unemployment insurance system was initially created with full-time (typically male) breadwinners in mind. Unemployment insurance is still a critical safety net for workers between jobs, but in its current form it does not meet the needs of today's modern, multifaceted workforce, which includes a significant percentage of part-time and temporary workers, as discussed above. An unemployment insurance system designed to enhance a strong and efficient economy should allow workers to spend time investing in new skills and finding an appropriate economic "match" when looking for a new job—thus improving the skill level and the efficiency of the labor market. Although a good unemployment insurance system does not in itself create innovation, it can support an innovative and growing economy by allowing workers to better take advantage of new skills and training that will eventually lead them to more productive jobs and industries.

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The best way to improve the current unemployment insurance system is by improving federal eligibility guidelines. These guidelines should make it easier, not harder, for Americans to receive benefits when they lose a job. In particular, Congress should pass legislation that updates the federal eligibility requirements for unemployment insurance by including an earnings threshold determined by hours worked rather than earnings. Furthermore, the legislation should require states to adopt an alternate base period and provide part-time workers with benefits if they are looking for part-time work. The Advisory Council on Unemployment Compensation, set up jointly by the Congress and the president in 1991, has recommended all of these steps, but none have been enacted.<sup>54</sup> The budgetary effects of an improved unemployment system depend on the level of unemployment.<sup>55</sup> In addition to providing better support for a growing and innovative economy, these funds literally provide the necessary resources for families to survive during periods of economic adjustment.

## STRENGTHEN THE ROLE OF UNIONS AS LABOR MARKET INTERMEDIARIES

Labor unions should have an essential role in creating and maintaining an innovative workforce. As demonstrated by the success of unions in industries in which part-time or temporary jobs are common (such as the construction, maritime, and entertainment industries), organized labor can be an effective force for winning better wages and benefits, serving as a conduit for training and job placement, and generally helping to provide economic security for the workers it represents. Beyond their traditional role in securing better wages, benefits, and working conditions, labor unions today can and should play a critical role as intermediaries between employers and workers who need education and retraining to participate productively in today's economy.

Unfortunately, recent changes in U.S. labor law make it nearly impossible for unions today to organize and represent non-traditional workers who need intermediaries the most. By overturning the *Sturgis* decision, as described above, the NLRB reinstated an obsolete policy that effectively terminates the ability of temporary workers to be represented by a union. This policy shift by the NLRB was shortsighted and ultimately will undercut the interests of tempo-

rary employees and employers alike. The president should promote legislative remedies to this decision, and in the future appoint NLRB members who support collective bargaining rights for temporary employees and other contingent workers.

More broadly, modernizing the role of labor unions benefits both employers and employees. In the telecommunications industry, for example, large employers such as SBC Communications have partnered with the Communication Workers of America (CWA) to offer workers continuous training.<sup>56</sup> These trained workers are able to generate profits for their employers while earning middle-class wages negotiated by the CWA. Smaller firms have also adopted a similar approach, with success at the level experienced by larger companies, and historically the building trades, the hotel and gastronomy industry, and others have benefited from partnerships between industry and labor.<sup>57</sup> Therefore, the president should encourage and Congress should pass legislation that allows employees to form unions without interference from employers. Stiff penalties should be imposed on those who interfere with this relationship. Companies should also be required to mediate with unions when negotiating contracts for the first time and protect the rights of workers to win their right to union representation through “card check” recognition, the fastest method for choosing a union. Current draft legislation embodies these principles, and Congress should pass a bill as quickly as possible to ensure that workers are able to exercise their right to join a union.<sup>58</sup>

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# 7

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## FOR SOLDIER AND COUNTRY: Saving the All-Volunteer Army

*As you know, you have to go to war with the Army you  
have, not the Army you want.*

—DONALD H. RUMSFELD, SECRETARY OF DEFENSE

The ability of the United States military to perform its missions depends on smart people more than on smart bombs. Even during the darkest days of the Cold War in the 1970s, when the Soviet military had far more weapons and forces than the United States, our military leaders repeatedly said that they would not trade our military for that of the Soviets because of the quality of our men and women in uniform. As Melvin Laird, Richard Nixon’s secretary of defense and the architect of the all-volunteer Army put it, “People, not hardware, must be our highest priority.”<sup>1</sup>

The priority given to the men and women of our armed forces today, especially those in the Army, appears to have diminished, as overextension and overuse, as well as inattention to quality of life issues, place severe strain on the troops. Operations in Iraq and Afghanistan have revealed deeply troubling cracks in the organization and structure of the million-strong U.S. volunteer Army. These problems have been exacerbated both by the current challenges of the international security environment and the way in which the Bush administration has used the active-duty and reserve components since September 11. As a result, we are closer to breaking our volunteer Army today than at any other time in its 30-year history.

Since September 11, the volunteer Army has been called upon to assume greater and broader responsibility than ever before. Our soldiers are needed to battle terrorism around the globe, protect the American homeland, and engage in peacekeeping, stabilization, and nation-build-

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*We are closer to breaking our volunteer Army today than at any other time in its 30-year history.*

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ing operations. Few imagined that the total volunteer Army would be used in such a manner when it was designed 30 years ago, and the Bush administration has failed to make the appropriate changes to reflect the new environment. As a result, the active-duty Army is not large enough and it does not have the mix of skills necessary to meet current needs; moreover, the reserve component is being used at unsustainable levels.<sup>2</sup> This threatens not only the quality and readiness of the total volunteer Army, but also its ability to recruit and retain troops.

To rectify these dangerous shortcomings, the president must work with the Congress to both enlarge and reorganize the total Army in the face of today's global and domestic challenges and give it the resources necessary to respond to them. To do so, the president and the Congress must embrace the following principles:

- *The all-volunteer model is the right one.* The president and the Congress should make every effort to maintain the total Army on an all-volunteer basis. Returning to the draft would not answer the manpower and capability problems the total Army faces. Rather, it would result in an Army that is not as well-suited to today's challenges because the overall experience and education level would decline. In addition, a mixed force of draftees and volunteers is more expensive because there would be more turnover and therefore much higher training costs. While the average volunteer enlists for four years and about half of them reenlist, draftees typically served for only two years and less than 10 percent reenlisted. Moreover, Pentagon studies show that recruits need up to three years to reach full competency in combat, combat support, and combat service support skills.<sup>3</sup> In addition, reinstating a draft at this time would open up a whole host of issues that this nation has not addressed satisfactorily since the 1960s, and in particular the question of who shall serve when not all shall serve. Reinstating the draft would also further isolate the United States from our NATO allies, most of whom have abolished conscription at our urging.
- *The size and skills of the active-duty Army must be equal to the new missions and duties it faces.* The active-duty Army should be large enough to meet current and anticipated needs and have the requisite quality and combination of skills to wage wars, fight terrorism, and win the peace (*i.e.*, engage in peacekeeping, stabilization, and nation-building operations).
- *The reserve component is a vital, but supplementary, part of the total Army, and should be treated as such.* Overusing the reserve—by, for example, activating it for more than one year out of every six years—has an adverse impact on the willingness of soldiers with prior active-duty service, as well as new recruits, to join and remain in the reserve component. This, in turn, undermines the ability of the nation to protect the homeland, since national security involves the ability not only to project force around the globe, but also to deter and respond to attacks at home.
- *Soldiers and their families should be treated with care and respect.* The military enlists individuals but retains families. As a matter of equity, and to maintain military readiness,

## GLOSSARY OF TERMS

**Total Army:** The Army is composed of over a million volunteers. About half of these men and women are on full-time active duty. The other half is in the reserve component, which is composed of the selected reserve and the individual ready reserve. These three groups comprise the total Army.

**Selected Reserve:** The selected reserve, sometimes known as the drilling reserve, consists of people who belong to organized units that train or drill one weekend a month and spend at least two weeks a year on active duty. The Army's selected reserve has two branches: the Army National Guard and the Army Reserve. Both components serve as back-ups to the active-duty Army.

**Army National Guard:** National Guard units, which are in all 50 states, can be used by the states as a militia for natural disasters or civil disorders when they have not been mobilized by the federal government, which pays for more than 90 percent of their costs and thus has first call on their services. It is comprised of combat and combat support units like civil affairs, transportation, and military police.

**Army Reserve:** Army Reserve units are under the control of the Department of the Army and can be mobilized by the secretary of the Army. It is composed mainly of combat support units.

**Individual Ready Reserve (IRR):** The IRR is composed of individuals who have completed their active-duty service and have not joined a selected reserve unit, but who

still have time left on their eight year military service obligation, which, by law, they incurred when they joined the Army. For example, a person who enlisted in the Army for four years in 1998 would have been released from active duty in 2002, but would remain in the IRR until 2006. Members of the IRR receive no pay, training, or benefits. Currently there are about 100,000 people in the IRR.

**Special Operations Forces:** These elite or commando units from the Army, Navy and Air Force are trained to perform clandestine missions behind enemy lines. Currently, there are about 50,000 personnel in these units. About 8,000 special operations forces are deployed in 54 countries.

**Army Organization:** The active Army is organized into ten divisions and the Army National Guard into eight. Each division has between 10,000 and 18,000 people organized into at least three brigades or regiments composed of 3,000 to 5,000 people. These brigades, in turn, consist of battalions of between 500 and 800 people each.

**Delayed Entry Pool:** Men and women who have enlisted in the military but who will not report for basic training until some time in the future. Normally the service has about 35 percent of its enlistees in this pool at any given time.

**Stop-Loss:** The policy that prohibits a person in the service from leaving his or her unit to return to civilian life even though his or her term

of enlistment has expired. This policy has been invoked for people in units that have received notification of being sent to Iraq or Afghanistan or are already in one of those countries.

**Military Police:** Individuals whose military specialty is performing police functions in a combat environment, for example, arresting and guarding prisoners, stopping looting, etc.

**Civil Affairs Units:** Units whose job it is to administer an area that has been conquered until a new civilian government can be established. These units have people with skills in civilian areas such as law, public administration, engineering, and health.

**Term of Enlistment:** An individual joining the armed forces agrees to serve on active duty for a certain term, normally four years.

**Military Service Obligation:** An individual enlisting in the armed forces incurs an eight-year obligation to the service, regardless of how long he or she agrees to serve on active duty.

**Imminent Danger Pay:** A pay supplement received by troops in combat zones. Currently about \$225 per month.

**Family Separation Allowance:** A pay supplement received by military families to help pay for expenses while troops are away from home. Currently about \$250 per month.

the nation needs to make sure that soldiers and their families have a decent quality of life. This social compact involves ensuring not only that they receive adequate pay and benefits, but also that they are not forced to spend more than one-third of their time away from home on foreign deployments on a regular basis.<sup>4</sup> This means that for every year a soldier is deployed abroad, he or she should spend at least two years at his or her home base (or if the deployment is six months long, the soldier should spend at least one year at home). Such a policy is not only a matter of basic equity, but it also enhances retention and readiness because it allows the units to retrain before being redeployed. The Navy, Marines, and Air Force rotate their men and women this way.

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*Returning to the draft would not answer the manpower and capability problems the total Army faces.*

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## CURRENT STATE OF PLAY

To better understand the nature of the problems facing the all-volunteer Army and what must be done to correct them, it is important to examine briefly the current model and how it came into being.

Richard Nixon put the all-volunteer model into place in 1973, in response to widespread public dissatisfaction with conscription and its use during the Vietnam War, when most of the country's elites managed to avoid service in what former Secretary of State

Colin Powell has referred to as an "antidemocratic disgrace."<sup>5</sup> While the draft had allowed the government to pay subsistence wages, the creation of the all-volunteer force (AVF) required a dramatic increase in military salaries at a time when it was also necessary to increase spending on military equipment and technology.<sup>6</sup> To keep costs under control, the Pentagon decided it had no choice but to reduce substantially the size of its active-duty military to some 2.2 million people, or about 18 percent below its pre-Vietnam level of 2.7 million.<sup>7</sup> Because finding volunteers was always harder for the Army than for the other services, it bore the brunt of these reductions, dropping from more than one million people before the Vietnam War to 780,000 in 1974, its lowest level since before the Korean War.<sup>8</sup>

To compensate, the Pentagon developed the concept of the "Total Force." Under this plan, the military's selected reserve component would, theoretically, receive enough resources to make it a full-fledged part of the nation's military. The National Guard and reserves were given separate accounts, and the selected reserve's share of the budget was doubled.<sup>9</sup> In deciding which forces to place in the reserves, the Army chief of staff, General Creighton Abrams, resolved to prevent a repetition of Vietnam (where successive presidents managed to avoid the political costs of waging an unpopular war by using only the active-duty force and not calling up the reserves), by putting fully half of the Army's combat units (divisions and brigades) in the reserve component.<sup>10</sup> In addition, certain non-combat components that were deemed to be essentially civilian functions, such as military police, engineers, and civil affairs, were allocated almost entirely to the reserves. These skills would be needed only for postwar stabilization, or what is now called "peacekeeping."

After getting off to a predictably rocky start, the new system began working reasonably well. By the mid-1980s, the AVF became the most professional, highly qualified military the United States had ever fielded. One of the reasons for its success is that norms and standards were established for the use of both the active and reserve components. When reservists were called up for the Persian Gulf War or for peacekeeping duties in the Balkans or the Sinai, they were not kept on duty for more than six months, which most analysts felt was necessary to get and keep people in the reserve component. This was in keeping with a longstanding Pentagon personnel policy that forces should not spend more than one-third of their time away from home. In fact, many reservists actually volunteered to go. Moreover, active-duty forces sent on peacekeeping missions were rotated home after six months and were not deployed overseas again until they had spent at least a year at home.

These standards and norms for the use of the volunteer Army began to break down after September 11, however, due in part to extremely poor planning for the postwar transition



in Iraq and the inability of the United States to get substantial troop contributions from other nations. When Donald Rumsfeld took charge of the Pentagon in January 2001, he did so with a mandate to transform the military by ensuring that its weapons systems and tactics took advantage of advances in technology. He did not, however, focus on the question of the size of the Army and the balance between active-duty and reserve soldiers, which became critical issues once the country launched the global war on terrorism and went to war in Afghanistan and Iraq. Thomas Hall, the assistant secretary of defense for reserve affairs, indicated three years ago that the Pentagon's civilian and military leadership was aggressively studying such issues.<sup>11</sup> In his first press briefing of 2004, Rumsfeld admitted that rebalancing the way reserve forces are used should be his first priority for the coming year. The Army has begun the process of shifting the duties of some 130,000 personnel, but this process is not yet complete.<sup>12</sup>

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*As a matter of equity, and to maintain military readiness, the nation needs to make sure that soldiers and their families have a decent quality of life.*

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Thus, the percentage of military functions currently allocated to the reserves is substantially the same as it was in 1973—and better represents the challenges of that era than of the present one. Reserves currently account for 97 percent of the Army's civil affairs units, 70 percent of its engineering units, 66 percent of its military police, and 50 percent of its combat forces.<sup>13</sup> Moreover, the size of the active-duty Army has shrunk: at around 490,000 soldiers, it currently makes up a smaller proportion of the total U.S. military—about 34 percent—than at any other point in U.S. history.<sup>14</sup> As a result, the all-volunteer Army is being overstretched and misused in an effort to meet the new challenges presented by international and homeland insecurity.

### Army Overstretched

The Army currently has about 490,000 soldiers serving on active duty in over 120 countries around the globe.<sup>15</sup> The bulk of these troops are in Iraq, Afghanistan, South Korea, and the Balkans.<sup>16</sup> In 2004, 26 of the active-duty Army's 33 combat brigades (or almost 80 percent) will have been deployed abroad.<sup>17</sup> Nine of the ten active-duty divisions in the Army were deployed to, getting ready to deploy to, or returning from Iraq or Afghanistan last year.<sup>18</sup> About 40 percent of the approximately 160,000 troops in Iraq are from the reserve component, as are almost all of the U.S. troops in the Balkans.<sup>19</sup> All told, seven combat brigades from the Army National Guard are currently in Iraq.<sup>20</sup> According to a Defense Science Board study presented to Secretary Rumsfeld on August 31, 2004, the military does not have sufficient personnel for the nation's current war and peacekeeping demands.<sup>21</sup>

This overstressing leaves us potentially vulnerable in places such as South Korea. In fact, one of the two Army brigades stationed in South Korea has already been sent to Iraq. It also means that combat units have been sent on back-to-back deployments or have had their overseas tours extended unexpectedly beyond the duration that had been promised.<sup>22</sup> For example, the 2<sup>nd</sup> Brigade of the 1<sup>st</sup> Cavalry Division, which was originally scheduled to come back to Fort Hood in November 2004, had its tour extended twice and did not return until April 2005.<sup>23</sup> The First Brigade of the 82<sup>nd</sup> Airborne Division spent December 2002 to August 2003 in Afghanistan, was deployed to Iraq only five months after its return, where it served until April 2004, and is now slated to return to Afghanistan in spring 2006 for at least another year.<sup>24</sup> The Third

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*Standards and norms for the use of the volunteer Army began to break down after September 11, due in part to extremely poor planning for the postwar transition in Iraq and the inability of the United States to get substantial troop contributions from other nations.*

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Infantry Division, the First Armored Division, and the Second Infantry Division's 2<sup>nd</sup> Brigade also had similar experiences.<sup>25</sup> In July 2003, the Army announced that Army units would have to spend a full year in Iraq, double the normal tour for peacekeeping duties.<sup>26</sup>

Our experience over the last 30 years shows that retention rates will decline if the Army keeps soldiers away from home for more than one year out of three, especially among mid-career personnel like Army captains, senior non-commissioned officers, and seasoned warrant officers, most of whom have not made a lifetime commitment to the Army. This is how we broke the

career Army in Vietnam.<sup>27</sup> Not retaining sufficient numbers of mid-career personnel will result in a hollow army that will be less capable and less ready to carry out the demanding challenges it currently faces.

### National Guard and Reserve Misused

Since September 11, over 400,000 reservists have been called to active duty.<sup>28</sup> Several National Guard and reserve units have been kept on active duty for longer than anticipated, sent overseas to Iraq and Afghanistan without effective training for the missions they are expected to carry out, and mobilized without reasonable notice. This practice not only undermines the readiness of the reserve soldiers to carry out their tasks, it also puts an unfair burden on the families and the employers of the reservists by leaving them with very little time to adjust to the absence of the soldier. Members of the Michigan National Guard, for example, were sent to Iraq with only 48 hours notice.<sup>29</sup> In another example, the Maryland National Guard's 115th Military Police Battalion has deployed three times since September 11, and by the end of their last tour, some of these soldiers had been on active duty for more than 24 months.<sup>30</sup> All of this has occurred in spite of the fact that Lieutenant General James Helmly, the commander of the Army Reserve, has stated that a reserve soldier ideally should be given at least 30-day notice before being mobilized and not be kept on duty for more than nine to twelve months in a five-year time frame.<sup>31</sup>

In 2004, the Bush administration was forced to notify about 5,600 Individual Ready Reservists that they will be called to active duty in order to replace casualties in the Guard and reserve units deployed to Iraq or to fill out understaffed units that have been mobilized to go to Iraq.<sup>32</sup> These are men and women who have completed their active-duty service and have not joined a Guard or reserve unit but who still have time left on their eight-year military service obligation. In addition to facing the unfairness of being called back involuntarily after having already served their country, many of these individuals are being sent to combat zones without any recent training. Thirty-seven percent of those Individual Ready Reservists who were to report to duty by October 17, 2004 failed to show.<sup>33</sup> All told, more than 3,000 of these former soldiers have resisted returning to active duty.<sup>34</sup>

The Bush administration has compounded this problem by invoking its stop-loss authority for individuals in both active-duty and reserve units. This policy, which Senator John McCain called the single most damaging morale issue for the military, prevents an individual in a unit that has been notified that it is being deployed to Iraq or Afghanistan—or is already in one of those countries—from leaving the service until three months after the unit returns from overseas. To date, more than 50,000 men and women have had their enlistment extended or retirements put on hold, some for as long as two years, because of stop-loss.<sup>35</sup> On December 6, 2004, eight of these soldiers challenged this Army policy in court.<sup>36</sup> And on December 8, 2004, a soldier in Kuwait who was headed to Iraq boldly asked Secretary of Defense Rumsfeld how much longer the Army will continue to use its stop-loss power to prevent soldiers from leaving the service who are otherwise able to retire or quit.<sup>37</sup>

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### Domestic Protection Capability Diminished

Many of the reservists who have been called up without appropriate notice and kept on duty too long are police officers, firefighters, and paramedics in their civilian lives—that is, first responders who are vital to the safety of their local communities.<sup>38</sup> When these personnel are called up for military service and kept on active duty for long periods, it can reduce the ability of their communities to deal with terrorism.

In addition, the fact that National Guard units have been deployed overseas undermines the ability of states to deal with natural disasters as well as potential terrorist attacks on the homeland. For example, Governor Dirk Kempthorne, a Republican from Idaho and immediate past chairman of the National Governors Association, said recently that he was worried because 62 percent of Idaho's National Guard had been called up to active duty by the Pentagon.<sup>39</sup> Like his colleagues in Washington, Oregon, and Alaska, where wildfires are a significant problem, Kempthorne was concerned that he would not be able to use the Guard troops to help with fire fighting.<sup>40</sup>

### Operational and Personnel Readiness Levels in Decline

The current system has led to a decline in the overall operational readiness of the Army. In fiscal year 2003, the Army canceled or postponed 49 of its 182 scheduled training exercises because the units were either going to or returning from Iraq or Afghanistan.<sup>41</sup> In December 2003, a senior Army official informed reporters that four Army divisions due to rotate back from Iraq in the spring would not be fully combat ready for as long as six months.<sup>42</sup> This, in turn, would leave only two of the Army's ten active-duty divisions ready for conflict outside Iraq and Afghanistan.<sup>43</sup> Furthermore, the Army has decided to send the 11<sup>th</sup> cavalry regiment, its elite training unit, to Iraq in 2005, taking them away from their mission of training other units.<sup>44</sup>

Personnel readiness, which depends on the experience level of the soldiers in a unit, is also declining. According to a survey of U.S. troops in Iraq by the military's own *Stars and Stripes* newspaper in late 2003, the Bush administration's approach to Iraq risks doing to the AVF what

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*The fact that National Guard units have been deployed overseas undermines the ability of states to deal with natural disasters as well as potential terrorist attacks on the homeland.*

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Vietnam did to the conscript service. After polling almost 2,000 troops, *Stars and Stripes* found that approximately one-third of them thought the war against Saddam Hussein had been of little or no value and that their mission lacked clear definition.<sup>45</sup> A full 40 percent said that their missions had little or nothing to do with what they had trained for.<sup>46</sup> And, most ominously, about half of the soldiers surveyed indicated they will not reenlist when their tours end and the Pentagon lifts the stop-loss order that prevents troops from retiring or leaving the service at this time.<sup>47</sup> A survey of Guard and reserve units conducted by the Defense Manpower Data Center in May 2004 had similar findings. According to the survey, fewer than half of the Army and Marine Corps reserve personnel who served in Iraq say they will likely or very likely stay in uniform.<sup>48</sup> Compared to a similar survey from May 2003, even non-deployed personnel are less inclined to stay

in because of the threat of being recalled, and the morale of all reservists declined over the past year.<sup>49</sup> Finally, the Pentagon says that more than 5,500 service personnel have deserted since the invasion of Iraq.<sup>50</sup>

Were it not for the stop-loss policy, which even high-ranking officials admit is inconsistent with the principles of voluntary service, the AVF and the Total Force would be in severe jeopardy, lacking the necessary personnel to complete their missions. For example, one infantry battalion commander deployed in Kuwait and headed for Iraq said that he would have lost a quarter of his unit over the next year were it not for the order.<sup>51</sup> Through a series of such stop-loss measures, the Army has prevented more than 50,000 troops from leaving its ranks.<sup>52</sup> Yet even with these rules in place, the Army Reserve failed to achieve its reenlistment requirements for fiscal year 2003.<sup>53</sup> The Army Reserve has lost so many middle grade or company officers that it has only 59 percent of the captains it is supposed to have.<sup>54</sup> The Army National Guard fell 12 percent short of its overall recruiting requirement for 2004 and missed its goal of reactivating people from the active force by 44 percent.<sup>55</sup> In fiscal year 2005, the Army Guard fell 20 percent below its recruiting goal, and the Army Reserve missed its goal by 13 percent, primarily because fewer and fewer soldiers joined the Guard and reserves after leaving active duty.<sup>56</sup> The active-duty Army, meanwhile, failed to meet its annual recruiting goal for the first time in six years, falling short by over 8 percent.<sup>57</sup>

The Pentagon is also having difficulty keeping enough experienced Special Forces personnel on active duty as more and more of these elite warriors are beginning to accept offers from private security contractors who are performing military functions in Iraq and Afghanistan.<sup>58</sup> Ironically, we need to use so many private security contractors because the Special Forces are not large enough to carry out all of the functions they are assigned. The taxpayer thus ends up paying twice, once to train the personnel for the Special Forces and then again for contractor services. These contractors pay up to \$1,000 per day for work in war zones such as Iraq, far above the average military salary.<sup>59</sup> Last year, the Special Forces units were manned only at the 85 percent level.<sup>60</sup>

The experience and capability level of the Army has also been hurt by the discharge of thousands of men and women for being openly gay and violating the “don’t ask, don’t tell” policy.

A number of those discharged were soldiers with critical skills, such as Arab language abilities.<sup>61</sup>

### Quality of Life Undermined

In wartime, every citizen should expect some privations, and this is particularly true for soldiers. But the Bush administration has exacerbated personnel problems by attempting to cut back benefits that members of the military and their families need. The timing of these cuts fueled the perception of disregard for the wellbeing of the same troops that the administration relies on to defend the country. For example, the administration proposed cutting imminent danger combat pay by one-third for U.S. troops in the war zones in Iraq and Afghanistan. It also proposed cutting family separation allowances by nearly two-thirds for those troops away from their home base.<sup>62</sup> Public pressure ultimately forced Congress to reject the White House proposals.

In addition, thousands of U.S. soldiers have been injured abroad, yet less than one in ten applicants to the military's disability compensation system is receiving the long-term disability payments they request. Almost one-third of sick or injured National Guard and reserve veterans returning from Iraq and Afghanistan are forced to wait more than four months to find out if they will be compensated. The majority of those who do receive disability pay leave the military with a one-time, lump-sum payment that is inadequate to make up for the loss they have suffered.<sup>63</sup>

Finally, the Bush administration also requested a 14 percent cut in assistance to public schools on military bases and other federal property.<sup>64</sup> In what one Army commander called an act of betrayal, the civilian leadership at the Pentagon has considered closing or transferring control of the 58 schools it operates on 14 military installations.<sup>65</sup> These decisions threaten not only the quality of education for the children of soldiers, but also the morale and support of military families. Ultimately, these decisions threaten the long-term viability of the all-volunteer force.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

If the United States hopes to be able to occupy and rebuild countries like Iraq, essentially by itself, while also meeting its other global commitments, protecting the homeland, and treating the men and women of the military fairly and in a way that ensures that they will join and remain in the volunteer Army, it must take the five steps outlined below. While some of these steps require adding money to the Army's budget, these funds can be found in other parts of the overall baseline defense budget of \$420 billion. Programs that can be reduced without undermining the nation's ability to wage the global war on terror include the National Missile Defense program, new nuclear weapons research programs, and Cold War-era programs like the F-22 fighter and Virginia Class submarine. The cost of adding funds to the Army budget can also be offset by reducing the number of people on active duty in the Navy and Air Force, both of which are currently exceeding their target end-strengths.

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Increase the size of the total Army by at least 86,000 troops<sup>66</sup>

The Army is overstretched and does not have sufficient numbers of active-duty troops trained for nontraditional duties such as nation-building. The additional 86,000 troops should be added while maintaining the same quality standards that the Army has followed for the past five years, namely that at least 90 percent of all recruits have a high school diploma, and 98 percent score average or above average on the Armed Forces Qualification Test. The new troops should be added as follows:

- *Add two division-sized peacekeeping or stabilization units.* Because the Army will continue to be used in nation-building, the president should request and the Congress should provide sufficient funds in the Army budget to recruit, train and equip two division-sized units of 13,000 people each (one active-duty and one reserve) trained in helping turn a battlefield victory into a political one. In addition to combat power, these units would have a greater number of personnel trained in policing, civil affairs, engineering, and medicine than are in the current Army divisions.
- *Double the size of the active-duty Special Forces.* The president should request and the Congress should provide sufficient funds to recruit, train, and equip the 50,000 people necessary to double the size of the active-duty Special Forces to 100,000. The secretary of defense must also give higher priority to these elite soldiers in the defense budget to enable them to take control of the military's counterterrorism mission. These steps will have the added benefits of allowing the Pentagon to reduce the number of private contractors in combat areas and enabling the administration to implement the 9/11 Commission's recommendation to transfer control of covert operations from the CIA to the Pentagon.<sup>67</sup>
- *Add 10,000 military police, civil affairs experts, engineers, and medical personnel to the active-duty force.* The president should direct the secretary of defense to bolster the Army's capacity for peacekeeping, stabilization and nation-building duties and request sufficient funds in the Army budget to recruit, train, and equip at least 10,000 military police, civil affairs experts, engineers, and medical personnel for the active-duty force. Such capacity is desperately needed because most of these critical personnel are currently in the reserve.

Amend the "back-door draft" policies

*Reduce the duration of the military service obligation.* To accomplish this, the Congress should pass legislation to reduce the length of the military service obligation—which by law lasts eight years from the date of initial enlistment—to six years after enlistment or four years of active duty, whichever comes first. This change would prevent the men and women of the Individual Ready Reserve (IRR), who have already volunteered time to serve their country, from having their lives interrupted unfairly after they have completed their active-duty service. Not only is this a matter of equity, but it would also increase the willingness of people to join the active-duty Army for a four-year enlistment. Moreover, it would have little negative impact on military readiness, since members of the IRR do not receive any training, which means that their military proficiency has decayed.

*Change stop-loss policy implementation.* The president should direct the secretary of defense to change stop-loss policy implementation so that no person is subject to stop-loss on more than one occasion without his or her consent. Furthermore, enlisted people who are affected by stop-loss or whose tours in Iraq or Afghanistan are extended beyond one year should receive a bonus of \$2,000 per month for the duration of their extra service.

*Issue a new executive order on selected reserve recall.* The president should issue an executive order that directs the secretary of defense not to recall a selected reserve unit to active duty for more than one year out of every five unless the president has declared a national emergency. The current executive order allows the Pentagon to keep a selected reservist on active duty for up to two years, and does not limit the number of times an individual can be recalled. Activating the Guard and reserve more than once every five years will have a severe impact on retention as well as the willingness of individuals to join the Guard and reserve after leaving active duty.

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*The Pentagon is also having difficulty keeping enough experienced Special Forces personnel on active duty as more and more of these elite warriors are beginning to accept offers from private security contractors.*

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#### Maintain homeland security capability

*Enlarge critical billets to include emergency responders.* The president should direct the secretary of defense to add first responders, such as police and firefighters, to the list of those who hold critical jobs who are currently prohibited from joining or remaining in the selected reserve. Given the ongoing threat to the U.S. homeland, the Pentagon cannot continue to allow individuals with civilian jobs that are important to homeland security to join the National Guard and reserves and be called up to serve abroad. Homeland defense is as integral to national security as is attacking terrorists abroad, and it requires dedicated personnel who will not be called to military duty away from their own communities.

*Establish a homeland security corps in each state.* The president should direct the secretary of homeland security to work with the 50 governors to establish in each state a non-deployable homeland security corps of volunteer citizens with skills that are central to responding to a terrorist attack as well as to natural disasters. Such volunteers would include doctors, nurses, lawyers, construction workers, firefighters, police officers, communications experts, city planners, engineers, and social workers, among others. These units would serve as a backup for National Guard units, which will continue to be deployed away from their home states. The Congress should increase the Department of Homeland Security's budget by \$1 billion to pay for such a program.

#### Repeal the "don't ask, don't tell" policy

*The Congress should repeal the "don't ask, don't tell" policy that prohibits openly gay men and women from remaining in the armed services.* The "don't ask, don't tell" policy is counterproductive to military readiness. As Rear Admiral John D. Hutson, who retired as Navy Judge Advocate General in 2000, noted, "Don't Ask, Don't Tell is virtually unworkable in the military—legally, administratively, and socially. Rather than preserving cohesion, it fosters divisiveness."<sup>68</sup> Since

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*Removing our troops' burden of worry about pay and benefits for themselves and their families would have a positive impact on morale as well as on retention and reenlistment rates.*

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1998, some 10,000 people have been discharged because of it.<sup>69</sup> The areas of expertise of a significant number of those who were discharged are the same as those in which the military has had personnel shortfalls and been forced to activate individuals from the Individual Ready Reserve.<sup>70</sup>

The Uniform Code of Military Justice is more than adequate to prevent and sanction inappropriate behavior by members of the armed forces, no matter what their sexual orientation. While the issue of gays in the military was certainly very divisive twelve years ago, it appears that the opinions of many military personnel and the public have evolved since then.<sup>71</sup> Seventy-nine percent of the public now favors allowing gay individuals to serve openly, and for the first time, a majority of junior enlisted personnel support that position.<sup>72</sup> Moreover, an internal Ministry of Defense report

from Britain, whose military was forced by the European Court of Human Rights to allow openly gay people to serve, found that the policy change was a "solid achievement . . . with fewer problems than might have been expected."<sup>73</sup>

#### Address quality-of-life issues to improve personnel readiness

Removing our troops' burden of worry about pay and benefits for themselves and their families would have a positive impact on morale as well as on retention and reenlistment rates. It is also necessary and appropriate given the sacrifices troops are making to protect our country. In particular:

- *Enable reservists and their families to enroll in TRICARE.* The president should support and Congress should pass legislation that would allow members of the selected reserve to enroll themselves and their families in the military's healthcare system, known as TRICARE. Enrollment in the TRICARE system would prevent reservists and their families from having to change healthcare plans when they are activated. Moreover, those members of the selected reserve who do not have health care insurance would be able to maintain their medical fitness for service without having to resort to paying for it out of their own pockets. Such access to the TRICARE system, which is much less costly than most private health care plans, would have a positive impact on both recruiting and retention for the Guard and reserve. The Congressional Budget Office estimated that the cost of this would be about \$454 million in the first year and phase in over the next three years to cost \$1.8 billion in the fourth year.<sup>74</sup>
- *Maintain troop pay and benefits.* The president should direct the secretary of defense to maintain quality of life benefits such as special pay, commissaries, and schools on military bases. The administration should also allow imminent danger and family separation allowances to maintain their real value by placing sufficient funds in the defense budget, and should call a moratorium on studies about closing commissaries and schools on military bases, at least as long as the U.S. military is trying to stabilize Iraq and Afghanistan.



## Status Update as of December 2005

Since the original release of this report in December 2004, the Army recruiting situation has gone from bad to worse. Despite lowering its educational and aptitude standards, raising the maximum age for first-time enlistees, and increasing bonuses dramatically, all components of the total Army are failing to meet their recruitment goals. From October 1, 2004 to September 30, 2005, the total Army needed to recruit 165,177 people. It actually recruited only 142,992—a shortage of 22,185 or 13 percent.<sup>75</sup>

Retention, on the other hand, has exceeded expectations. At the end of FY 2005, the reenlistment rate for the active Army was eight percent, or 5,350 soldiers, above its goal. Career soldiers are reenlisting at higher rates than normal, but reenlistment rates for mid-career soldiers are below target.

Several bills have been introduced in Congress to increase the size of the active-duty Army permanently by up to 100,000 people. To date, none of these bills has become law.

Governors are still concerned about the overuse of the National Guard troops. In July 2005, Governor Mike Huckabee, a Republican from Arkansas, who is the newly elected head of the National Governors Association, said if the country suffered a major natural disaster we would be stretched thin. Less than two months later, Hurricane Katrina hit the Gulf Coast and proved the point.

## ENDNOTES

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<sup>2</sup> Mark Mazzetti, *U.S. Military Is Stretched Too Thin, Defense Board Warns*, *L.A. Times*, Sept. 30, 2004, at A11.

<sup>3</sup> Thom Shanker, *Need for Draft Is Dismissed by Pentagon Officials*, *N.Y. Times*, Oct. 31, 2004, at A22.

<sup>4</sup> Between one-fifth and one-third was the deployment ratio range given as that which could be used while still maintaining a soldier's desire to remain in the Army. See Andrew F. Krepinevich, *The Thin Green Line*, Center for Strategic and Budgetary Assessments, Aug. 14, 2004.

<sup>5</sup> Colin Powell with Joseph E. Persico, *My American Journey*, (1996); and Daniel Schorr, *The Privilege of a 'War President'*, *Christian Science Monitor*, Feb. 20, 2004, at 9.

<sup>6</sup> The military urgently needed to be updated because the Pentagon had postponed buying new equipment for its forces in order to hold down the overall size of the defense budget during the Vietnam War, and the United States also needed to increase military spending to catch up to the growing Soviet threat.

<sup>7</sup> Lawrence J. Korb, *The Fall and Rise of the Pentagon: American Defense Policies in the 1970s*, at 38 (1979).

<sup>8</sup> See DOD Active Duty Military Strength Levels (Fiscal Years 1950-2002), available at <http://web1.whs.osd.mil/mmid/military/ms9.pdf> (last viewed Dec. 7, 2004).

<sup>9</sup> Lawrence J. Korb, *The Fall and Rise of the Pentagon: American Defense Policies in the 1970s*, at 40 (1979).

<sup>10</sup> *Ibid.*; see also Lewis Sorley, *Thunderbolt: General Creighton Abrams and the Army of His Times*, at 363-365 (1992).

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## PROTECTING AND PRESERVING AN OPEN SOCIETY:

### An Integrated Approach to Homeland Security

*We the People of the United States, in Order to ... provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity ...*

—PREAMBLE TO THE CONSTITUTION OF THE UNITED STATES

Above all else, the primary responsibility of the president is to protect the American people. Yet four years after September 11, the Bush administration has left us with a patchwork of homeland security remedies that has not done enough to reduce threats to our communities and our nation. The United States needs an integrated strategy for homeland security and national security—one that sets the right priorities, combines efforts in the public and private sectors, and ensures a more open, credible system of informing authorities and the public. Action is required now to make America safer.

The threat is clear. Terrorist attacks around the world against U.S. citizens, soldiers, allies, and interests are on the rise.<sup>1</sup> Al Qaeda and other terrorist networks retain the personnel, command structure, and resources to conduct major operations, as recent attacks in Jordan, Britain, Spain, Saudi Arabia, and Egypt demonstrate.<sup>2</sup> The war in Iraq has served as a recruiting call-to-arms and created a training ground for the next generation of global jihadists.<sup>3</sup> The United States spent virtually all of 2004 in a high or elevated threat status. Transit systems were raised to “orange alert” after the London bombings in 2005. A number of government officials

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*Iraq has become both a recruiting tool and a training ground for the next generation of global jihadists.*

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and security experts have repeatedly warned that another major attack in the United States is not only possible, but probable.<sup>4</sup>

Our homeland security and economic security are no longer assured by-products of our unsurpassed military power and political influence. In fact, America's global dominance will continue to create international friction and breed resentment that serves as oxygen for al Qaeda and similar terrorist organizations. Those groups, moreover, can deploy terror strategically and have an asymmetric advantage: they can strike where and when they sense

opportunity while we must defend everywhere. They can select vulnerable targets that exist predominantly in the private sector, using tactics that are extremely difficult to defend against and cause disproportionate damage to our society. It is estimated that the terrorist operations of September 11 cost less than \$500,000 to carry out, yet claimed 2,973 victims and produced \$31.7 billion in losses.<sup>5</sup>

Strong American leadership, international cooperation, and a comprehensive strategy that involves more than just military action can defeat al Qaeda and its affiliates. Yet even as we attempt to eliminate terrorists and their networks around the world, we need an effective homeland security capability here at home. Because the tools to inflict harm against American interests are simply too easy and inexpensive to acquire, our goal must be to make a terrorist attack less likely and less effective. This cannot be done by creating a fortress America, but rather through a layered and flexible approach to homeland security that raises the cost and complexity of planning an attack, lowers the odds of a successful attack, and mitigates the impact on the United States should an attack occur.<sup>6</sup>

Realizing these goals will not be easy in a society as broad, open, and diverse as ours. But we must not accept decade-long timetables to fix known problems. Homeland security—protecting our people, our economy and our way of life from threats both continents away and within our midst—has never been more urgent.

Our strategy encompasses five fundamental points:

First, we must set priorities and focus on preventing catastrophic terrorism against targets where the threat and consequences of attack are most significant. Terrorism is not an equal opportunity threat. While many areas of the country are potentially vulnerable, terrorist groups like al Qaeda are more likely to strike in urban centers against high-profile targets where large numbers of people gather. Addressing vulnerabilities without regard to the threat guarantees that finite resources will be stretched too thin.

Second, we must engage the private sector and institute strong security standards when incentives and voluntary efforts fall short. The private sector owns and operates 85 percent of our critical infrastructure.<sup>7</sup> Stopping the next terrorist plot could just as easily involve a security guard patrolling the fence line at a commercial nuclear power plant in New York as an intelligence analyst connecting dots in Washington. The private sector must be prepared.

Third, we must take an integrated and comprehensive approach to homeland security. Terrorism is a global challenge, transcending international boundaries. This therefore requires that we have a unified strategy and structure as well as a comprehensive budget to properly integrate defense, homeland security, intelligence, counterterrorism, emergency response, and other programs directed against the terrorist threat.

Fourth, the federal government has and must accept primary responsibility for homeland security. The Constitution clearly charges the federal government “to provide for the common defense.”<sup>8</sup> Communities, cities, states, and the private sector each have important roles to play, but Washington must provide the leadership, coordination, and resources to make the United States safer. This responsibility cannot be outsourced.

Finally, homeland security is sustainable only if the government is transparent and credible. Our actions cannot come at the cost of fundamental freedoms or the isolation of our nation from the rest of the world. The government needs to be forthcoming in providing more information on threats and risks to the American people. The presumption must be to share significant security information, not to withhold or classify it. We must also maintain an open society, a pillar of American strength, by finding the balance between protecting our borders and bringing in the visitors, students, immigrants, and trading partners who promote the very international understanding, cooperation, and opportunity that is crucial to reducing terrorism’s appeal.

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*Our goal must be to make a terrorist attack less likely and less effective—not by creating a fortress America, but by securing the critical economic and social links that bind us to the world and have made us powerful, prosperous, and open.*

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## CURRENT STATE OF PLAY

As the ineffective response to Hurricane Katrina demonstrated, the United States today does not have an effective homeland security system in place. Four years after the attacks of September 11, the Bush administration has failed to do a number of things necessary to enhance our homeland security. It has failed to set priorities and integrate vital systems. It has failed to press the private sector to operate in ways that are inherently safer or institute the strict standards necessary to protect our communities. It has failed to produce a cohesive homeland security strategy, integrate responsible agencies, and eliminate overlapping bureaucratic responsibilities. And it has failed to devote the necessary resources for a credible approach to our security.

Nothing better illustrates the administration’s failure to set priorities and guard against catastrophic terrorism than its efforts to protect our nation’s airliners, ports, and railways. While cockpit doors, luggage screening, and passenger checkpoints have been strengthened, less than 5 percent of cargo placed on passenger aircraft is physically screened.<sup>9</sup> Our ports remain extraordinarily vulnerable. Only 5 percent of all shipping containers are inspected, despite estimates by security experts that it is only a matter of time before terrorists use a container to smuggle in a dirty bomb.<sup>10</sup> The Coast Guard estimates it will take \$7.3 billion over ten years to make our ports more secure, but the administration only requested \$46 million in port security grants to accomplish the task.<sup>11</sup> Congress recently tripled that amount, but more is required.<sup>12</sup>

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*The Constitution clearly charges the federal government “to provide for the common defense.” This responsibility cannot be outsourced.*

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The administration has paid lip service to rail and mass transit security, but has resisted meaningful action and tougher mandatory standards despite the Madrid rail bombings.<sup>13</sup> The federal government went to court to prevent the District of Columbia from enacting a strategy for rerouting hazardous rail cars away from the heart of the nation’s government. The secretary of homeland security even questions whether an attack like London or Madrid against a mass transit system qualifies as a “catastrophe.”<sup>14</sup> He wants to eliminate tailored critical infrastructure security grants and pool money for ports, rail, transit and other priorities, which needlessly places them in competition and guarantees that scarce resources will be spread too thin.

As the 9/11 Commission rightly reported, “the private sector remains largely unprepared” for a future attack.<sup>15</sup> Much of this can be traced to the Bush administration’s failure to create proper incentives for the private sector to improve security or to impose strict security standards when voluntary measures are inadequate. Even in areas where catastrophe risk is acute—such as attacks on private chemical facilities, where the industry estimates 100 plants have the potential to threaten more than one million people each—the administration has refused to require safety measures.<sup>16</sup> Rather than build a genuine partnership with the private sector, the former secretary of homeland security characterized the security of facilities critical to the economy as a “private sector need,” even though one of al Qaeda’s principal goals is to attack and weaken the U.S. economy.<sup>17</sup> In fact, the Department of Homeland Security (DHS) does not even know how much is being spent in the private sector to secure the nation’s critical infrastructure.<sup>18</sup>

The country also lacks a consolidated and coherent strategy. Since July 2002, the Bush administration has produced six different homeland security-related strategies, but has yet to coordinate these parts into a single comprehensive plan.<sup>19</sup> Repeated deadlines for a national transportation security strategy have been missed.<sup>20</sup> The White House treats homeland security as a distinct security challenge rather than an inherent element of a cohesive national security strategy. After opposing formation of the Department of Homeland Security, the White House then undertook the most expansive possible option in forming the new department, yet failed to devote the resources necessary to effectively integrate 22 agencies and 170,000 employees.<sup>21</sup> Even today, the White House continues to support a Homeland Security Council and a National Security Council, competing power centers within the White House that inhibit the proper coordination of policy.<sup>22</sup>

The administration also has failed to integrate vital data systems that allow us to track potential terrorists while making sure that legitimate visitors can enter.<sup>23</sup> Four years after al Qaeda defeated existing immigration and border security systems, despite increased resources and stricter guidelines, an estimated ten million people remain in the United States who have evaded the immigration system.<sup>24</sup> Rather than concentrating on stopping terrorists from boarding airplanes, DHS overreached in its proposed updating of the Computer Assisted Passenger Prescreening System (CAPPS II). It recommended potentially broad screening criteria, including the use of commercial databases, raising serious privacy concerns.<sup>25</sup> Under congressional pressure, the CAPPS II program was discarded, delaying integration of the consolidated



terrorist watchlist with the airline no-fly list, a system flaw that was successfully exploited on September 11.<sup>26</sup>

The Bush administration also is attempting to do homeland security “on the cheap.”<sup>27</sup> It is not dedicating sufficient resources at the federal level to do what is required. It is not putting those resources where they are needed to make America safer. And it is not addressing priorities in an integrated fashion. Consider these facts:

- Although homeland security funding has doubled since September 11, the DHS budget is only one-tenth that of the Department of Defense.<sup>28</sup> In fact, the federal government is spending more to secure Iraq than the American homeland.<sup>29</sup>
- The White House is spending six times more on ballistic missile defense than on port security, even though it is far more likely that a nuclear weapon will enter the United States via a shipping container than launched on a long-range missile.<sup>30</sup>
- In FY 2004, Wyoming received \$37.60 per capita in homeland security grants, the highest among the 50 states, while New York, where the threat is far more significant, received only \$9.55 per capita.<sup>31</sup> DHS narrowed the margin measurably in its FY 2005 grant allocations, although 27 states, including rural states like Nebraska, Oklahoma, and Kentucky, received the limited Urban Area Security Initiative funds.<sup>32</sup>

Public support is critical in times of crisis, but the administration has consistently undermined the credibility of existing efforts to protect the homeland.<sup>33</sup> The existing color-coded warning system has never served its purpose, and at times has even compromised intelligence operations.<sup>34</sup> The timing of some high-level, seemingly urgent, yet vague warnings has raised questions about politicization of the system. State and local officials have complained about receiving incomplete information,<sup>35</sup> delays in receiving threats,<sup>36</sup> and the lack of efficient two-way communication.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

Given the nature of the ongoing threat the U.S. homeland faces, the immediate security imperative is to deny al Qaeda and affiliated groups what they strive to achieve through their attacks: significant loss of civilian life, major economic losses, and political and social turmoil.

### Prevent Catastrophic Terrorism and Minimize Its Impact

Our strategy is based on a simple idea: focus the nation’s time and resources on defending its most valuable and vulnerable targets, including the economy. This means that we must focus first where terrorists are most likely to strike and with the greatest effect: the nation’s chemical and nuclear facilities, ports, rail system, air cargo, and city centers. Aggressive action overseas must be accompanied by focused, sensible and rapid action to defend targets here at home. Where millions of lives are at stake and billions of dollars in economic damage at risk, voluntary approaches are insufficient. The threat is evolving and we have to deter the next plot,

not just guard against the last one. In particular, the Center for American Progress makes the following recommendations.

**Identify top chemical facility threats, reduce hazards, and provide incentives for substitution with less toxic alternatives.** The president should direct the Environmental Protection Agency (EPA), in cooperation with DHS, to develop hazard-reduction plans for facilities that use the most acutely toxic chemicals. The plans can be required under existing provisions of the Clean Air Act and should outline immediate steps to improve site security and harden storage containers for acutely toxic chemicals, as well as reduce the concentration and levels of chemical storage inventory through state-of-the-art manufacturing processes.<sup>37</sup> Over the long term, the government must encourage long-term non-toxic or non-explosive material substitution that will eliminate the risk entirely. For the deadliest chemicals, the EPA should create a “fast-track” permit process to encourage industry to transition to safer alternatives as quickly as possible.

**Require redirection of hazardous rail shipments away from city centers.** The president should direct the Department of Homeland Security to work with the rail industry to immediately reroute hazardous material away from major urban areas. Washington, D.C. is a prime example of hazardous material passing perilously close to critical government buildings, including the U.S. Capitol and the National Mall, where tens of thousands of visitors regularly gather, creating an unnecessary opportunity for terrorists.<sup>38</sup> Appropriate coordination must be undertaken with individual railroads and regional authorities to identify the safest feasible arrangement.

**Improve security at vulnerable railway infrastructure.** The Transportation Security Administration (TSA) should work in cooperation with the Federal Railroad Administration to develop national standards for rail security; require stronger regional security plans focused on improving security around rail yards, tunnels, and other critical rail infrastructure; and provide sufficient transparency for meaningful state and local cooperation.<sup>39</sup> Similar effort should be made between TSA and the Federal Transit Administration to: (1) assess the terrorism threat to major transit systems; (2) identify recommendations that can be implemented now—including design features to incorporate safety and security into physical and operational security over the long term; and (3) identify resources to sustain security and develop an appropriate cost-sharing formula among federal, state and local governments. These points need to be incorporated into a comprehensive National Transportation Security Strategy that DHS must complete as soon as possible, as called for in the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>40</sup>

**Set strong national standards for security at nuclear facilities.** The Congress should pass legislation that would require stronger national security standards at nuclear power reactors and other nuclear facilities where nuclear theft or sabotage could pose catastrophic threats. Along with government facilities not regulated by the Nuclear Regulatory Commission (NRC), these reactors and other facilities should be able to successfully detect and repel a team of suicide attackers. Critical components should be modified to reduce vulnerability to external attack or internal sabotage. Particular attention needs to be paid to the vulnerability of cooling pools for spent fuel rods. Congress should consider shifting security policy and enforcement responsibility from the NRC, which is primarily focused on safety, to the Department

of Energy, which may be better able to craft comprehensive and global security and threat reduction strategies through its Office of Security and Safety Performance Assurance and the National Nuclear Security Administration (NNSA).

**Screen all air cargo.** Congress should pass legislation requiring 100 percent screening of all cargo placed on board commercial passenger and cargo aircraft.<sup>41</sup> Although screening will add friction and cost to a “just in time” business system, the additional expense is only a fraction of the potential economic and public impact that would follow another air disaster. Cargo shippers would be charged a security fee by the airlines to cover the cost of new systems.

**Install new explosive detectors at all airports.** The president should direct the Transportation Security Administration (TSA) to change its airport security regulations to require all commercial airports to install the next generation of explosive detection equipment (“puffer” machines) to prevent passengers from smuggling a bomb on board a commercial airliner.<sup>42</sup>

**Strengthen shoulder-fired missile defenses.** The president should direct the Federal Aviation Administration to instruct airlines to add to flight crew training new emergency landing techniques involving an aircraft damaged by a shoulder-fired missile. Airports should increase resources devoted to perimeter security to deter missile threats during takeoff and landings, as was done in Los Angeles.<sup>43</sup> Research should continue regarding the suitability and cost of adapting missile detection and countermeasure technologies for commercial aircraft.<sup>44</sup>

**Integrate watchlists into airline passenger screening.** The president should direct TSA to implement the Secure Flight passenger screening program within six months so that airline passenger lists can be integrated with the consolidated terrorist watchlist.<sup>45</sup> The consolidated watchlist must be coupled with improved privacy protections and an appeals process so that passengers who are victims of mistaken identification are not subject to repeated delays for unnecessary additional searches.

**Introduce biometric technology at all ports of entry.** Congress should accelerate funding for the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program so that biometric technology can be installed within three years at all land, port, and air terminals.<sup>46</sup> It is also important to strengthen exit procedures at ports and borders so that immigration officials can more effectively track visitors both coming into and leaving the country. Under the current US-VISIT program design, points of departure are not manned but employ self-serve kiosks. This gap in our entry-exit system will potentially add more “phantom overstays” who have in fact left the country but clog up the existing visa tracking system. As the new system is implemented, it is equally important that robust privacy safeguards are in place to protect against unwarranted use of the biometric data and any databases that are developed from the US-VISIT program. Recognizing that the challenge of illegal immigration cannot be solved at our borders alone, the Bush administration should propose, and Congress should enact, comprehensive immigration reform as soon as possible. No country can call itself secure

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*Our strategy is based on a simple idea: focus the most time and resources defending our most valuable and vulnerable targets and our economy. This means that we must focus first where terrorists are most likely to strike and with the greatest effect.*

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if 700,000 people each year evade an immigration system that is broken, outdated, and inadequate to confront the challenges of global economic migration and terrorism.<sup>47</sup>

**Increase resources and set priorities for Maritime Transportation Security Act (MTSA) implementation.** The Congress should pass proposed legislation to use customs duties to increase port security funding to at least \$500 million per year, which is up from the current annual appropriation of approximately \$150 million in port security grants.<sup>48</sup> The president should direct the Coast Guard to amend its port security regulations to place greater emphasis on threat and consequence analysis, concentrating on targets terrorists are most likely to strike and which carry the highest risk of mass casualties and economic loss. Such an approach could reduce the cost of MTSA implementation from the current estimate of \$7.3 billion over 10 years to less than \$5 billion.<sup>49</sup> The United States should also work with the International Maritime Organization (IMO) to adapt the International Ship and Port Facility Security (ISPS) Code to require all cargo vessels to have a global vessel identification capability similar to a commercial airliner beacon so that ships can be tracked and courses verified as they travel to the United States.

**Accelerate research and development on non-intrusive container scanning technology.** Congress should increase funding in the Homeland Security budget to \$100 million to more rapidly develop next generation technology for a rapid, reliable, and safe “CAT scan” of the roughly six million shipping containers that enter and exit the 361 U.S. sea and river ports each year.<sup>50</sup> No technology currently in existence or on the immediate horizon provides the necessary radiological imaging with sufficient speed and confidence to achieve 100 percent scanning of all shipping containers. No port security system will be sufficiently reliable until such technology exists. Current funding levels are inadequate to get us where we need to be fast enough.

**Combine strengths of existing container security programs.** The president should direct Customs and Border Protection (CBP) to take immediate steps to improve and better coordinate existing container security programs. Furthermore, Congress should provide an additional \$100 million in future years to accomplish the following:

- Accelerate Phase III of the Container Security Initiative (CSI) and allow DHS to station up to 400 agents on extended overseas tours with proper language training. The program is currently hampered by too few agents sent on short-term rotations, which limits international cooperation.
- Increase trusted shipper certification inspections under the Customs-Trade Partnership Against Terrorism (C-TPAT) program.<sup>51</sup> Currently, CBP has a “trust but don’t verify” approach due to resource constraints.<sup>52</sup> Better integration of data generated by Automated Targeting System (ATS) and CSI can make C-TPAT inspections more effective.
- Develop a next-generation ATS computer model that fuses more data from broader sources for more effective analysis of shipping risk factors and anomalies. Roughly half of all physical inspections of containers are currently done based on random selection, not risk profiling.<sup>53</sup> Not only is better shipping intelligence required, but independent assessments of ATS are needed.<sup>54</sup>

- CBP should also strengthen its cyber-security capabilities to ensure that it can detect computer intrusions and attempts to forge shipping documents.

**Make global shipping more secure.** The president should direct the secretaries of commerce and homeland security to convene a global shipping summit to reach agreement with major importers, shippers, and terminal operators to invest in a more transparent, efficient, and secure intermodal trading system. The emphasis should be on setting standards that will promote the rapid deployment of new technologies. Within three years, all shipping containers should be equipped with tamper-proof secure seals, on-board Global Positioning System (GPS) tracking capability, a radiation detection device, and a detailed, computerized cargo manifest with prior imaging attached. All U.S. ports can then be configured with “green lanes” for rapid clearance of shipping containers conveyed by certified “safe shippers” utilizing smart technology. All shipping containers that fail to meet revised standards will be subject to “red lanes,” creating a market incentive for security investments.<sup>55</sup>

**Increase emphasis on secure computer technologies.**

The secretary of homeland security should task DHS’s undersecretary for preparedness to work in cooperation with the National Science Foundation to present a plan within six months to eliminate all known computer software programming vulnerabilities within three years. Experts say that 90 percent of all software vulnerabilities can be traced to 19 programming flaws.<sup>56</sup> Global economic damage from denial-of-service attacks has been estimated to exceed \$34 billion,<sup>57</sup> yet DHS’s Science and Technology Division received only \$18 million for cyber research and development in FY 2005.<sup>58</sup> Computer attacks by Islamic groups have grown significantly since 9/11 and particularly since the invasion of Iraq.<sup>59</sup> The Congress should dramatically increase its investment in cyber research and development. The administration should direct relevant agencies to identify and certify secure software that eliminates the possibility of computer programming flaws and then push the private sector to urgently upgrade its systems.

**Maintain government support for terrorism insurance.** The administration should promptly engage the insurance industry to devise a permanent risk arrangement to replace the Terrorism Risk Insurance Act and ensure a viable private insurance market to minimize the potential economic impact of future terrorist attacks. One option is the creation of a government-sponsored enterprise terrorism risk reinsurance corporation, capitalized by the private sector and backed by the U.S. government, particularly if the private terrorism insurance market is inadequate to meet long-term demand. The administration should also appoint an advisory panel of legal, security, public and private sector, and legislative experts to make recommendations regarding commercial liability and terrorism. Establishing clear parameters regarding the private sector’s liability in the event of future attacks could help restore the private insurance market over the long-term and provide incentives for private sector adoption of mandatory and enforceable security and safety standards in return for commercial liability relief.

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*No technology currently in existence or on the immediate horizon provides the necessary radiological imaging with sufficient speed and confidence to achieve 100 percent scanning of all shipping containers. No port security system will be sufficiently reliable until such technology exists.*

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**Renew the Victims Compensation Fund.** Congress should review the Victims Compensation Fund and pass legislation authorizing its renewal for a three-year period. The reauthorized Fund would assist the families of U.S. citizens who are victims of future acts of foreign-sponsored terrorism anywhere in the world as well as the families of anyone who is a victim of terrorist attacks *within* the United States. After September 11, the federal government processed more than 7,300 claims valued at more than \$2.6 billion and proved itself as an effective mechanism to speed compensation to victims, thereby enhancing Americans' ability to recover from this attack.<sup>60</sup> Given the threat of another attack, it is appropriate to maintain this special process on a temporary basis. After two years, the Departments of Justice and Homeland Security should submit a report that evaluates the ongoing nature of the terrorist threat, the degree to which society has strengthened its security and preparedness, and whether a continued exception to the normal victim compensation and tort systems is warranted.

### An Integrated Approach Anchored By Strong Federal Leadership

To protect the homeland, we need an integrated, comprehensive approach that bridges three intersecting relationships: homeland and national security; federal, state and local responsibilities; and the public and private sectors. Homeland security and national security are indivisible. The federal government cannot protect the homeland alone, but it must lead. It must establish genuine and reciprocal partnerships with state governments and local communities, and with the private sector. States, local communities, and the private sector all must do their share to make us safer, but only federal leadership and resources can adequately address vulnerabilities that terrorists can and will exploit. A credible and effective approach requires more than water, duct tape, and plastic sheeting. Vague and confusing announcements that appear to be made for domestic political gain undercut support at home and vital partnerships around the world. Similarly, arbitrary and secretive rules that appear to add a veneer of security ultimately undercut what we represent as a nation and how we are perceived by friends and allies.

**Introduce a consolidated national security budget.** Beginning with the next presidential budget, the Office of Management and Budget should issue a national security top line budget figure to the Congress that combines the budgets of the Departments of Defense, State, and Homeland Security; all elements of the Intelligence Community, as defined in the National Security Act of 1947;<sup>61</sup> and the relevant portions of the budgets of the Departments of Energy, Justice, Health and Human Services, Treasury, and other departments and agencies that have national security, homeland security, intelligence, counterterrorism, and foreign assistance functions.<sup>62</sup> Barring action by the Congress to amend its rules to allow a consolidated national security appropriations bill, this would provide a useful guide to understanding the difficult tradeoffs involved in funding an integrated national security strategy.

**Consolidate the National Security and Homeland Security Councils.** The president should immediately issue a new National Security Presidential Directive that integrates the executive branch policy coordination responsibility of the Homeland Security Council with that of the National Security Council. The staff of the Office of Homeland Security within the Executive Office of the President should be incorporated within the staff of the National Security Council and report to the president through the national security advisor and a newly created deputy assistant to the president for homeland security.

**Develop a new national security strategy.** Within six months, the administration should update the nation's homeland security strategy within an integrated national security strategy that reflects all international and domestic policy elements that will be decisive in reducing the terrorist threat to the United States. It should incorporate national strategies related to homeland security, maritime security, cyber security, critical infrastructure protection, weapons of mass destruction, terrorism, and money laundering into a single overarching and coordinated approach.

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*Homeland security and national security are indivisible. The federal government cannot protect the homeland alone, but it must lead.*

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**Establish an integrated network of Homeland Security**

**Operations Centers in all 50 states to improve the two-way flow of threat information.** Working with Congress, the president should designate sufficient resources within the Department of Defense budget to create a network of state homeland defense operations (HDOC) centers. This HDOC network would be the primary conduit for homeland defense alerts and better enable rapid civil support in case of a crisis. The operations centers, which would be staffed and managed by National Guard personnel on Title 32 status,<sup>63</sup> would more effectively integrate federal government entities, including NORTHCOM, Joint Harbor Operations Centers (JHOC), Joint Terrorism Task Forces (JTTFs), and regional Federal Emergency Management Agency (FEMA) headquarters with state and local entities. Such a network would also enhance coordination between the DHS and state and local officials, including improved flow of local intelligence information to DHS's Directorate of Information Analysis and Infrastructure Protection.

**Increase security clearances for state and local officials.** After eliminating the current backlog of security clearances and establishing consistent clearance standards across intelligence agencies,<sup>64</sup> the administration should expand the number of state and local officials who have security clearances and access to intelligence.<sup>65</sup> This will enable more effective coordination across all levels of government and greater regional participation in joint planning and analysis.

**Reimburse states and communities for unexpected security costs.** The president should propose and the Congress should pass legislation that would create a specific fund for the federal government to reimburse state and local authorities for a percentage of unanticipated security costs incurred as a result of federal government taskings to states and communities to heighten security based on specific requirements or available intelligence.<sup>66</sup> The current levels of security are not sustainable without greater federal support, since cities and states are dealing with hundreds of millions of dollars in unfunded security costs while trying to balance their own budgets. Congress should establish a Homeland Security Trust Fund and dedicate revenue from port customs, aviation security, and other user fees to improve and sustain critical infrastructure security over the long term.

**Consolidate homeland security grant programs under DHS.** The Congress should pass legislation consolidating the administration of all homeland security grant programs under the newly proposed undersecretary of homeland security for preparedness. States and communities should have an opportunity for "one-stop shopping" in applying to DHS for grants, and they need to be more flexibly administered and better tailored to where the threat,

consequences and need are most acute, while ending false competition between prevention and response. All grant programs should be designated as either “first preventer” (law enforcement, intelligence, security, and technology programs) or “first responder” (fire, emergency response, and medical surge capabilities). These distinct missions are currently competing for homeland security funds, but both are worthy of support. The administration and Congress should designate specific allocation formulas that provide all communities with a baseline for response, but assign the majority of funds based on threat and attack consequence. Grants should also facilitate joint training among state, community, and private sector security personnel to promote better public-private coordination and the development of area security plans for critical infrastructure protection.

**Revise the existing Homeland Security Advisory System (HSAS).** Reissue Homeland Security Presidential Directive 3 as a National Security Presidential Directive, revising the existing five-color-coded public alert system to make it more targeted and localized. The current national approach does not work and generates public fears and system disruptions that partially fulfill terrorist objectives.<sup>67</sup> The HSAS would serve as the primary threat assessment tool for the federal government, state and local homeland security, law enforcement, fire, and emergency response officials, and representatives from critical private economic sectors. National warnings for the general public, however, should be issued only when the government expects the American people to take specific actions, including alerts for suspicious individuals or activity and travel restrictions. Amber Alerts, which warn motorists to be on the lookout for a specific individual or type of vehicle, are a good example of the kind of specific announcement that should be issued.<sup>68</sup>

## ENDNOTES

<sup>1</sup> U.S. Department of State, Patterns of Global Terrorism 2003, at 18 (2004), *available at* <http://www.state.gov/s/ct/rls/pgtrpt/2003/> (last viewed Jan. 7, 2005).

<sup>2</sup> International Institute for Strategic Studies, Strategic Survey 2002/2003, An Evaluation and Forecast of World Affairs, at 5 (2003).

<sup>3</sup> *Ibid* at 6.

<sup>4</sup> David J. Rothkopf, *Terrorist Logic: Disrupt the 2004 Election*, Washington Post, Nov. 23, 2003, at B1. Author refers to a poll taken at the CNBC Outlook 2004 Summit during which almost 75 percent of the government, security, and business experts in attendance predicted that there would be another attack before the end of 2004.

<sup>5</sup> Insurance Information Institute, Catastrophes: Insurance Issues (2004), *available at* <http://www.iii.org/media/hottopics/insurance/xxx> (last viewed Jan. 7, 2005).

<sup>6</sup> National Commission on Terrorist Attacks Upon the United States, Final Report, at 169 (2004). The attack on the USS *Cole* in 2000 and the 2004 Madrid bombings cost less than \$10,000 each; the 9/11 attacks were executed with an estimated \$500,000.

<sup>7</sup> *Ibid* at 398.

<sup>8</sup> The Preamble to the U.S. Constitution reads, “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”



- <sup>9</sup> Testimony of Norman J. Rabkin, General Accounting Office (which, since July 7, 2004, has been renamed the Government Accountability Office), before the U.S. Senate Subcommittee on Aviation, Committee on Commerce, Science and Transportation, Mar. 30, 2004, *available at* <http://www.gao.gov/new.items/d04592t.pdf> (last viewed Jan. 7, 2005).
- <sup>10</sup> Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe*, at 8 (2004).
- <sup>11</sup> Government Accountability Office, *Maritime Security: Substantial Work Remains to Translate New Planning Requirements into Effective Port Security*, at 5 (2004).
- <sup>12</sup> House Appropriations Committee, *FY05 Homeland Security Appropriations Bill*, P.L. 108-334 (2004).
- <sup>13</sup> Joe Fiorill, *Railroads, U.S. Said to Agree on Protecting, But Not Rerouting, Chlorine Trains Through Capital*, *Global Security Newswire*, Oct. 20, 2004, *available at* [http://www.nti.org/d\\_newswire/issues/2004\\_10\\_20.html](http://www.nti.org/d_newswire/issues/2004_10_20.html) (last viewed Jan. 7, 2005).
- <sup>14</sup> See Bill Johnstone, *New Strategies to Protect America: Terrorism and Mass Transit after Madrid and London*, August 2005, at 6, *available at* <http://www.americanprogress.org/site/apps/nl/content3.asp?c=biJRJ8OVF&b=593305&ct=1263031> (last viewed Aug. 16, 2005).
- <sup>15</sup> National Commission on Terrorist Attacks Upon the United States, *Final Report*, at 398 (2004).
- <sup>16</sup> Robert Block, *Chemical Plants Still Have Few Terror Controls*, *Wall Street Journal*, Aug. 20, 2004, at B1.
- <sup>17</sup> William McCall, *Ridge: Private Cos. Must Help Fight Terror*, *Associated Press*, Apr. 5, 2004.
- <sup>18</sup> Government Analytical Perspectives, *FY2005 Budget of the United States: Homeland Security Funding Analysis*, at 36 (2004).
- <sup>19</sup> Since September 11, the administration has produced the National Strategy for Homeland Security (July 2002), the National Strategy to Combat Weapons of Mass Destruction (December 2002), the Maritime Strategy for Homeland Security (December 2002), the National Strategy for Combating Terrorism (February 2003), the National Strategy for The Physical Protection of Critical Infrastructures and Key Assets (February 2003), and the National Strategy to Secure Cyberspace (February 2003). It also produces annual updates of the National Security Strategy and National Money Laundering Strategy.
- <sup>20</sup> See Bill Johnstone, *New Strategies to Protect America: Terrorism and Mass Transit after Madrid and London*, August 2005, at 10, *available at* <http://www.americanprogress.org/site/apps/nl/content3.asp?c=biJRJ8OVF&b=593305&ct=1263031> (last viewed Aug. 16, 2005).
- <sup>21</sup> Two former high-level members of the Office of Homeland Security confirmed in separate interviews that smaller restructuring options were considered, but the White House could not overcome cabinet-level bureaucratic opposition. James Lee Witt, former FEMA director, said in an interview that he recommended to the White House that the Department of Homeland Security start “small,” but that his advice was not followed.
- <sup>22</sup> The White House, *Homeland Security Presidential Directive 7*, Dec. 17, 2003, *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031217-5.html> (last viewed Jan. 7, 2005).
- <sup>23</sup> Robert Block & Gary Fields, *Effort to Create Terror Watch List Is Falling Behind, Report Finds*, *Wall Street Journal*, Oct. 1, 2004, at A1.
- <sup>24</sup> Mary Beth Sheridan, *Tracking Down Immigrant Fugitives*, *Washington Post*, Jan. 2, 2005 at A1.
- <sup>25</sup> Testimony of Norman J. Rabkin, General Accounting Office (which, since July 7, 2004, has been renamed the Government Accountability Office), before the U.S. Senate Subcommittee on Aviation, Committee on Commerce, Science and Transportation, Mar. 30, 2004, *available at* <http://www.gao.gov/new.items/d04592t.pdf> (last viewed Jan. 7, 2005).
- <sup>26</sup> Jeremy Torobin & Tim Sparks, *New Airline Passenger Screening System Prepared for Takeoff*, *Congressional Quarterly*, Aug. 24, 2004.
- <sup>27</sup> Richard A. Clarke, *Against All Enemies*, at 253 (2004).
- <sup>28</sup> Steven Kosiak, *Funding on Defense, Homeland Security and Related Activities Since 9/11*, *Center for Strategic and Budgetary Assessments*, at 1-8, updated Oct. 18, 2004, *available at* <http://www.csbaonline.org/4Publications/Archive/U.20041020.FundingGWOT/U.20041020.FundingGWOT.pdf> (last viewed Jan. 7, 2005). Between FY 2001 and FY 2005, defense spending was \$1.885 trillion in annual appropriations as opposed to \$163 billion for homeland security. Adding in additional supplemental funding since 9/11 does not appreciably change this imbalance.

- <sup>29</sup> Jonathan Weisman, *Funds Ready for Tsunami Aid, But Hill Seeks to Do More*, Washington Post, Jan. 6, 2005, at A15. Office of Management and Budget, 2003 Report to Congress on Combating Terrorism, at 10 (2003), available at [http://www.whitehouse.gov/omb/inforeg/2003\\_combat\\_terr.pdf](http://www.whitehouse.gov/omb/inforeg/2003_combat_terr.pdf) (last viewed Jan. 7, 2005). Government Analytical Perspectives, FY2005 Budget of the United States: Homeland Security Funding Analysis, at 26 (2004). The administration has committed \$144.4 billion through the end of 2004 in Iraq and is expected to add as much as \$100 billion in early 2005. This exceeds the roughly \$164 billion spent on homeland security since the September 11 attacks.
- <sup>30</sup> Brian Bender, *Terror Risk Seen Highest at US Ports*, Boston Globe, June 21, 2003, at A1.
- <sup>31</sup> Congressional Research Service, FY2003 and FY2004 State Allocations for Selected Homeland Security Assistance Programs, at 7-8 (2004), available at <http://www.fas.org/sgp/crs/RL32463.pdf> (last viewed Jan. 7, 2005).
- <sup>32</sup> U.S. Department of Homeland Security, FY2005 Homeland Security Grant Program Allocations (2004), available at <http://www.dhs.gov/interweb/assetlibrary/states.htm#moreinfo> (last viewed Jan. 7, 2005).
- <sup>33</sup> Judgment based on DHS Secretary Ridge press conference on August 1, 2004 and Attorney General Ashcroft press conference on May 26, 2004, available at <http://www.dhs.gov/dhspublic/display?content=3870> (last viewed Jan. 7, 2005) and <http://www.cnn.com/2004/US/05/26/terror.threat.transcript/> (last viewed Jan. 7, 2005).
- <sup>34</sup> Maria Ressa, *U.S. Leak Harms al Qaeda Sting*, CNN.com, Aug. 9, 2004, available at <http://www.cnn.com/2004/WORLD/asiapcf/08/09/terror.wrap/> (last viewed Jan. 7, 2005).
- <sup>35</sup> Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction (The Gilmore Commission), Fifth Annual Report to the President and Congress of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, at 5, Dec. 15, 2003 available at [http://www.rand.org/nsrd/terrpanel/volume\\_v/volume\\_v.pdf](http://www.rand.org/nsrd/terrpanel/volume_v/volume_v.pdf) (last viewed Jan. 7, 2005). Seventy percent of state and local agencies say the federal government refuses to share information that they need to respond appropriately to changes in alert level.
- <sup>36</sup> Government Accountability Office, Homeland Security Advisory System: Preliminary Observations Regarding Threat Level Increases from Yellow to Orange, at 2 (2004), available at <http://www.gao.gov/new.items/d04453r.pdf> (last viewed Jan. 7, 2005).
- <sup>37</sup> The chemical industry has followed the broader trend within the business world and begun “just-in-time manufacture,” meaning that it undertakes the synthesis required for a chemical process immediately prior to use, rather than doing it elsewhere and transporting it to the final manufacturing site or storing it in reserve. See Linda E. Greer, New Strategies to Protect America: Securing our Nation’s Chemical Facilities, Apr. 6, 2005, available at <http://www.americanprogress.org/site/apps/nl/content3.asp?c=bjJRJ8OVF&cb=681085&ct=625335> (last viewed Aug. 16, 2005).
- <sup>38</sup> Marc Fisher, *Next Time, Terror Could Ride the Rails*, Washington Post, July 15, 2004, at B1. See also Fred Millar, New Strategies to Protect America: Putting Rail Security on the Right Track, available at <http://www.americanprogress.org/site/apps/nl/content3.asp?c=bjJRJ8OVF&cb=681085&ct=645303> (last viewed Aug. 16, 2005).
- <sup>39</sup> Testimony of Jack Riley before Senate Commerce, Science and Transportation Committee, “Terrorism and Rail Security,” at 10, Mar. 23, 2004, available at <http://www.rand.org/publications/CT/CT224/CT224.pdf> (last viewed Feb. 19, 2005).
- <sup>40</sup> Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 4001(a)(3)(B).
- <sup>41</sup> See Universal Screening of Air Cargo Act, introduced by Congressman Ed Markey, June 13, 2003, available at [http://www.house.gov/markey/Issues/iss\\_airlinesecurity\\_bill030613.pdf](http://www.house.gov/markey/Issues/iss_airlinesecurity_bill030613.pdf) (last viewed Jan. 7, 2005).
- <sup>42</sup> Ricardo Alonso-Zaldivar, *9/11 Panel Urges Firmer Security Grip*, L.A. Times, July 29, 2004, at A1. The government has not decided whether to install such detectors at 450 commercial airports. At \$132,000 apiece, it would cost about \$240 million to equip each of 1,800 security lanes at airports around the nation.
- <sup>43</sup> Greg Krikorian, *LAX Guards Against Portable Missile Attacks*, L.A. Times, Dec. 14, 2004, at B1.
- <sup>44</sup> Government Accountability Office, The Department of Homeland Security Needs to Fully Adopt a Knowledge-Based Approach to its Counter-MANPADS Development Program, at 2 (2004), available at <http://www.gao.gov/atext/d04341r.txt> (last viewed Jan. 7, 2005).
- <sup>45</sup> Chris Strohm, *TSA to Debut Revised Pre-Screening Program Early Next Year*, Government Executive, Aug. 27, 2004, available at <http://www.govexec.com/dailyfed/0804/082704c1.htm> (last viewed Jan. 7, 2005).
- <sup>46</sup> National Commission on Terrorist Attacks Upon the United States, Final Report, at 389 (2004).

- <sup>47</sup> See Rajeev Goyle & David A. Jaeger, Deporting the Undocumented: A Cost Assessment, July 2005, at 3, *available at* <http://www.americanprogress.org/site/pp.asp?c=bjJRJ8OVF&b=913099> (last viewed Aug. 16, 2005).
- <sup>48</sup> House Appropriations Committee, FY05 Homeland Security Appropriations Bill, P.L. 108-334 (2004); *see also* Joseph F. Bouchard, New Strategies to Protect America: Safer Ports for a More Secure Economy, June 15, 2005, *available at* <http://www.americanprogress.org/site/apps/nl/content3.asp?c=bjJRJ8OVF&b=681085&ct=1014739> (last viewed Aug. 16, 2005).
- <sup>49</sup> Government Accountability Office, Maritime Security: Substantial Work Remains to Translate New Planning Requirements into Effective Port Security, at 27-28 (2004), *available at* [www.gao.gov/cgi-bin/gettrpt?GAO-04-838.pdf](http://www.gao.gov/cgi-bin/gettrpt?GAO-04-838.pdf) (last viewed Jan. 7, 2005).
- <sup>50</sup> Congressional Research Service, Maritime Security: Overview of Issues, at 2 (2003), *available at* <http://www.fas.org/sgp/crs/RS21079.pdf> (last viewed Jan. 7, 2005).
- <sup>51</sup> Written testimony of Dr. Stephen Flynn, before the Subcommittee on Coast Guard and Maritime Transportation of the House Committee on Transportation and Infrastructure, Aug. 25, 2004, *available at* [http://www.cfr.org/pub7314/stephen\\_e\\_flynn/the\\_ongoing\\_neglect\\_of\\_maritime\\_transportation\\_security.php](http://www.cfr.org/pub7314/stephen_e_flynn/the_ongoing_neglect_of_maritime_transportation_security.php) (last viewed Jan. 7, 2005).
- <sup>52</sup> *Ibid.*
- <sup>53</sup> RAND Europe, “Seacurity”: Improving the Security of the Global Sea-Container Shipping System, at 8 (2003), *available at* <http://www.rand.org/publications/MR/MR1695/MR1695.pdf> (last viewed Jan. 7, 2005).
- <sup>54</sup> Graham Allison, Nuclear Terrorism: The Ultimate Preventable Catastrophe, at 104 (2004).
- <sup>55</sup> Stephen Flynn, America the Vulnerable, at 102-103 (2004).
- <sup>56</sup> Ted Leventhal, Homeland Security Official Urges Prudent Cyber Approach, Government Executive, April 13, 2004, *available at* <http://www.govexec.com/dailyfed/0404/041304tdpm1.htm> (last viewed Jan. 7, 2005).
- <sup>57</sup> News Alert, The Rise of Islamic Hacking and Criminal Syndicates, Oct. 20, 2004, *available at* [www.mi2g.com](http://www.mi2g.com) (last viewed Jan. 7, 2005).
- <sup>58</sup> U.S. House of Representatives, Report 108-774 on Homeland Security Appropriations, Oct. 9, 2004, *available at* [http://thomas.loc.gov/cgi-bin/cpquery?&db\\_id=cp108&r\\_n=hr774.108&sel=TOC\\_0&](http://thomas.loc.gov/cgi-bin/cpquery?&db_id=cp108&r_n=hr774.108&sel=TOC_0&) (last viewed Jan. 7, 2005).
- <sup>59</sup> News Alert, The Rise of Islamic Hacking and Criminal Syndicates, Oct. 20, 2004, *available at* [www.mi2g.com](http://www.mi2g.com) (last viewed Jan. 7, 2005).
- <sup>60</sup> U.S. Department of Justice News Release, 9/11 Victim Compensation Fund Pays Over \$2.6 Billion to Date, Apr. 1, 2004, *available at* [http://www.usdoj.gov/opa/pr/2004/April/04\\_civ\\_207.htm](http://www.usdoj.gov/opa/pr/2004/April/04_civ_207.htm) (last viewed Jan. 7, 2005).
- <sup>61</sup> The National Security Act of 1947, 50 U.S.C. § 401a(4) defines the portions of the 14 agencies that constitute the “Intelligence Community.”
- <sup>62</sup> Foreign Policy In Focus, A Unified Security Budget for the United States, at 2 (March 2004), *available at* <http://www.fpiif.org/pdf/defensereport/fulltext.pdf> (last viewed Jan. 7, 2005).
- <sup>63</sup> Title 32 allows the National Guard to perform a federal mission using federal resources even though personnel remain under the control of the state governor. This is an ideal situation for many homeland defense/homeland security situations, allowing for a more rapid locally directed response to an evolving situation, using National Guard resources who are familiar with the area and well-acquainted with state and local authorities. In contrast, where the National Guard is federalized for service overseas, such as missions in Iraq and Afghanistan, the National Guard comes under the authority of the president and the Department of Defense and operates under Title 10.
- <sup>64</sup> For more detailed recommendations related to improving the security clearance process see *Better Spies, Better Intelligence* in this volume.
- <sup>65</sup> National Commission on Terrorist Attacks Upon the United States, Final Report, at 417 (2004).
- <sup>66</sup> Raising the alert system from yellow to orange is estimated to cost the government \$1 billion per week. *See* Sara Kehaulani Goo, Threat Level May Fall To Yellow, Washington Post, Jan. 9, 2004, A2. *See also* DHS Homeland Security Advisory Council, Report from the Task Force on State and Local Homeland Security Funding, at 17 (June 2004), *available at* <http://www.dhs.gov/interweb/assetlibrary/HSAC-FundingTaskForceRpt0604-FINAL.pdf> (last viewed Feb. 19, 2005).
- <sup>67</sup> The White House, Homeland Security Presidential Directive 3, Mar. 12, 2003, *available at* <http://www.whitehouse.gov/news/releases/2002/03/20020312-5.html> (last viewed Jan. 7, 2005).

<sup>68</sup> The America's Missing: Broadcast Emergency Response (Amber) alert system was established in April 2003 to broadcast special alerts over airwaves to combat kidnapping of children. More information is *available at* <http://www.ptb.state.il.us/pdf/amber.pdf> (last viewed Jan. 7, 2005).

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## BETTER SPIES, BETTER INTELLIGENCE: A Progressive Strategy for Creating a Professional Intelligence Corps

*No duty the Executive had to perform was so trying as to put  
the right man in the right place.<sup>1</sup>*

—THOMAS JEFFERSON

Catastrophic, transnational terrorism perpetrated by non-state actors represents the fundamental security challenge of our time. Equipping policymakers to understand, detect, and protect against this threat is primarily an intelligence function. The Intelligence Community must mobilize the resources at its disposal to help policymakers anticipate and prevent terrorist attacks.

For the Intelligence Community to be as effective as our security needs demand, it must undergo a transformation that focuses on its primary asset—its people. Unfortunately, despite the unprecedented attention and energy dedicated to examining the Intelligence Community since September 11, its human infrastructure has received scant attention.

The aftermath of the September 11 attacks has seen numerous studies and investigations of the Intelligence Community, punctuated by the 9/11 Commission's 20-month investigation, which culminated in a call for a major overhaul of the Intelligence Community. The Commis-

## THE INTELLIGENCE COMMUNITY

The Intelligence Community was formally established by the National Security Act of 1947.<sup>2</sup> It brought together the agencies of the U.S. government that have intelligence responsibilities under the coordinating control of the Director of Central Intelligence, who concurrently also had the job as the Director of the Central Intelligence Agency (CIA). The Intelligence Reform and Terrorism Prevention Act of 2004 separated the two roles and created the position of Director of National Intelligence to assume the responsibility of managing the Intelligence Community.<sup>3</sup> The CIA and the intelligence components of the Federal Bureau of Investigation (FBI) are only two of those agencies, but examining them provides lessons that are generally applicable throughout the Intelligence Community. The 15 agencies or portions thereof currently included in the Intelligence Community are:

- Air Force Intelligence
- Army Intelligence
- Central Intelligence Agency
- Coast Guard Intelligence
- Defense Intelligence Agency
- Department of Energy Office of Intelligence
- Department of Homeland Security
- Department of State Bureau of Intelligence and Research
- Department of Treasury Office of Intelligence Support
- Federal Bureau of Investigation
- Marine Corps Intelligence
- National Geospatial-Intelligence Agency
- National Reconnaissance Office
- National Security Agency
- Navy Intelligence

sion and others have recognized the importance of personnel as the primary driver of organizational transformation.<sup>4</sup> The recently passed Intelligence Reform and Terrorism Prevention Act of 2004 that resulted from many of the Commission's recommendations contains provisions on personnel development, yet they seem to be almost an afterthought. Congress was seized with debate surrounding the authorities and duties of the Director of National Intelligence and almost completely neglected the tens of thousands of other employees that make up the Intelligence Community.

Moreover, when personnel issues have been addressed, they have been handled poorly. Most recently, the management changes and retirements instigated by newly appointed CIA Director Porter Goss brought widespread accusations that senior managers were being pushed out for political reasons.<sup>5</sup> It is clear that some change in the top leadership at the CIA needed to occur.<sup>6</sup> But any sensible personnel shake-up should happen in a systemic way and as part of an overall strategy. Goss failed to lay out a vision or describe any general plan to justify the changes he has made. By design or not, the CIA lost a significant amount of its institutional memory in a matter of weeks.

Two little-noticed presidential memoranda sent to the director of the CIA and the attorney general just before Thanksgiving 2004 do focus on personnel issues in the CIA and the FBI. The president ordered 50 percent increases in clandestine operatives, analysts, and language specialists at the CIA.<sup>7</sup> Welcome recognition of deficiencies in these areas for sure, yet hiring more people without changing anything else is the personnel equivalent of throwing money at the problem.<sup>8</sup>

The president's directives to the attorney general require the FBI to develop its intelligence collection, analysis, and translation capabilities.<sup>9</sup> Every examination of the FBI since September 11—and notably some before the attacks as well—has recognized the need to improve the intelligence function at the Bureau. Unfortunately, this new presidential directive, just as many failed FBI reform efforts in the past,<sup>10</sup> leaves the implementation entirely to the FBI.<sup>11</sup>

It is insufficient to simply declare that we need more intelligence personnel or to replace senior leadership absent an overall strategy. Rather, strategies and structures need to be developed that enable the Intelligence Community to identify, train, and retain employees with the necessary skills for the essential tasks they must perform.

A strategy for progressive intelligence reform, therefore, must focus on maximizing the effectiveness of the Intelligence Community's most crucial resource: its people. We must empower the leadership throughout the Intelligence Community to get the right people with the right skills in the right place at the right time. The key to progressive intelligence reform is an integrated national strategy to create a professional intelligence corps—similar to how we recruit, train, and build our military services—that can meet the challenges of today's threats and identify and adapt to those of tomorrow. Achieving this requires:

- Making education a national security imperative by investing in language and area studies programs to expand the pool of people available to intelligence agencies with critical intelligence skills.
- Training and rewarding intelligence analysts who can identify emerging threats and creating a clear career track that provides them with appropriate promotional opportunities so that good analysts stay in their jobs.
- Incorporating analysis on emerging threats into strategic planning to ensure the community has the people, skills, resources, and tactics to adapt to evolving challenges.

One of the tragic lessons of September 11 is that it is simply not sufficient to have talented and dedicated staff; indeed many of the intelligence successes before 9/11 resulted from personnel overcoming bureaucratic structures. It is vital that the Intelligence Community embark on the difficult assignment of finding and developing the right people, placing them in the right position, and focusing them on the right tasks.

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*The key to progressive intelligence reform is an integrated national strategy to create a professional intelligence corps that can meet the challenges of today's threats and identify and adapt to those of tomorrow.*

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## CURRENT STATE OF PLAY

Examining the current dysfunction of the Intelligence Community is a task made difficult by the shroud of secrecy behind which many portions of the Community must function. Much can be learned, however, from examining two entities at the heart of the intelligence effort to combat international terrorist networks and about which more information is publicly available—the FBI and CIA. A review of the way these agencies handle their personnel should inform any progressive intelligence reform effort.

### Leadership and Strategic Personnel Planning

Despite nascent reform efforts, the FBI and CIA are bogged down by antiquated personnel management. The failure to transform the manner in which these important agencies conduct business more than three years after the tragic events of September 11 leaves the United States more vulnerable than it should be to another terrorist attack.

#### THE FEDERAL BUREAU OF INVESTIGATION

Immediately after the attacks of September 11, 2001, new FBI Director Robert Mueller pledged that the overriding priority for the FBI would be the prevention of terrorist attacks on the homeland. To accomplish its new mission, the FBI faced a fundamental challenge: to transform its culture from a reactive posture, in which investigating criminal activity and developing cases for prosecution was paramount, into an intelligence operation designed to detect and disrupt terrorist activity before it occurs. Despite admirable efforts by Director Mueller, the transformation of the FBI is far from complete.

The obstacles to change at the FBI have been and remain significant. At the time of the attacks, the FBI had critical personnel shortages in nearly every area: agents with counterterrorism experience made up less than 15 percent of its total agent workforce;<sup>12</sup> it lacked any meaningful strategic analytical capability;<sup>13</sup> and it had fewer than 100 specialists in the priority languages of Arabic, Farsi, Pashto, and Urdu.<sup>14</sup> The FBI also remains imbued with a law-enforcement-first culture that is at odds with the skills and duties central to perform its intelligence function. In interviews with analysts who were discouraged by the pace of reform, the 9/11 Commission staff found that many analysts were still being significantly underutilized.<sup>15</sup>

Regardless of its mission or priorities, FBI management has been disturbingly unaware of how its directives are, or are not, implemented throughout the FBI bureaucracy. According to the Department of Justice's Inspector General, the FBI has never conducted an analysis of whether its resource allocation and its actual performance matched its investigative priorities.<sup>16</sup>

The disconnect between FBI management and its sprawling bureaucracy has meant that efforts to adapt the FBI to its newly emphasized intelligence mission have had little effect in the FBI's 56 field offices. The special agents in charge (SACs) who run the field offices have very little, if any, national security experience.<sup>17</sup> The 9/11 Commission found that "management in the field offices still can allocate people and resources to local concerns that diverge from the national security mission" and feared that this "system could revert to a focus on lower-priority criminal justice cases over national security requirements."<sup>18</sup>



## THE CENTRAL INTELLIGENCE AGENCY

Although there are indications that CIA leadership had some understanding of the threat posed by transnational terrorist networks prior to September 11, as well as the importance of the Intelligence Community working to protect against that threat, the CIA, like the FBI, has yet to undergo the necessary transformation to maximize its ability to increase America's security.

CIA Director George Tenet was among the first officials in the Intelligence Community to recognize the gravity of the threat posed by Osama bin Laden and the al Qaeda network. In a December 4, 1998 memorandum, Tenet wrote, "We are at war. I want no resources or people spared in this effort, either inside CIA or the Community."<sup>19</sup> However, Tenet was not able to shape the bureaucracy of the Intelligence Community to fight his war on terrorism. Consequently, senior CIA leadership failed to grasp the areas in which changes were needed. They lacked sufficient resources and detailed proposed expenditures. Furthermore, they needed organizational changes that would be linked to counterterrorism objectives.<sup>20</sup> Finally, they needed to create a feedback mechanism that would have alerted Tenet to instances in which priorities were not being addressed by appropriate action. Such a mechanism would likely have avoided the troubling conclusion of the 9/11 Commission that Tenet's "declaration of war" went unnoticed in much of the Intelligence Community.<sup>21</sup>

The CIA completed a strategic plan in December 2003. Although, the details of the plan are not publicly known, based on news reports, it appears to call for similar increases in personnel as the president's recent directive.<sup>22</sup> Press reports on the strategic plan and the president's directive beg serious questions regarding the level of communication between the Intelligence Community and the White House, as it appears that the president was unaware that the CIA has conducted its review, let alone that it had been completed a year earlier.<sup>23</sup>

## THE FBI'S INFORMATION TECHNOLOGY PROBLEM

Another critical component of the transformation of the FBI is the development and implementation of new Information Technology (IT) systems. The culture at the FBI has resisted technology upgrades that would bring the Bureau into the modern world of business function and efficiency. Not only do the FBI's deficiencies in this area make it more difficult to fulfill its new counterterrorism mission, it makes it much harder to attract and retain personnel from the private sector. The Government Accountability Office (GAO) has reported that the FBI has had five Chief Information Officers since 2003.<sup>24</sup>

Last summer, a panel of the National Research Council at the National Academies concluded that the FBI's efforts to modernize its Information Technology program "is not currently on a path to success." Additionally, the panel found that the impending rollout of the key aspect of the Trilogy program, the Virtual Case File System, "runs a very high risk" that it will cause "mission disruptive failures and further delays."<sup>25</sup> Despite such warnings, the FBI was unable to address the problems and it was forced to conclude that the Virtual Case File System was so riddled with problems that it had to be scrapped.<sup>26</sup> The FBI has spent \$581 million on IT upgrades since September 11, \$170 million on the Virtual Case File System alone, much of which now appears to have been rendered worthless.<sup>27</sup> The seriousness of the problem raises this issue to the level of presidential action.

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*In relation to its requirements, the FBI has less capacity to translate material than it did on September 11, 2001.*

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### Recruitment, Training, and the Pool of Available Personnel

Both management failings and personnel issues hinder the Intelligence Community's transformation into an effective and integrated counterterrorism force. Through no fault of those fulfilling such front-line responsibilities, the Intelligence Community remains poorly-staffed to deal with the threat at hand.

Although the September 11 attacks provoked a call to service in the country that produced an unprecedented surge in applications to the federal government, real challenges remain in transforming this into more effective Intelligence Community staffing. The FBI received more than 40,000 applications for its special agent vacancies, and 57,000 from aspiring analysts between February and September 2004.<sup>28</sup> According to testimony to Congress by then-Acting CIA Director John McLaughlin, the CIA has experienced a similar surge in applications—totaling between 3,000 and 6,000 per week.<sup>29</sup> A larger applicant pool, however, has not yet led to the Intelligence Community having personnel with the appropriate skills in sufficient numbers.

The FBI's special agent hiring practices, for example, remain stuck in the past. The qualities the FBI traditionally seeks in special agents—law enforcement experience, legal or accounting backgrounds, and/or military service—are poorly matched to its new mission. Although Director Mueller has asserted that the Bureau is now recruiting with an eye toward intelligence experience—including language specialists, regional experts, computer scientists, and life scientists<sup>30</sup>—FBI special agents still must be hired in one of five entry programs, none of which is intelligence.<sup>31</sup> The Applicant Information Booklet for special agents available on the FBI website was last revised in 1997.<sup>32</sup>

The FBI's analyst and linguist recruitment efforts do not encourage the conclusion that the Bureau has turned the corner towards truly transforming its personnel. The GAO recently reported that through June 2004, the FBI had added only a net of 197 analysts since September 11, 2001, approximately 20 percent of its analyst workforce.<sup>33</sup> The GAO also found that temporary staff reassignments remain necessary to investigate all counterterrorism leads and priorities.<sup>34</sup> Similarly, despite more than triple the funding and a large influx of applications, the FBI added a net 331 linguists to its staff and contract corps, a rise of only 37 percent.<sup>35</sup> That increase has been outpaced by the demand placed on such linguists. For example, audio intercepts in languages primarily associated with counterterrorism<sup>36</sup> increased during the same period by 45 percent and “nearly 24 percent of ongoing FISA [Foreign Intelligence Surveillance Act] counterintelligence and counterterrorism intercepts are not being monitored.”<sup>37</sup> In sum, in relation to its requirements, the FBI has less capacity to translate material than it did on September 11, 2001.

The CIA appears to be making strides to address its personnel deficiencies, although without nearly as much public data available as is for the FBI, it is difficult to assess its overall performance. As noted earlier, President Bush has directed the CIA to increase its operatives, analysts, and linguists by 50 percent. The CIA is turning out record numbers of graduates from training for the clandestine services—up from a low point of 12 in 1996—and it has increased its numbers of Arabic language specialists by 36 percent in the last year.<sup>38</sup> No figures are available for any increase in the number of analysts. While such an increase is commendable, it is not

clear that it is sufficient to handle the amount of new material that needs to be translated in the wake of enhanced collection post-9/11.

The inadequate language skills within the Intelligence Community are particularly troubling because internal analysis from before the September 11 attacks indicated that it lacked depth in this key area.<sup>39</sup> Yet no concerted effort has been made to significantly increase the pool of potential linguists. This failure is reflected in figures from the National Center for Education Statistics that show the United States graduated only 14 students with Bachelor's, Master's, or Doctoral degrees in Arabic in 2002, the last year figures are available, representing 0.08 percent of the total degrees obtained in foreign languages that year.<sup>40</sup>

#### SECURITY CLEARANCES: AN OBSTACLE TO OBTAINING CRITICAL SKILLS

Some of the personnel deficiencies that undermine the effectiveness of the Intelligence Community are rooted in the burdensome process of obtaining a security clearance for access to classified material. The protracted clearance process has become an impediment to attracting high-quality people into government service. The security clearance process is mired by redundancies, inadequate resources, and inflexible attitudes toward applicants with family living abroad. Indeed, 9/11 Commissioner Fred Fielding said that the clearance process is making "it so difficult for people to come into government that the very laws that are supposed to carry out the will of the people become the very instruments to inhibit the people from having the very best come in."<sup>41</sup> Mark Bullock of the FBI told Congress that "we're having the most difficulty hiring the agents with the language skills, barring Spanish: Arabic, Urdu, Russian, and Chinese. We still have difficulties finding the individuals with those skills that can get through our process and overcome the security issues with having family members that live abroad."<sup>42</sup>

In addition, a 1995 Executive Order that established a common set of standards for the clearance process has failed to have the desired harmonizing effect.<sup>43</sup> The recently passed intelligence reform legislation takes a step in the right direction by authorizing the president to designate one entity to conduct and oversee the clearance process and by calling for a dramatic reduction in the length of the process. It also goes a step further than the 1995 Executive Order and creates a presumption of reciprocity for security clearances across the Intelligence Community. Unfortunately, the legislation contains several exceptions that could limit the effectiveness of this provision,<sup>44</sup> and it does not include any provisions to address the issues raised by Mr. Bullock.

#### Lack of Investment in Intelligence Personnel

Among other issues, the Intelligence Community remains poorly structured and ill-prepared to effectively retain and nurture its personnel. These problems are particularly pronounced in the FBI, but extend to the CIA and other corners of the Intelligence Community. The problems in the FBI stem from its historical failure to value intelligence work. Those of the CIA appear to be a function of neglect.

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*The first step towards establishing a professional intelligence corps is to dramatically improve the management of personnel currently employed in the Intelligence Community to maximize their performance and ensure that the right people are in the right jobs.*

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*Identifying critical skill areas guided by long-range threat assessments and feeding that information back into resource allocation for education, recruiting, and training programs is vital to prevent a repeat of current personnel shortages.*

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The FBI's career ladder for intelligence personnel is limited, placing the Bureau at a comparative disadvantage with other agencies in the Intelligence Community and making retention of talented intelligence operatives difficult. For example, both the National Security Agency and the CIA have long had positions at the top grade, General Schedule Grade 15 (GS-15), and in the Senior Executive Service (SES) available to intelligence personnel. Although the FBI has declared that it recognizes the need to create nonsupervisory senior level positions for analysts, both the Congressional Research Service and the GAO have recently reported that the Bureau does not currently have any such positions above GS-14.<sup>45</sup>

The FBI is taking steps to improve its intelligence collection and analysis resources,<sup>46</sup> but there is reason to be skeptical that these changes will be institutionalized and last beyond the current leadership. As the Congressional Research Service has reported, "Twice before—in 1998, and then again in 1999—the FBI embarked on almost identical efforts to establish intelligence as a priority, and to strengthen its intelligence program."<sup>47</sup> Both efforts were failures. The intelligence reform legislation is unlikely to significantly improve the plight of intelligence personnel within the FBI. Although it included provisions aimed at establishing an intelligence career service at the FBI, it leaves the implementation primarily to the Bureau, it imposes no specific oversight mechanisms or reporting requirements, and it imposes no penalty for failure.<sup>48</sup>

Similarly, although the FBI has also completed the development of a human capital management plan, as of March 2004, it had yet to hire senior personnel to direct such planning.<sup>49</sup> The Bureau also continues to rely on a pass/fail system to evaluate its employees' performance that, according to a GAO report, "does not provide enough meaningful information and dispersion in ratings to recognize and reward top performers, help everyone attain their maximum potential, and deal with poor performers."<sup>50</sup>

Exacerbating the intelligence personnel shortcomings at the FBI is the simultaneous graying and greening of its workforce, a phenomenon that is occurring throughout the Intelligence Community. Diminishing resources forced agencies to cut back on hiring during the 1990s. Older staff is approaching the retirement age, and with the next layer of staff missing because of the reductions in hiring, the recent influx of large numbers of new recruits with much less experience is dramatically altering the composition of the Intelligence Community workforce. For example, a 2001 study of the FBI found that 25 percent of special agents would be eligible to retire by 2005, and that 80 percent of senior executives were eligible to retire at the time of the study.<sup>51</sup> The seriousness of the problem is demonstrated by the fact that the four principal deputies that Director Mueller appointed to top counterterrorism and counterintelligence positions in the wake of 9/11 had all left the FBI by December 2003.<sup>52</sup>

The Intelligence Community also does not provide the kind of continuing education and leadership training programs to its employees that the U.S. military does. The Department of Defense operates the Joint Military Intelligence College, where officers can obtain a Master's

degree in intelligence analysis. Additionally, a senior military officer can spend between ten and twenty percent of his or her career in continuing education or leadership training programs, such as the U.S. Army War College. Such extensive professional development opportunities simply do not exist within the Intelligence Community despite some nascent efforts.<sup>53</sup> The massive influx of new employees must be properly trained and its older personnel must be provided with mid-career opportunities to update their skills.

### Long-Range Threat Analysis and Personnel Planning

The Intelligence Community has serious resource and personnel deficiencies that hamper its attempts to adequately counter the immediate threat of catastrophic terrorism. This predicament exists primarily because policymakers failed to identify and adapt to the requirements of the changing threat environment after the Cold War and realign policies to ensure a workforce equipped to counter emerging threats.

This failure resulted from several factors, including a general reduction of resources immediately after the Cold War. Another critical aspect that has contributed to these deficiencies was the lack of a coordinated effort to utilize the Intelligence Community's long-range threat assessments as a guide to personnel decisions.

The Intelligence Community uses warning analysis to communicate information on threats to policymakers to allow them to manage or deter it. The National Intelligence Officer for Warning and the National Warning Staff officially came into being after a string of failures led Congress to recommend their establishment in the 1970s.<sup>54</sup> For much of its existence the National Warning Staff focused on monitoring Soviet military buildups and actions by others of the world's largest militaries. After the Cold War, warning analysts shifted focus and did recognize the potential for catastrophic attacks on the homeland, but were not able to prioritize it against other threats.<sup>55</sup>

The current warning mission has been diluted because it focuses too often on answering policymakers' queries on immediate threats.<sup>56</sup> Moreover, there does not appear to be a dedicated mechanism to feed information on changing threats from warning analysts into long-term strategic policy planning by the National Security Council (NSC), Congress, and the Intelligence Community. As a result, warning analysis generally does not, "affect Intelligence Community priorities and resources," according to John Gannon, a former Assistant Director of Central Intelligence for Analysis and Production.<sup>57</sup> This situation contributes to the U.S. government's difficulty in identifying and adapting to a changing threat environment.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

To maximize its ability to protect the nation, the Intelligence Community must radically improve how it attracts, utilizes, trains, and retains its personnel. The president should work with the Congress to implement the following steps to create a professional intelligence corps that can meet the challenges of today's threats and identify and adapt to those of tomorrow.

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*We must develop a strategy that creates a partnership between the U.S. government and Arab and Muslim citizens and immigrants in the pursuit of our common goal: the prevention of terrorist acts.*

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## Personnel Management

The first step towards establishing a professional intelligence corps is to dramatically improve the management of personnel currently employed in the Intelligence Community in order to maximize their performance and ensure that the right people are in the right jobs.

### INSTITUTIONALIZE STRATEGIC PERSONNEL PLANNING IN THE INTELLIGENCE COMMUNITY

The president should instruct the Director of National Intelligence to adopt a management system that maximizes the Community's ability to match personnel decisions with resource needs. A crucial first step to establishing such a system and addressing the uneven leadership and limited strategic personnel planning would be the appointment of a Chief Human Capital Officer for the Intelligence Community to formulate and implement a strategic human capital plan.<sup>58</sup> The Chief Human Capital Officer, in turn, should:<sup>59</sup>

- Identify resource needs and develop programs to educate, recruit, train, and reward personnel with critical skills.<sup>60</sup>
- Develop data-driven performance management systems to assist leaders to manage risk by spotlighting critical skill shortages and identifying areas for agency improvement.
- Align individual performance with agency goals by rewarding employees and units for applying organizational goals.

Elements of such a system are contained in the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>61</sup> For example, the concept of “jointness” has been identified by many experts as an important tool to improve operations across the Intelligence Community—including the 9/11 Commission and the report of the Markle Foundation, released in October 2002.<sup>62</sup> The Goldwater-Nichols Department of Defense Reorganization Act of 1986 enshrined the concept of “jointness” in the ethos of the military, where the relative strengths of each service branch would complement each other to make the whole greater than the sum of its parts.

The new law authorizes the Director of National Intelligence to establish positions specifically designed to involve service in two or more agencies within the Intelligence Community during the course of a career, and to provide rewards for undertaking missions with planning or analysis involving two or more agencies of the Intelligence Community.

### INCORPORATE LONG-RANGE THREAT ASSESSMENTS INTO STRATEGIC PERSONNEL PLANNING

Strategic resource assessments have determined that the Intelligence Community's most pressing needs are for language and area specialist personnel. Those needs drive our recommendations below to invest in education programs in order to produce more linguists and area specialists and to reexamine the process for obtaining security clearances.

Beyond its immediate needs, the Intelligence Community and the policymakers who rely on its work cannot lose sight of anticipating the Community's long-term needs. The Intelligence Community should conduct a review of resource requirements based on long-range warning analysis every five years. Identifying critical skill areas guided by long-range threat assessments and feeding that information back into resource allocation for education, recruiting, and training programs is vital to prevent a repeat of current personnel shortages.

As a first step in this process, the Intelligence Community should conduct a review of its analytical capability aimed at establishing a distinct long-range warning capability separate from current intelligence analysis.<sup>63</sup> The Intelligence Community must institutionalize a capacity to look beyond the horizon for emerging challenges and align its resources accordingly.<sup>64</sup> To ensure the Intelligence Community establishes this capacity, the National Security Council and congressional oversight committees should require annual reports from long-range analysts on the changing threat environment.<sup>65</sup>

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*The hard work involved in developing a professional intelligence corps . . . can all be wasted if not enough effort is invested to properly promote and retain these employees.*

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### Expanding the Pool of Available Personnel

Building a professional intelligence corps requires investment in education programs to teach critical skills. It also requires examining policies that make it more difficult to recruit potential employees who possess needed skills, and adjusting them, as appropriate.

#### MAKE EDUCATION A NATIONAL SECURITY IMPERATIVE

The Hart-Rudman Commission reported in February 2001 that “the capacity of America’s educational system to create a 21<sup>st</sup> century workforce second to none in the world is a national security issue of the first order. As things stand, this country is forfeiting that capacity.”<sup>66</sup> As we noted earlier, the American education system has not produced sufficient numbers of language or area specialists. The Hart-Rudman Commission highlighted critical shortages in teachers as well.<sup>67</sup> These problems are cumulative, as current shortages spawn more acute shortages in the future.

The David L. Boren National Security Education Act of 1991 created the National Security Education Program (NSEP), which provides scholarships and fellowships to undergraduate and graduate students to study languages, areas studies, and other national security related fields. The Act also provides grants to universities to improve the provision of education in these areas where deficiencies exist. The NSEP is funded by the National Security Education Trust Fund. An \$8,000,000 appropriation was authorized for the Trust Fund in the Intelligence Authorization Act for Fiscal Year 2005.<sup>68</sup>

The Intelligence Reform and Terrorism Prevention Act of 2004 established the Intelligence Community Scholarship Program.<sup>69</sup> As a return for each year of assistance, students would commit to a two-year term of service as an employee of an agency in the Intelligence Community. This scholarship program will be under the control of Director of National Intelligence, and while the NSEP is designed to service the broad category of national security, this program is specifically designed to feed agencies in the Intelligence Community.

Congress should significantly increase the funding to the Trust Fund. Furthermore, it should add a scholarship program to the NSEP for U.S. persons who possess native fluency in critical languages and expand the National Flagship Initiative, which provides grants to universities that adopt innovative approaches to language and area studies.

The Intelligence Community and Congress should work together to incorporate the results of the five-year reviews of long-range threats into the funding priorities for Intelligence Community Scholarship Program to ensure that it will be able to draw on a large pool of applicants with the appropriate skills.

#### IMPROVE HIRING IN CRITICAL SKILL AREAS

The United States is a country of immigrants. As a result, we have an abundance of first- or second-generation Americans with close family relations that still live outside our borders.<sup>70</sup> We must maximize the participation of this large group of Americans, many of whom are eager to work in intelligence-related fields. While employing more personnel that have immediate family members living abroad may increase the risk to the security of classified information, this risk can be managed and minimized by the kind of thorough investigation that is elemental to the clearance process. Properly managed, this risk is dwarfed in comparison with the risk of being unable to translate intercepted material due to the lack of qualified linguists.

The president should appoint a commission to examine options for facilitating the hiring and clearing of prospective personnel who are first- and second-generation Americans who have lived abroad, or who have family members living abroad.<sup>71</sup>

#### IMPROVE RELATIONS WITH AND RECRUIT INDIVIDUALS FROM ARAB-AMERICAN COMMUNITIES

Both the FBI and CIA have experienced difficulties in recruiting assets in Muslim, Arab, and Arab-American communities in the wake of domestic actions in the war on terrorism and the war in Iraq. The challenge for our government is to be simultaneously aggressive in pursuit of leads and terrorist suspects, yet create and maintain positive working relationships with the communities that are often on the receiving end of those aggressive tactics.

The solution to this challenge lies in what many might view as an odd pairing: combining the principles of the civil liberties and civil rights communities with the requirements of law enforcement and intelligence agencies. It is simply bad policy to expect the cooperation of people affected by the actions of the government that create resentment and fear in those communities.

We must develop a strategy that creates a partnership between the U.S. government and Arab and Muslim citizens and immigrants in the pursuit of our common goal: the prevention of terrorist acts. There are instances since September 11<sup>th</sup> when this type of effort proved successful, but only at the local level.

In December 2001, the Justice Department launched a project to interview nearly 5,000 Arab and Muslim recent immigrants. Since the targets were determined exclusively by national origin, in many areas this instilled the belief that all Muslims were suspects. This approach was unnecessary and counterproductive and some law enforcement officers felt it had a negative impact on community relations.<sup>72</sup>

The Eastern District of Michigan, however, was one of two districts that contacted those to be interviewed by letter rather than arriving unannounced at a place of work or residence.<sup>73</sup> The interviews were conducted in a “friendly and professional” manner and those interviewed were “allowed to bring lawyers or other guests and to tape-record the conversations.”<sup>74</sup> These factors



contributed to this district, which includes Detroit, conducting a higher number of interviews than any of the other 93 districts.<sup>75</sup>

The attorney general should appoint a commission with representatives from affected communities and law enforcement and intelligence officials to formulate a strategy to enhance the cooperation between Arab-American and Muslim communities and the government. The commission's recommendations must go beyond simple public relations gestures and include confidence-building measures and practical steps to improve relations.

#### CREATE AN INTELLIGENCE COMMUNITY RESERVE SERVICE

An effective Intelligence Community is one that can surge to meet the demands of a crisis or imminent threat while maintaining its ability to examine the horizon for emerging challenges. Creating the necessary surge capacity requires the formation of a meaningful Intelligence Community Reserve Service.

Although the Intelligence Reform and Terrorism Prevention Act of 2004 authorized a National Intelligence Reserve Corps, its implementation is entirely at the discretion of the Director of National Intelligence.<sup>76</sup> The president should instruct the DNI to work with Congress to establish a robust Intelligence Community Reserve Service. Such a service would enable the Community to retain a capability in critical areas when employees retire or resign. Furthermore, it would provide a dedicated reserve similar to the military's where individuals are recruited and trained specifically for the reserve force.

This dedicated reserve component could be fed by a program similar to the military's Reserve Officer Training Corps (ROTC), in which potential reservists receive stipends in exchange for periods of training and active duty.<sup>77</sup> Reservists would be required to maintain security clearances and receive regular training to ensure that their skills are current. A reserve corps would also enable the Intelligence Community to draw on the expertise of people outside of government service.

#### Training and "Jointness"

The Intelligence Community must take a more strategic approach to training its personnel. Initial and mid-career training present ideal opportunities to bring together employees from across the Intelligence Community, impart common practices, build working relationships, and break down barriers between agencies. Joint training can help instill in personnel the belief that they are a part of a professional intelligence corps rather than merely employees of an individual agency isolated from others in the Intelligence Community.

#### IMPROVE THE TRAINING OF INTELLIGENCE COLLECTORS AND ANALYSTS

The CIA operates its own university to train its intelligence analysts. In 2000, it also started the Sherman Kent School of Intelligence to impart analyst tradecraft. Although it is difficult to evaluate much of these activities in detail because of classification issues, the CIA devotes significant resources to training its new employees on intelligence collection and analysis techniques. The Intelligence Community, however, does not make the same long-term commitment to continuing training and professional development that is an established aspect of a military career.

The status of the FBI's training program is more troubling. Although it has recently added a College of Analytical Studies to its training facility at Quantico, Virginia, its curriculum has been largely devoted to orienting the new analysts to FBI procedures and guidelines. The FBI is providing its new agents more intelligence training, though the time allotted to counterintelligence and counterterrorism training still only represents a meager 11.8 percent, or 80 hours, of total new agent training.<sup>78</sup>

These separate structures for training personnel within the Intelligence Community create additional barriers to cooperation and collaboration among agencies. The Intelligence Community should create a National Intelligence Academy to train analysts community-wide.<sup>79</sup> Section 1042 of the Intelligence Reform and Terrorism Prevention Act of 2004 addresses this issue, albeit in very brief terms. It calls for the Director of National Intelligence to “establish an integrated framework that brings together the educational components of the intelligence community in order to promote a more effective and productive intelligence community through cross disciplinary education and joint training.”<sup>80</sup>

The benefits of establishing a joint training center go beyond imparting common methods. Relationships can be established that reach across agency lines and facilitate collaboration and cooperative planning. Joint training, however, would not replace the training programs run by the individual intelligence agencies that impart methods that are unique to that agency.

#### MANAGEMENT TRAINING WITH MANDATORY ROTATIONS ACROSS THE INTELLIGENCE COMMUNITY

It is typical for political appointees to come to Washington without much background or experience in management.<sup>81</sup> Nonpolitical senior managers who have been promoted through the ranks of Intelligence Community agencies have often risen based on their performance in nonmanagement oriented tasks.

The training efforts of individual agencies should be standardized across the Intelligence Community and all senior managers should rotate through community-wide management training to ensure consistent application of organizational strategies. Portions of this program could be included in the curriculum at the proposed National Intelligence Academy. Joint management training would also contribute to the goal of establishing the sense of “jointness” within the Intelligence Community.<sup>82</sup>

#### TRAINING FOR INTELLIGENCE CONSUMERS

The government invests significant resources to determine whether an official can be trusted to receive classified intelligence information, yet it devotes almost no energy to ensure that the official has the skills necessary to interpret that information properly. The NSC should oversee a program that requires all intelligence consumers to undergo training on how to interpret and evaluate material received from the Intelligence Community. For example, new employees in the Executive Office of the President should meet a series of requirements when first taking their positions. Training in the proper use of intelligence should be one of those requirements.

## Valuing and Retaining Personnel

The hard work involved in developing a professional intelligence corps—identifying critical skill areas, maximizing the pool of prospective employees with those skills, recruiting these individuals, and training and building working relationships among employees across the Intelligence Community—can all be wasted if not enough effort is invested to properly promote and retain these employees. This area has been a critical failure of the FBI—and the next two recommendations are aimed directly at the Bureau. The entire Intelligence Community would benefit from the third recommendation: the establishment of a mechanism to draw on expertise outside of the Community.

### INSTITUTIONALIZE REFORM IN FBI FIELD OFFICES

Traditionally, special agents in charge (SACs) have held close to absolute authority in the FBI's field offices. The overwhelming majority of SACs do not have national security experience and have been slow to implement reform initiatives instituted by Director Mueller.<sup>83</sup> Successive reform efforts aimed at giving higher priority to intelligence functions at the FBI have failed and have not adequately penetrated the deeply ingrained law enforcement culture of the Bureau and its field offices. The Field Intelligence Groups that have been created have not had the requisite impact on field intelligence operations. Compounding the problem, the intelligence reform legislation hardly addresses issues in the field offices, and then only in the context of the Field Intelligence Groups.<sup>84</sup> We cannot afford to fail again.

Director Mueller should appoint a Special Agent in Charge for Intelligence (SAC-I) for each of the FBI's largest 15 field offices.<sup>85</sup> The SAC-I would be responsible for institutionalizing the intelligence function in these field offices. It is important that this new position both carry the Special Agent in Charge title, and the Intelligence title, to clearly communicate the position's standing in the field offices and the importance of the intelligence function in the FBI's mission. Having equal standing with the traditional SAC in the field is essential to avoid the redirection of intelligence personnel and resources to meet short-term law enforcement needs. Furthermore, the SAC-I would have equal and direct access to senior management at FBI headquarters.

### ESTABLISH A CREDIBLE CAREER TRACK FOR INTELLIGENCE PERSONNEL IN THE FBI

The FBI has stated a commitment to developing a Career Intelligence Service but has tried and failed repeatedly in recent years to make intelligence a priority.<sup>86</sup> The Intelligence Reform and Terrorism Prevention Act of 2004 calls for the establishment of a National Intelligence Workforce in the FBI, but the Act's requirements are very general, and leave implementation entirely up to the FBI.<sup>87</sup>

Several of our other recommendations, if fully implemented, would assist the FBI in establishing a credible career track for its intelligence personnel: strategic human capital planning; appointment of SAC-Is in the field offices; and improved training of collectors and analysts.

To further the cause of creating an intelligence career path, the FBI should formalize a higher pay band for intelligence personnel to the GS-15 grade level and fast-track agents into priority offices instead of following its plan to first place intelligence agents in one of the 41 smaller field offices. Finally, in light of past FBI failures in this area, more vigilant congressional oversight of efforts to implement this reform is essential.

## ENDNOTES

<sup>1</sup> John B. McMaster, *History of the People of the United States*, v. 2, at 586 (1919).

<sup>2</sup> 50 U.S.C § 401a(4).

<sup>3</sup> See Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 §§ 1011-1020, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004).

<sup>4</sup> The Government Accountability Office has produced a series of reports on the importance of human capital management for organizational change in the federal government, beginning with *A Model for Strategic Human Capital Management*, March 2002, *available at* <http://www.gao.gov/new.items/d02373sp.pdf> (last viewed Dec. 22, 2004). It has also consistently monitored the human capital issues at the Federal Bureau of Investigation. Those reports will be referenced later in this chapter. We are also pleased to note that the report of the Commission on Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (hereafter referred to as WMD Commission), released March 31, 2005, while this paper was in post-production, examined personnel issues within the Intelligence Community and made several recommendations that closely track our own. The report is *available at* <http://www.wmd.gov/report/> (last viewed Mar. 31, 2005).

<sup>5</sup> Douglas Jehl, *CIA Churning Continues as 2 Top Officials Resign*, *N.Y. Times*, Nov. 15, 2004, at A16.

<sup>6</sup> See e.g., Douglas Jehl, *CIA Report Finds Its Officials Failed in Pre-9/11 Efforts*, *N.Y. Times*, Jan. 7, 2005, at A1.

<sup>7</sup> President George W. Bush, “Strengthening Central Intelligence Agency Capabilities,” Nov. 18, 2004 (made public Nov. 23), *available at* <http://www.usembassy.ro/WF/300/eur308htm> (last viewed Jan. 11, 2005).

<sup>8</sup> Subsequent to the original release of this report in April 2005, the WMD Commission released a memorandum in which it analyzed the CIA response to President Bush’s memorandum and found that “too little has changed as a result” of the memo, and that the CIA plan, submitted in February 2005, “generally recites institutional aspirations that are well-known and most of which are contained in previous CIA plans.” Commission on Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Mar. 29, 2005, *available at* <http://www.wmd.gov/report/fbicia.pdf> (last viewed on August 12, 2005).

<sup>9</sup> President George W. Bush, “Further Strengthening Federal Bureau of Investigation Capabilities,” Nov. 23, 2004, *available at* <http://www.fas.org/irp/news/2004/11/wh112304ag.html> (last viewed Jan. 11, 2005).

<sup>10</sup> National Commission on Terrorist Attacks Upon the United States, *Staff Statement #9: Law Enforcement, Counterterrorism, and Intelligence Collection in the United States Prior to 9/11*, at 5-7, Apr. 14, 2004, *available at* [http://www.9-11commission.gov/staff\\_statements/staff\\_statement\\_9.pdf](http://www.9-11commission.gov/staff_statements/staff_statement_9.pdf) (last viewed Dec. 22, 2004)(discussing past failed attempts at reform).

<sup>11</sup> The WMD Commission memorandum referenced above also analyzed the FBI’s response and found a “business as usual” approach that is “inconsistent with the core recommendation of the 9/11 Commission regarding the FBI” and “fails to create a truly specialized and integrated national security workforce” as the President’s memo requires. Commission on Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, March 29, 2005, *available at* <http://www.wmd.gov/report/fbicia.pdf> (last viewed on August 12, 2005).

<sup>12</sup> Statement of David M. Walker, Comptroller General of the United States, “FBI Reorganization,” before the House Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary, June 21, 2002, *available at* <http://www.gao.gov/new.items/d02865t.pdf> (last viewed Dec. 22, 2004).

<sup>13</sup> National Commission on Terrorist Attacks Upon the United States, *Staff Statement #12: Reforming Law Enforcement, Counterterrorism, and Intelligence Collection in the United States*, at 5-6, Apr. 14, 2004, *available at* [http://www.9-11commission.gov/staff\\_statements/staff\\_statement\\_12.pdf](http://www.9-11commission.gov/staff_statements/staff_statement_12.pdf) (last viewed Dec. 22, 2004).

<sup>14</sup> Department of Justice Inspector General, *The Federal Bureau of Investigation’s Foreign Language Program, Audit Report 04-25*, at v, July 2004, *available at* <http://www.usdoj.gov/oig/audit/FBI/0425/final.pdf> (last viewed Dec. 22, 2004).

<sup>15</sup> National Commission on Terrorist Attacks Upon the United States, *Staff Statement #12: Reforming Law Enforcement, Counterterrorism, and Intelligence Collection in the United States*, at 5-6, Apr. 14, 2004, *available at* [http://www.9-11commission.gov/staff\\_statements/staff\\_statement\\_12.pdf](http://www.9-11commission.gov/staff_statements/staff_statement_12.pdf) (last viewed Dec. 22, 2004).

<sup>16</sup> Department of Justice Inspector General, *Federal Bureau of Investigation Casework and Human Resource Allocation, Audit Report 03-37*, at 9, September 2003, *available at* <http://www.usdoj.gov/oig/audit/FBI/0337/final.pdf> (last viewed Dec. 22, 2004).

<sup>17</sup> Congressional Research Service, *FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress*, at 21, Apr. 6, 2004 (updated Aug. 4, 2004) *available at* <http://www.fas.org/irp/crs/RL32336.pdf> (last viewed Jan. 5, 2005).

- <sup>18</sup> National Commission on Terrorist Attacks Upon the United States, Final Report, at 425, (2004).
- <sup>19</sup> National Commission on Terrorist Attacks Upon the United States, Staff Statement #11: The Performance of the Intelligence Community, at 10, Apr. 14, 2004, *available at* [http://www.9-11.commission.gov/staff\\_statements/staff\\_statement\\_11.pdf](http://www.9-11.commission.gov/staff_statements/staff_statement_11.pdf) (last viewed Dec. 22, 2004).
- <sup>20</sup> *Ibid* at 11. *See also* Douglas Jehl, *CIA Report Finds Its Officials Failed in Pre-9/11 Efforts*, N.Y. Times, Jan. 7, 2005, at A1.
- <sup>21</sup> *Ibid* at 10.
- <sup>22</sup> Walter Pincus & Dana Priest, *Bush Orders CIA to Hire More Spies*, Washington Post, Nov. 24, 2003, at A4.
- <sup>23</sup> *Ibid*.
- <sup>24</sup> Statement of Laurie E. Ekstrand, Director Homeland Security and Justice Issues, Government Accountability Office, “Transformation of the Federal Bureau of Investigation,” before the Senate Appropriations Subcommittee on Justice, State, Commerce and the Judiciary, Mar. 23, 2004, *available at* [http://www.globalsecurity.org/security/library/congress/2004\\_h/040323-ekstrand-hite.htm](http://www.globalsecurity.org/security/library/congress/2004_h/040323-ekstrand-hite.htm) (last viewed Dec. 22, 2004).
- <sup>25</sup> Computer Science and Telecommunications Board, National Research Council, A Review of the FBI’s Trilogy Information Technology Modernization Program, at 1, June 2004, *available at* <http://books.nap.edu/html/FBI/0309092248.pdf> (last viewed Dec. 22, 2004). The National Research Council (NRC) issued a letter following a briefing from FBI officials in response to the report. That briefing reassured members of the NRC, but the NRC noted “that the FBI has many remaining challenges before it in the IT area and that it will take some time to see the results from the many IT plans that the FBI has recently put into place.” Letter to FBI Director Mueller from James C. McGroddy, June 7, 2004, at 1, *available at* <http://books.nap.edu/books/NI000561/html/1.html> (last viewed Dec. 22, 2004).
- <sup>26</sup> Eric Lichtblau, *FBI Ends a Faltering Effort to Overhaul Computer Software*, N.Y. Times, Mar. 8, 2005, at 16.
- <sup>27</sup> Richard B. Schmitt, *New FBI Software May Be Unusable*, L.A. Times, Jan. 13, 2005, at 1.
- <sup>28</sup> Statement of Mark Bullock, Assistant Director of Administrative Services, FBI, “9/11 Commission Human Capital Recommendations: A Critical Element of Reform,” before the Senate Governmental Affairs Subcommittee on Government Management, the Federal Workforce, and the District of Columbia, Sept. 14, 2004, *available at* [http://www.senate.gov/-gov\\_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=203&WitnessID=732](http://www.senate.gov/-gov_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=203&WitnessID=732) (last viewed Jan. 5, 2005).
- <sup>29</sup> Statement of John E. McLaughlin, Acting Director CIA, “Building an Agile Intelligence Community to Fight Terrorism and Emerging Threats,” before the Senate Government Affairs Committee, Sept. 8, 2004, *available at* [http://hsgac.senate.gov/\\_files/090804mclaughlin4843.pdf](http://hsgac.senate.gov/_files/090804mclaughlin4843.pdf) (last viewed Jan. 5, 2005).
- <sup>30</sup> Statement of FBI Director Robert S. Mueller, “Building an Agile Intelligence Community to Fight Terrorism and Emerging Threats,” before the Senate Governmental Affairs Committees, Sept. 8, 2004, *available at* [http://hsgac.senate.gov/\\_files/090804mueller3300.pdf](http://hsgac.senate.gov/_files/090804mueller3300.pdf) (last viewed Jan. 5, 2005).
- <sup>31</sup> Congressional Research Service, FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress, at 13 n.52, Apr. 6, 2004 (updated Aug. 4, 2004) *available at* <http://www.fas.org/irp/crs/RL32336.pdf> (last viewed Jan. 5, 2005).
- <sup>32</sup> FBI Special Agent Selection Process, Applicant Information Booklet, *available at* <https://www.fbijobs.com/general.htm> (last viewed Dec. 22, 2004).
- <sup>33</sup> Statement of Laurie E. Ekstrand, Director Homeland Security and Justice Issues, Government Accountability Office, “Oversight of FBI Transformation,” before the Senate Appropriations Subcommittee on Justice, State, Commerce and the Judiciary, at 5, June 3, 2004, *available at* <http://www.gao.gov/new.items/d04817t.pdf> (last viewed Dec. 22, 2004).
- <sup>34</sup> *Ibid* at 4.
- <sup>35</sup> Department of Justice Inspector General, The Federal Bureau of Investigation’s Foreign Language Program, Audit Report 04-25, at viii (in footnote 11), July 2004, *available at* <http://www.usdoj.gov/oig/audit/FBI/0425/final.pdf> (last viewed Dec. 22, 2004).
- <sup>36</sup> The DOJ Inspector General described these as Arabic, Farsi, Urdu, and Pashto. *Ibid* at vi.
- <sup>37</sup> *Ibid* at viii.
- <sup>38</sup> Statement of John E. McLaughlin, Acting Director CIA, “Building an Agile Intelligence Community to Fight Terrorism and Emerging Threats,” before the Senate Government Affairs Committee, Sept. 8, 2004, *available at* [http://hsgac.senate.gov/\\_files/090804mclaughlin4843.pdf](http://hsgac.senate.gov/_files/090804mclaughlin4843.pdf) (last viewed Jan. 5, 2005).

- <sup>39</sup> National Intelligence Production Board, Strategic Investment Plan for Intelligence Community Analysis, at 12, February 2001, *available at* [http://www.cia.gov/cia/reports/unclass\\_sip/UnclasSIP.pdf](http://www.cia.gov/cia/reports/unclass_sip/UnclasSIP.pdf) (last viewed Dec. 22, 2004).
- <sup>40</sup> Congressional Research Service, Requirements for Linguists in Government Agencies, at 8, Sept. 2, 2004, *available at* <http://www.fas.org/irp/crs/RL32557.pdf> (last viewed Mar. 2, 2005).
- <sup>41</sup> Statement of Fred Fielding, 9/11 Commissioner, “9/11 Commission Human Capital Recommendations: A Critical Element of Reform,” before the Senate Governmental Affairs Subcommittee on Government Management, the Federal Workforce, and the District of Columbia, Sept. 14, 2004, *prepared statement available at* [http://www.senate.gov/-gov\\_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=203&WitnessID=730](http://www.senate.gov/-gov_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=203&WitnessID=730) (last viewed Jan. 5, 2005).
- <sup>42</sup> Federal Document Clearing House Political Transcripts, “9/11 Commission Human Capital Recommendations: A Critical Element of Reform,” Hearing of the Senate Governmental Affairs Subcommittee on Government Management, the Federal Workforce, and the District of Columbia, Sept. 14, 2004.
- <sup>43</sup> Executive Order 12968, Access to Classified Information, Aug. 4, 1995, *available at* <http://www.fas.org/sgp/clinton/eo12968.html> (last viewed Mar. 2, 2005).
- <sup>44</sup> See Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 3001, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004). The law grants broad authority to the head of a new entity that would be responsible for all security clearances to add on additional requirements for certain investigations or agencies (§ 3001(d)(3B)). Additionally, the law would allow the head of the new entity to disallow the reciprocity of certain security clearances (§ 3001(d)(5)).
- <sup>45</sup> Statement of J. Christopher Mihm, Managing Director Strategic Issues, Government Accountability Office, “9/11 Commission Human Capital Recommendations: A Critical Element of Reform,” before the Senate Governmental Affairs Subcommittee on Government Management, the Federal Workforce, and the District of Columbia, Sept. 14, 2004, *prepared statement available at* [http://hsgac.senate.gov/\\_files/091404Mihm5549.pdf](http://hsgac.senate.gov/_files/091404Mihm5549.pdf) (last viewed Jan. 5, 2005); *see also* Congressional Research Service, FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress, at 13 & 29, Apr. 6, 2004 (updated Aug. 4, 2004), *available at* <http://www.fas.org/irp/crs/RL32336.pdf> (last viewed Jan. 5, 2005).
- <sup>46</sup> Director Mueller established the position of Executive Assistant Director for Intelligence and appointed Maureen Baginski, who has extensive experience in the Intelligence Community for the job. According to the staff of the 9/11 Commission, she directed each field office to establish a Field Intelligence Group that would manage intelligence operations. National Commission on Terrorist Attacks Upon the United States, Staff Statement #12: Reforming Law Enforcement, Counterterrorism, and Intelligence Collection in the United States, at 5, Apr. 14, 2004, *available at* [http://www.9-11commission.gov/staff\\_statements/staff\\_statement\\_12.pdf](http://www.9-11commission.gov/staff_statements/staff_statement_12.pdf) (last viewed Dec. 22, 2004).
- <sup>47</sup> Congressional Research Service, FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress, at 53, Apr. 6, 2004.
- <sup>48</sup> See Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 2001(c) *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004).
- <sup>49</sup> Statement of Laurie E. Ekstrand, Director Homeland Security and Justice Issues, Government Accountability Office, “Transformation of the Federal Bureau of Investigation,” before the Senate Appropriations Subcommittee on Justice, State, Commerce and the Judiciary, Mar. 23, 2004, *available at* [http://www.globalsecurity.org/security/library/congress/2004\\_h/040323-ekstrand-hite.htm](http://www.globalsecurity.org/security/library/congress/2004_h/040323-ekstrand-hite.htm) (last viewed Dec. 22, 2004).
- <sup>50</sup> Government Accountability Office, FBI Reorganization: Progress Made in Efforts to Transform, but Major Challenges Continue, at 4, June 18, 2003, *available at* <http://www.gao.gov/new.items/d03759t.pdf> (last viewed Dec. 22, 2004).
- <sup>51</sup> Statement of David M. Walker, Comptroller General of the United States, “FBI Reorganization,” before the House Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary, at 7, June 21, 2002, *available at* <http://www.gao.gov/new.items/d02865t.pdf> (last viewed Dec. 22, 2004).
- <sup>52</sup> Rebecca Carr, Exodus of Senior Agents Creates FBI ‘Brain Drain,’ Atlanta Journal-Constitution, Jan. 20, 2004, at 1A.
- <sup>53</sup> Congressional Research Service, FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress, at 14-15, Apr. 6, 2004 (updated Aug. 4, 2004) *available at* <http://www.fas.org/irp/crs/RL32336.pdf> (last viewed Jan. 5, 2005).
- <sup>54</sup> Statement of Dr. Mary O. McCarthy, “Intelligence and the War on Terrorism,” before the 9/11 Commission, Oct. 14, 2003, *available at* [http://www.9-11commission.gov/hearings/hearing4/witness\\_mccarthy.htm](http://www.9-11commission.gov/hearings/hearing4/witness_mccarthy.htm) (last viewed Dec. 22, 2004).

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Testimony of John C. Gannon, "Intelligence and the War on Terrorism," before the 9/11 Commission, Oct. 14, 2003, *available at* [http://www.9-11commission.gov/hearings/hearing4/witness\\_gannon.htm](http://www.9-11commission.gov/hearings/hearing4/witness_gannon.htm) (last viewed Dec. 22, 2004).

<sup>58</sup> The FBI has developed a human capital plan. The Intelligence Community produced a Strategic Investment Plan for the Intelligence Community in February 2001, but it needs to be updated.

<sup>59</sup> For a more detailed description of the elements of a successful human capital plan, see two GAO reports, [A Model for Strategic Human Capital Management](#), March 2002, *available at* <http://www.gao.gov/new.items/d02373sp.pdf> (last viewed Dec. 22, 2004), and [Results Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success](#), March 2003, *available at* <http://www.gao.gov/new.items/d03488.pdf> (last viewed Dec. 22, 2004).

<sup>60</sup> The Intelligence Reform and Terrorism Prevention Act of 2004 requires the Director of National Intelligence to perform this function for foreign language skills, mandating annual reports on success in recruiting in priority languages. *See* Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 1041, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004).

<sup>61</sup> *See* Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 1011(l), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004).

<sup>62</sup> Markle Foundation, [Protecting America's Freedom in the Information Age](#), October 2002, at 73, *available at* [http://www.markletaskforce.org/documents/Markle\\_Full\\_Report.pdf](http://www.markletaskforce.org/documents/Markle_Full_Report.pdf) (last viewed Dec. 22, 2004).

<sup>63</sup> Statement of Dr. Mary O. McCarthy, "Intelligence and the War on Terrorism," before the 9/11 Commission, Oct. 14, 2003, *available at* [http://www.9-11commission.gov/hearings/hearing4/witness\\_mccarthy.htm](http://www.9-11commission.gov/hearings/hearing4/witness_mccarthy.htm) (last viewed Dec. 22, 2004).

<sup>64</sup> Subsequent to the original release of this report in April 2005, the House Permanent Select Committee on Intelligence called for a structured and regularized review process, similar to the Defense Department's Quadrennial Defense Review, for the Intelligence Community. *See* House Permanent Select Committee on Intelligence, Report 109-101, Intelligence Authorization Act for Fiscal Year 2006, June 2, 2005, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_reports&docid=f:hr101.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr101.109.pdf) (last viewed August 12, 2005). The report states that "[s]uch a strategic review, and the resulting forward-looking strategy, could identify the breadth and depth of the threats, the capabilities existing and needed to combat those threats, and better identify the alignment of resources, authorities, and personnel needed to support those required capabilities." Ibid.

<sup>65</sup> This recommendation closely tracks the recommendations of Dr. McCarthy in her testimony to the 9/11 Commission. Ibid.

<sup>66</sup> The U.S. Commission on National Security/21<sup>st</sup> Century Road Map for National Security, [Phase III Report: Imperative for Change](#), Feb. 15, 2001, at 38, *available at* <http://www.au.af.mil/au/awc/awcgate/nssg/phaseIIIfr.pdf> (last viewed Dec. 22, 2004).

<sup>67</sup> Ibid at 40.

<sup>68</sup> *See* Intelligence Authorization Act for Fiscal Year 2005, P.L. 108-487 § 601, *available at* <http://thomas.loc.gov/cgi-bin/query/C?c108:/temp/-c108vpWhvx> (last viewed Mar. 9, 2005).

<sup>69</sup> *See* Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 1043, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004).

<sup>70</sup> The Census Bureau has estimated that in 2004 there were 34.2 million naturalized citizens and 30.4 million second generation Americans, natives with one or both parents born in another country, living in the United States, combining for nearly 25 percent of the U.S. population. United States Census Bureau, [Foreign-Born Population Tops 34 Million, Census Bureau Estimates](#), Feb. 22, 2005, *available at* [http://www.census.gov/Press-Release/www/releases/archives/foreignborn\\_population/003969.html](http://www.census.gov/Press-Release/www/releases/archives/foreignborn_population/003969.html) (last viewed Mar. 2, 2005).

<sup>71</sup> Subsequent to the original release of this report in April 2005, the House Permanent Select Committee on Intelligence, in its report on the Intelligence Authorization Act for Fiscal Year 2006, said, “[y]ear after year, this Committee has insisted that the Intelligence Community recruit a more culturally diverse cadre of analysts and officers, especially seeking individuals proficient in critical languages such as Arabic, Chinese, and, the much less well known languages including Pashtu and Urdu.” The Committee identified the main obstacle in achieving this goal to be the clearance process that often eliminates from consideration first- and second-generation Americans, and therefore added Section 309 to the Intelligence Authorization Act, which calls on the DNI to “promptly establish and oversee the implementation of a multi-level security clearance system across the intelligence community to leverage skills of individuals proficient in foreign languages.” House Permanent Select Committee on Intelligence, Report 109-101, Intelligence Authorization Act for Fiscal Year 2006, June 2, 2005, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_reports&docid=f:hr101.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr101.109.pdf) (last viewed August 12, 2005). The CIA is reportedly reviewing its security clearance procedures as a result. Douglas Jehl, *CIA Reviews Security Policy for Translators*, N.Y. Times, June 8, 2005, at A1.

<sup>72</sup> Government Accountability Office, Justice Department’s Project to Interview Aliens After September 11, 2001, April 2003, at 17, *available at* <http://www.gao.gov/new.items/d03459.pdf> (last viewed March 30, 2005).

<sup>73</sup> *Ibid* at 11.

<sup>74</sup> Jodi Wilgoren, *Questioning with a Powder-Puff Edge*, N.Y. Times, Dec. 13, 2001, at A1.

<sup>75</sup> Government Accountability Office, Justice Department’s Project to Interview Aliens After September 11, 2001, April 2003, at 30, *available at* <http://www.gao.gov/new.items/d03459.pdf> (last viewed Mar. 30, 2005).

<sup>76</sup> See Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 1053, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004).

<sup>77</sup> Senator Bob Graham (D-FL), former chairman of the Senate Intelligence Committee, inserted a pilot program for such a service into the budget of the National Security Agency. Unfortunately, Senator Graham retired from the Senate last year. Congress must ensure that this program is fully implemented. Lucy Morgan, *Graham Pushes Spy Training Plan*, St. Petersburg Times, Oct. 22, 2004, at 1A.

<sup>78</sup> Congressional Research Service, FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress, at 14, Apr. 6, 2004 (updated Aug. 4, 2004) *available at* <http://www.fas.org/irp/crs/RL32336.pdf> (last viewed Jan. 5, 2005).

<sup>79</sup> We note that the Intelligence Community identified this as an aspiration in its Strategic Investment Plan for Intelligence Community Analysis, National Intelligence Production Board, February 2001.

<sup>80</sup> See Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 1042, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004).

<sup>81</sup> Statement of J. Christopher Mihm, Managing Director Strategic Issues, Government Accountability Office, “9/11 Commission Human Capital Recommendations: A Critical Element of Reform,” before the Senate Governmental Affairs Subcommittee on Government Management, the Federal Workforce, and the District of Columbia, Sept. 14, 2004, *available at* [http://hsgac.senate.gov/\\_files/091404Mihm5549.pdf](http://hsgac.senate.gov/_files/091404Mihm5549.pdf) (last viewed Jan. 5, 2005).

<sup>82</sup> Markle Foundation, Protecting America’s Freedom in the Information Age, October 2002, at 73, *available at* [http://www.markletaskforce.org/documents/Markle\\_Full\\_Report.pdf](http://www.markletaskforce.org/documents/Markle_Full_Report.pdf) (last viewed Dec. 22, 2004).

<sup>83</sup> See generally National Commission on Terrorist Attacks Upon the United States, Staff Statement #12: Reforming Law Enforcement, Counterterrorism, and Intelligence Collection in the United States, Apr. 14, 2004, *available at* [http://www.9-11commission.gov/staff\\_statements/staff\\_statement\\_12.pdf](http://www.9-11commission.gov/staff_statements/staff_statement_12.pdf) (last viewed on Dec. 22, 2004).

<sup>84</sup> See Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 2001(d) *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&docid=f:hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf) (last viewed Dec. 22, 2004).

<sup>85</sup> The FBI has identified 15 field offices as its large offices; the remaining 41 offices are smaller. Statement of Mark Bullock, Assistant Director of Administrative Services, FBI, “9/11 Commission Human Capital Recommendations: A Critical Element of Reform,” before the Senate Governmental Affairs Subcommittee on Government Management, the Federal Workforce, and the District of Columbia, Sept. 14, 2004, *available at* [http://www.senate.gov/~gov\\_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=203&WitnessID=732](http://www.senate.gov/~gov_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=203&WitnessID=732) (last viewed Jan. 5, 2005).



<sup>86</sup> Subsequent to the original publication of this report in April 2005, President Bush ordered the creation of a National Security Service within the FBI and the Department of Justice to be headed by an Executive Assistant Director selected after consultation with the Director of National Intelligence. This is a significant step that grants the DNI a measure of control over the national security and intelligence functions of the FBI. See President George W. Bush, Strengthening the Ability of the Department of Justice to Meet Challenges to the Security of the Nation, June 29, 2005, *available at* <http://www.whitehouse.gov/news/releases/2005/06/20050629-1.html> (last viewed on August 12, 2005).

<sup>87</sup> See Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 § 2001(c) *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_reports&doid=hr796.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&doid=hr796.108.pdf) (last viewed Dec. 22, 2004).



# 10

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## AGENDA FOR SECURITY: Controlling the Nuclear Threat

*So it's correct to say . . . that both of you agree, if you're reelected, Mr. President, and if you are elected, Senator Kerry, the single most serious threat . . . is nuclear proliferation?*

—QUESTION POSED BY JIM LEHRER TO PRESIDENT BUSH AND SENATOR KERRY DURING THE FIRST 2004 PRESIDENTIAL DEBATE

The greatest threat facing Americans is a terrorist or rogue regime armed with a nuclear weapon. No weapon combines such singularly massive destructive force with the potential to destabilize entire regions and undermine the United States' unmatched strength. Today, the United States faces undeterrable potential nuclear adversaries in the form of al Qaeda and other terrorists with a global reach just as the world is witnessing a resurgence of nuclear proliferation in East Asia and the Middle East.

The Bush administration has experienced some modest successes against nuclear threats. After years of sanctions and negotiations spanning multiple presidential administrations, Libya peaceably renounced its pursuit of weapons of mass destruction. The Bush administration and Russia concluded the Strategic Offensive Reduction Treaty (SORT), which sets modest limits on the number of strategic nuclear weapons each side can deploy. Finally, the Bush administration launched the Proliferation Security Initiative (PSI), a partnership of approximately a dozen core countries that have committed to common principles for intercepting suspected weapons shipments.

But the impact of these positive developments is eclipsed by the administration's significant failures. Despite President Bush's recognition that the spread of nuclear weapons to America's

## GLOSSARY

**Anti-Ballistic Missile (ABM) Treaty:**

A treaty under which the United States and Russia agreed not to develop a comprehensive, technologically advanced capacity to shoot down ballistic missiles. The treaty entered into force in 1972, but the United States withdrew in December 2001 to pursue the deployment of National Missile Defense (NMD).

**Ballistic missiles:** A class of missiles capable of delivering nuclear warheads that can only be guided at the beginning of their flight, after which the missile free-falls to its target. They can be launched from land or via a submarine.

**Bunker buster:** A nuclear warhead designed to penetrate many tens of feet into the earth and then detonate, directing much of the shock into the ground in order to destroy buried enemy bunkers. The technical name for the weapon is “robust near-earth penetrator” (RNEP).

**Cooperative Threat Reduction (CTR):**

A series of programs, begun by the United States and Russia in 1991 and now involving many countries, that secure and/or dismantle weapons of mass destruction around the world as well as the materials and technology used to create such weapons. CTR is often also referred to as “Nunn-Lugar” (see below).

**Comprehensive Test Ban Treaty**

**(CTBT):** A treaty that bans the testing of nuclear weapons and establishes a monitoring system for verifying compliance. The United States has signed the treaty, but the Senate has not ratified it. Almost 120 countries—including France, Russia, and the United Kingdom—have ratified the treaty. By the treaty’s terms, it cannot enter into force until China and the United States have ratified it. China has indicated that it would ratify it if the United States ratified it.

**Container Security Initiative (CSI):**

Launched in 2002, CSI is an initiative of the United States to improve the security of intermodal shipping containers—the standardized containers used to carry freight around the world and within the United States on trucks, trains, and ships. Under CSI, the United States works with the largest ports in the world to inspect containers before they arrive in the U.S. homeland. If countries agree to host U.S. inspectors at their ports, the United States reciprocates.

**Fissile Materials Cut-Off Treaty**

**(FMCT):** Still in draft form, a treaty that aims to end the production of fissile materials for weapons. Some versions of the treaty would outlaw the production of weapons-grade materials, while other versions would only outlaw the production of weapons-grade materials expressly intended for use in a nuclear weapon. In addition, some versions have verification provisions. The version supported by the Bush administration has no verification provisions, and would only ban the production of materials expressly intended for use in a weapon.

**Fuel cycle:** The equipment and infrastructure needed to produce weapons-grade fissile materials.

**Fuel cycle loophole:** The flaw in the NPT that allows states to operate a fuel cycle even though having a fuel cycle for ostensibly peaceful uses means that a country can “go nuclear” on as little as several weeks notice.

**Grand Bargain:** The main agreement undertaken between non-nuclear-weapons states and the nuclear-weapons states in the Nuclear Nonproliferation Treaty, whereby the former agreed to forgo nuclear weapons development and accept International Atomic Energy Agency (IAEA) inspections over their nuclear facilities in exchange for the latter having agreed to provide civilian nuclear assistance and gradually disarm.

enemies is our greatest threat, he has failed to personally invest political capital in overcoming the bureaucratic and legal obstacles hampering progress on our efforts to secure nuclear weapons, expertise, and weapons-grade nuclear material from theft. As a result, the pace at which these materials have been secured has not changed since 9/11.<sup>1</sup> Iran and North Korea—members of Bush’s “Axis of Evil”—have accelerated their pursuit of nuclear weapons, while Bush’s failure to resolve divisions within his cabinet over how to deal with these threats has allowed the two regimes’ nuclear ambitions to fester unchecked. The Bush administration resisted British advice to expose A.Q. Khan’s involvement in a nuclear black market once the true scale and scope of that network became clear, which the CIA believes enabled North Korea to move forward with its potentially deadly uranium enrichment program.<sup>2</sup>

The Bush administration is also helping to create the conditions for a new nuclear arms race. Its pursuit of new nuclear weapons of marginal utility has sent the signal that nuclear weapons can

**G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction:**

An agreement, originating with the G8 but now expanded to most OECD countries, to help Russia (and more recently the Ukraine) manage the weapons of mass destruction legacy left by the former Soviet Union.

**Highly enriched uranium (HEU):**

Uranium enriched beyond 90 percent, which is suitable for use in a nuclear weapon and some civilian applications in energy and research reactors.

**International Atomic Energy Agency (IAEA):**

A specialized United Nations organization responsible for promoting the peaceful and safe use of nuclear technology by facilitating international cooperation on nuclear issues. The IAEA is also responsible for monitoring states' compliance with the Nuclear Nonproliferation Treaty by carrying out inspections of nuclear facilities.

**IAEA Additional Protocol:** An optional agreement between the International Atomic Energy Agency (IAEA) and a state that grants the IAEA heightened authority to inspect nuclear facilities.

**Mini-nuke:** A low-yield, tactical nuclear weapon with several envisioned uses, such as to destroy and incinerate chemical and biological weapons stockpiles or for use on the battlefield.

**National Missile Defense (NMD):**

In theory, NMD is a system of radars, missiles (known as "interceptors"), and eventually lasers designed to detect enemy launches of missiles and shoot down missiles in mid-flight. The system has failed almost 40 percent of the time in the highly scripted tests that have been run to date. When even slightly more realistic testing conditions are employed, the efficacy of the system drops to almost zero. Despite these failures, the Bush administration withdrew from the Anti-Ballistic Missile Treaty in order to pursue this system.

**Nuclear Nonproliferation Treaty**

**(NPT):** The keystone treaty in the nuclear nonproliferation regime that sets out the basic obligations and terms of cooperation for states with and without nuclear weapons. The treaty is based on the Grand Bargain, and entered into force in 1970.

**Nuclear Suppliers Group (NSG):**

Comprised of 40 countries, the NSG formulates international guidelines for controlling the export of sensitive nuclear technology.

**Nunn-Lugar:** The common shorthand for the Nunn-Lugar-Domenici Cooperative Threat Reduction Program (CTR). It is used to refer to a series of programs, begun by the United States and Russia in 1991 and now involving many countries, that secure and/or dismantle weapons of mass destruction around the world as well as the materials and technology used to create such weapons. Nunn-Lugar is often used interchangeably with CTR.

**Proliferation Security Initiative (PSI):**

A U.S.-led partnership introduced in 2003 in which over a dozen countries have agreed to procedures and principles for cooperating to intercept weapons shipments.

**Strategic nuclear weapon:** Generally refers to high-yield, longer-range nuclear weapons designed for deterrence purposes, as opposed to tactical use in an ongoing battle.

**Strategic Offensive Reductions Treaty (SORT):**

An agreement ratified by the United States and Russia in 2003 that limits the number of strategic nuclear weapons each side can deploy (as opposed to holding in storage) to 1,700-2,200. Both sides must achieve these modest limits by December 31, 2012. At that point, the treaty expires. The treaty does not require that any warheads be destroyed.

**Tactical nuclear weapon:** Definitions vary, but generally this term refers to a diverse class of nuclear weapons that are portable, low-yield, and for use in battlefield scenarios.

**Weapons-grade fissile material:**

Typically refers to uranium-235 and plutonium-239, enriched to 90 percent or more.

**Yield:** The explosive force of a nuclear weapon, usually measured in equivalents to tons of dynamite. The bomb dropped on Hiroshima was equivalent to approximately 14,000 kilotons of dynamite, or 14kt for short.

improve security at a time when our leadership should be trying to convey the opposite view. The administration's willful politicization of National Missile Defense encourages China and Russia to point more nuclear weapons at us. Finally, the legal and political framework that was built by successive generations of leaders for addressing the proliferation threat is crumbling, as the United States and its allies increasingly diverge over how best to prevent proliferation.

During his second term, George W. Bush will face unprecedented nuclear challenges. To overcome these challenges, he must make nuclear nonproliferation a chief national security priority, devoting to it all the authority of his office. An invigorated strategy for fighting the spread of nuclear weapons, technology and materials must include:

- strengthening and accelerating efforts to secure nuclear weapons, expertise, and weapons-grade nuclear materials;

- maximizing the prospects for peaceful, sustainable solutions to the North Korean and Iranian nuclear crises;
- aligning the U.S. nuclear posture with our broader nonproliferation goals, including ending research and development of new nuclear weapons; and
- repositioning the United States to exercise essential leadership in updating the nuclear nonproliferation regime to deal with 21st century threats.

We can achieve these strategic goals by committing to the following principles:

*The United States must lead a global partnership.* No nuclear nonproliferation initiative or treaty has ever been concluded without U.S. leadership, yet no effort to reduce the nuclear risk will work unless it is global. To address today's nuclear threats, we must forge and lead active, durable coalitions that persuade the world to respond to and eliminate the most pressing threats. We must rebuild U.S. credibility, particularly after the administration's gross miscalculations about Iraq's nuclear activities. We must also demonstrate to all nations that pursuing nuclear weapons will harm their interests while verifiably renouncing them carries real benefits.

*Focus resources and effort where they will have the greatest impact.* In particular, the United States should direct its resources toward exploiting bottlenecks along the path to acquiring nuclear weapons. By focusing on bottlenecks, we target nonproliferation resources directly at the key steps terrorists and rogue states need to take to develop nuclear weapons. The most important of these bottlenecks is acquiring sufficient fissile materials. If we can stop terrorists and rogue states from acquiring these materials, we can stop them from acquiring nuclear weapons capabilities. The Bush administration, however, has failed to exploit this and other bottlenecks to maximal advantage.

*A comprehensive approach is essential.* The Bush administration has over-emphasized military force as a deterrent to rogue states that seek to acquire nuclear weapons or willfully harbor terrorists that might use the weapons. Threats of military action are, of course, a necessary part of an effective nonproliferation strategy. But the specific circumstances that drive states to proliferate or support proliferation are diverse and threats of military force will not always address those circumstances and compel states to change course. The United States must be prepared to use all of the tools at its disposal to fight nuclear proliferation.

*"Trust, but verify" states' compliance.* The wisdom of Ronald Reagan's Russian-borrowed maxim has been confirmed with each new instance of a state successfully hiding its nuclear weapons program—from Iraq in the early 1990s to North Korea and Iran today. Verification measures raise the costs of pursuing nuclear weapons while increasing the odds that violators are caught—without compromising our own nuclear security, given the transparency of our government and the intense media scrutiny of our weapons programs.

## CURRENT STATE OF PLAY

Understanding the Bush administration's failures during its first term is vital to creating a strategy in a second term that addresses four key problems: the spread of nuclear weapons, materials, and technology to terrorists and rogue regimes; the nuclear ambitions of North Korea and Iran; the misalignment of our nuclear posture with our nonproliferation goals; and the void created by a crumbling nonproliferation framework.

### Acquisition by terrorists and rogue regimes

There are two potential avenues a terrorist or rogue regime can take to acquire a nuclear weapon. They can attempt to build a weapon, which requires access to a sufficient quantity of weapons-grade nuclear materials and, if the goal is to build a sophisticated as opposed to a crude nuclear weapon, nuclear weapons expertise. Alternatively, they can attempt to acquire a weapon that has been stolen from a state's arsenal. Once the weapon is acquired, the terrorist or rogue regime must then be able to deliver the bomb to its target.

The greatest obstacle to *building* a nuclear weapon is acquiring sufficient weapons-grade nuclear material. This can be accomplished in two ways: *procuring* it from an existing stockpile, or *manufacturing* it using complicated scientific processes requiring significant expertise. A comprehensive nonproliferation regime must prevent terrorists and states from both acquiring and producing weapons-grade nuclear materials.

### PROCURING WEAPONS-GRADE NUCLEAR MATERIALS

Efforts to prevent states and terrorists from sourcing weapons-grade materials from existing stockpiles began in 1991 with the congressional passage of the Nunn-Lugar Cooperative Threat Reduction Program (frequently referred to simply as "Nunn-Lugar"). Nunn-Lugar created and funded initiatives led by the Department of Defense to improve the security of Russia's nuclear weapons complex. In the past 15 years, Nunn-Lugar programs have secured or destroyed hundreds of tons of vulnerable weapons-grade materials, in addition to improving security over Russia's nuclear weapons and providing alternative employment, training, and incentives to thousands of unemployed or underemployed former Soviet weapons scientists who have access to or expertise in these materials.<sup>3</sup> Additional complementary programs are administered by the Departments of Energy and State.

In recent years, however, progress on securing vulnerable materials has been dismal: it bears repeating that the pace at which former Soviet fissile materials are being secured has not accelerated since 9/11.<sup>4</sup> Weapons-grade fissile materials are stored in hundreds of military and civilian sites located in nearly 60 countries—enough to build many tens of thousands of nuclear weapons.<sup>5</sup> Less than a quarter of it is secured according to what noted security expert and Harvard professor Graham Allison has called "the gold standard": the level of security provided to the gold at Fort Knox.<sup>6</sup> Bureaucratic red tape and disputes over legal liability are among the primary obstacles hampering progress on efforts to secure vulnerable nuclear weapons-usable materials.

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*During his second term, George W. Bush will face nuclear challenges without precedent. To meet these challenges head-on, he must make nuclear nonproliferation his chief national security priority, and devote to it all the authority of his office.*

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*Experts agree that a terrorist or state with a sufficient quantity of highly enriched uranium could build a crude nuclear weapon, similar in destructive force to the one dropped on Hiroshima, with no specialized nuclear weapons expertise and even without the knowledge of the state in which they are operating.*

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While efforts to improve the security of vulnerable materials have lagged on President Bush's watch, global stockpiles of these materials have grown. The amount of plutonium in civilian stockpiles is growing significantly.<sup>7</sup> This rate of increase shows no signs of slowing: in a significant shift in U.S. policy, which had long discouraged the use of plutonium in civilian reactors because of its potential use in nuclear weapons, the Bush administration recently allowed the export of separated plutonium to France for use in a nuclear power reactor.<sup>8</sup> Additionally, the Bush administration declined to take strong steps towards eliminating the future production of weapons-grade material for use in nuclear weapons by refusing to support verification measures in ongoing negotiations for a key arms control treaty, the Fissile Materials Cut-Off Treaty.

#### MANUFACTURING MATERIALS AND THE PROBLEM OF A.Q. KHAN AND HIS DANGEROUS NETWORK

165 The Bush administration's response to the nuclear network has been marked with miscalculations and mistakes from the beginning. The Bush administration ignored advice from the British to confront Pakistan about Khan's involvement as soon as evidence began to surface about how dangerous the network was.<sup>10</sup>

The Bush administration's reported motivations for waiting—to learn more about the network—are understandable. But given the severity of the threat this technology poses to U.S. national security, its decision to wait was ultimately a mistake. Indeed, it was during this period of waiting that Khan fulfilled an important shipment of uranium enrichment technology to North Korea.<sup>11</sup> Though there is some dispute over the details of North Korea's uranium enrichment program,<sup>12</sup> the CIA believes this technology could eventually help North Korea produce two new nuclear weapons per year.<sup>13</sup>

The Bush administration now claims that Khan's network has been put "out of business."<sup>14</sup> While Khan's involvement has been exposed, Khan was one player in a global network that is most likely still in operation.<sup>15</sup> Moreover, the United States has not directly questioned Khan as to what other individuals and countries have been involved in the black market. Instead, it is relying on the government of Pakistan—which a report from the nonpartisan Congressional Research Service says may have been complicit in sustaining the network—for intelligence about the black-market.<sup>16</sup> Additionally, while other members of Khan's black-market remain at large, many nations are failing to adequately regulate the sale and export of critical nuclear equipment—either because they do not care, or because they lack the regulatory capacity to do so. This further elevates the risk that states will be able to acquire the equipment needed to make weapons-grade materials for a nuclear weapon.

#### BUILDING A WEAPON

After acquiring weapons-grade materials, terrorists or states still need to transform those materials into a weapon. Experts agree that a terrorist or state with a sufficient quantity of highly enriched uranium could build a crude nuclear weapon, similar in destructive force to the one dropped on Hiroshima, with no specialized nuclear weapons expertise and even without the



knowledge of the state in which they are operating.<sup>17</sup> The weapon might not be perfect, but it would most likely work. Several basic designs are already irretrievably in the public domain. Given the relative ease with which a terrorist could deliver a nuclear weapon, as described below, a strengthened nonproliferation strategy must focus in particular on preventing nuclear materials from falling into the hands of terrorists and rogue states in the first place.

While terrorists are likely to be content with crude nuclear weapons, states typically want to integrate their nuclear weapons capacity into their broader military strategies and to be able to mount the bomb on a missile. Accordingly, states trying to develop nuclear weapons desire specialized weapons expertise that can help them develop smaller, reliable, and more specialized nuclear weapons.

Two new potential sources of this expertise have emerged in the past four years: nuclear experts from Iraq and Libya. Thousands of former weapons scientists and technicians from these countries are out of work. In the case of Iraq especially, these scientists face a very uncertain future, with their country in chaos and the economy in shambles. As Under Secretary of State John Bolton, the Bush administration's senior nonproliferation diplomat, testified before the House Committee on International Relations, these experts are "the biggest threat that we now face from Iraq's defunct WMD program."<sup>18</sup>

The State Department had programs in place to redirect these former weapons scientists to peaceful, productive pursuits. The programs were modeled on highly successful, ongoing initiatives used to redirect unemployed and underemployed weapons scientists in the former Soviet Union. But the State Department's programs for Iraq and Libya received miniscule funding during their first few months of existence, and in 2004 the Bush administration declined to request that the Congress fund these programs.<sup>19</sup> As a result, Iraqi and Libyan weapons scientists are out of work, and vulnerable to being tempted to sell their weapons expertise to anyone willing to pay for it.

#### BUYING OR STEALING AN EXISTING WEAPON

A terrorist or state could bypass the hurdle of acquiring weapons-grade materials and building a crude weapon with them by attempting to procure an actual nuclear weapon on the black market. Though there have been no confirmed cases of theft of a nuclear weapon, the possibility should not be ruled out.<sup>20</sup> The most probable origin for such a weapon would be Russia. Russia naturally has every incentive to guard its nuclear weapons—after all, a stolen weapon could plausibly be used against Russia. But the fact that Rus-

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*No nuclear nonproliferation initiative or treaty has ever been concluded without U.S. leadership, yet no effort to reduce the nuclear risk will work unless it is global.*

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#### WEAPONS-GRADE FISSILE MATERIALS

The two elements used in nuclear weapons—uranium and plutonium—do not exist in weapons-grade form in nature. Uranium must be mined, processed, and then enriched to become highly enriched uranium (HEU) before it can be used in a bomb. A minimum of 35 pounds of HEU is needed to make a bomb. Plutonium exists in very minute forms in nature, and is also a byproduct of the reactions that take place in nuclear reactors. Plutonium for use in bombs and energy reactors is produced by using chemical processes to extract the substance from the byproducts created by the nuclear reactions that take place in certain kinds of nuclear reactors. A minimum of nine pounds is needed to build a bomb.

sia has an incentive to guard its massive weapons stockpile does not mean that Russia has the actual capacity to guard it.

Out of the entire Russian nuclear weapons arsenal, terrorists or rogue states would most likely seek to acquire a Russian tactical nuclear weapon—a portable, comparatively small, and easy-to-conceal nuclear weapon capable of being smuggled with relative ease. Experts estimate that Russia has somewhere between 3,000 and 20,000 tactical nuclear weapons, a range indicative of how little is known about Russia's stockpile.<sup>21</sup> Although the United States is helping Russia to safely and securely dismantle thousands of Russia's *strategic* nuclear weapons through the Nunn-Lugar programs, Russia's *tactical* nuclear weapons remain entirely outside of these programs.

#### DELIVERING A NUCLEAR WEAPON: THE BUSH ADMINISTRATION'S SKEWED AGENDA

In addition to preventing terrorists and states from developing or acquiring nuclear weapons, a comprehensive strategy must also prevent terrorists and rogue states from delivering a nuclear weapon against U.S. targets. The Bush administration has focused principally on one particular delivery threat—that of a long-range ballistic missile launched at the U.S. homeland. There are two states driving this threat perception: Iran and North Korea.<sup>22</sup> Both countries, however, are at least a decade away from successfully building a missile that is capable of carrying a nuclear warhead all the way to the United States.<sup>23</sup> Moreover, even in the extremely unlikely event that these countries suddenly acquired ballistic missiles capable of credibly targeting the continental United States, there is no reason to believe that our overwhelming and devastating ability to respond to any nuclear attack in kind would fail to deter them from committing national suicide by attacking us.

Nevertheless, the Bush administration requested \$7.8 billion for FY 2006 to develop and deploy a ground-based midcourse National Missile Defense (NMD) system designed to shoot down enemy ballistic missiles in flight. Simply put, the system does not work. The system has failed approximately 40 percent of the time in the highly scripted tests that have been run to date.<sup>24</sup> When even slightly more realistic testing conditions are employed, the efficacy of the

system drops to almost zero.<sup>25</sup> The system has been tested only twice in the last two years, and each of these \$85 million tests ended in failure when a critical component of the system—the rocket designed to carry the “kill vehicle” that destroys enemy missiles into space—did not launch properly.<sup>26</sup> Nevertheless, the Bush administration has plans to spend more than \$50 billion dollars over the next six years on the system.<sup>27</sup>

### CARRYING OUT NUCLEAR ATTACKS

A crude nuclear weapon will fit in the back of a medium-size truck, while the fissile materials needed to build a nuclear weapon occupy less space than a two-liter bottle of soda. In light of these dimensions, the most likely route for terrorists to launch a nuclear attack against the United States is to hide a nuclear weapon or its key components (specifically, the fissile materials) in a cargo container, ship it into the United States, and transport it to its final destination for assembly and/or detonation. This route offers a relatively easy and cost-effective way to deliver a weapon with high accuracy.

While the Bush administration has spent billions rushing to deploy an NMD system that does not work against a threat that does not yet exist, it has virtually ignored the route most likely to be used in a nuclear attack: terrorists smuggling the weapon or weapons-grade nu-

clear materials into the United States. Experts estimate that a shielded nuclear weapon smuggled in a container still has a 90 percent chance of making it through customs completely undetected.<sup>28</sup> Efforts to intercept weapons shipments have improved, with the May 2003 launch of the Proliferation Security Initiative (PSI), but the PSI has uneven membership and rests on a weak legal foundation that threatens to obstruct the smooth operation of the initiative.<sup>29</sup>

### Unchecked nuclear ambitions of Iran and North Korea

Iran and North Korea pose the greatest current challenges to limiting the spread of nuclear weapons. By threatening to preemptively invade them with its “axis of evil” rhetoric, the Bush administration hardened the determination of these countries to acquire the one weapon capable of deterring an American invasion: a nuclear bomb. Since making the threat, however, the Bush administration has done nothing credible to counteract the incentive.

On President Bush’s watch, North Korea withdrew from the Nuclear Nonproliferation Treaty, set aside enough fissile materials to quadruple the suspected size of its nuclear arsenal, and accelerated efforts to build additional capacity for manufacturing weapons-grade nuclear materials. Perhaps most disturbingly, the reclusive Stalinist regime may have transferred a key precursor to making highly enriched uranium—uranium hexafluoride—to Libya.<sup>30</sup> If North Korea has done this, then it demonstrates a willingness on its part to help rogue states overcome the greatest obstacle to acquiring nuclear weapons: the acquisition of weapons-grade fissile materials.

Meanwhile, Iran has flouted its legal obligation to subject its nuclear facilities to International Atomic Energy Agency (IAEA) safeguards designed to help prevent states from using civilian nuclear energy programs as cover for weapons programs, while accelerating its efforts to build facilities that will enable it to develop an entirely self-sufficient nuclear weapons program.

Rather than addressing these imminent nuclear threats, the Bush administration obsessed over what most experts in the national security community viewed as a far-distant threat: Iraq under Saddam Hussein. During the period from the fall of 2002 to the summer of 2003, while the Bush administration was focusing on its invasion and occupation of Iraq, North Korea expelled IAEA inspectors, removed IAEA seals from spent fuel rods, restarted the Yongbyon reactor, and withdrew from the Nuclear Nonproliferation Treaty. Iran continued to flout its IAEA obligations and to work on building a fuel cycle.

When the administration did finally turn to Iran and North Korea, it could not agree on how to act because of deep divisions within President Bush’s cabinet that he failed to resolve. Despite 31 months of drafting efforts, a presidential decision directive—the document that lays out official policy guidance on the most pressing national security issues—on Iran was never signed.<sup>31</sup> This indecision left the administration hamstrung over how to respond to three secret overtures from Tehran that held the promise of addressing the full range of our concerns with that country.<sup>32</sup>

A similar policy paralysis has hamstrung the administration’s North Korea policy. The administration took 18 months to lay out a specific response to North Korea’s announcement that it was pursuing nuclear weapons.<sup>33</sup> Even then, the response was so unrealistic that no participant in the so-called “six party talks” took it seriously. To this day, the administration appears to

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have no coherent policy for addressing either country's nuclear ambitions: President Bush has been powerless to convince North Korea to renew talks about its nuclear ambitions, and the administration continues to sit on the sidelines of Europe's efforts to work out a peaceful, sustainable outcome regarding Iran's nuclear programs.

Both Iran and North Korea present very difficult cases, to be sure. But the administration's undisciplined "Axis of Evil" rhetoric and subsequent statements, skewed priorities, and lack of a clear strategy have, at a minimum, given each country more time and additional incentives to pursue nuclear weapons. At worst, the administration has allowed the nuclear ambitions of both countries to harden beyond the point of no return.

#### The nuclear posture of the United States

The Bush administration has left the U.S. nuclear posture mired in stale Cold War thinking about the scale of targeting needed to robustly deter threats. Our nuclear posture must continue to pose a credible deterrent, but the United States has approximately 5,300 fully operational nuclear weapons and another 5,000 weapons in various stages of storage, repair, and refurbishment.<sup>34</sup> The only country in the world with a nuclear arsenal remotely close to this size is Russia.

Rather than take serious steps with Russia toward mutually reducing our stockpiles, the Bush administration has encouraged Russia to continue to point nearly 1,000 nuclear weapons at the United States by politicizing the deployment of NMD, pursuing research on a bunker-buster nuclear weapon that many in the Russian nuclear establishment believe is intended to enable the United States to carry out a crippling first strike against hardened Russian nuclear silos and storage facilities, and raising by several hundred the number of land-based nuclear weapons pointed at Russian targets.<sup>35</sup> In light of Russia's decaying physical command and control apparatus and the lingering questions about its political stability—which increase the chances of an accidental or unauthorized launch—these weapons pose a direct threat to U.S. national security that our nuclear forces cannot readily deter.

Similarly, the Bush administration has made no effort to work with Russia to lower the alert status of each side's deployed nuclear weapons, despite the fact that a massive preemptive decapitation strike by either side is no longer a plausible scenario. Since U.S. weapons are more reliable and accurate than Russian weapons, maintaining this alert status provides the Russians with an incentive to act rashly under conditions of stress or uncertainty.<sup>36</sup>

The one step the administration has taken toward decreasing Russian proliferation is the Strategic Offensive Reductions Treaty (SORT), which President Bush and Russian President Putin touted as a major arms control agreement. It is not. SORT sets very modest limits on the number of operational warheads each side can have—a maximum of 2,200, each capable

of vaporizing a city—and does not require that excess weapons be permanently dismantled. They must achieve these cuts by 2012, at which point the treaty expires. It also has no verification mechanisms, so the United States has no way to know whether Russia is abiding by its commitments.

As an additional component of our nuclear posture, the Bush administration also sought to develop new nuclear weapons: the “bunker buster,” designed to destroy hardened bunkers, and the “mini-nuke,” a low-yield battlefield weapon. Though Congress sensibly cut funding for these programs in its FY 2005 Omnibus Spending Bill against the president’s wishes, the Bush administration has requested funding for research on the weapon in its FY 2006 budget.<sup>37</sup> The tactical advantages of these weapons, compared with conventional alternatives, are highly dubious.<sup>38</sup> The Bush administration’s pursuit of new nuclear weapons has, however, undermined our broader efforts to convince the world that, in today’s security environment, nuclear weapons are of declining value, and has made U.S. calls for strengthened nonproliferation rules sound sharply hypocritical. In addition, the weapons promote fear in Russia and China that such weapons could be used against them, giving each country an incentive to strengthen its own nuclear arsenal, creating the conditions for a new nuclear arms race and increasing the chances of a nuclear attack against the United States.

### The crumbling nonproliferation framework

The heart of international nonproliferation efforts for decades has been the Nuclear Nonproliferation Treaty (NPT). The NPT, which entered into force in 1970, was designed to prevent the spread of nuclear weapons while allowing the development of peaceful nuclear technology. To this end, it instituted a “Grand Bargain” between states that tested nuclear weapons prior to January 1, 1967 (the “nuclear-weapon States”) and states that did not (the “non-nuclear weapon States”). Under the Grand Bargain, which was extended indefinitely in 1995, the five nuclear-weapon States—China, France, Russia, the United Kingdom, and the United States—agreed to not help non-nuclear weapon States build nuclear weapons, decrease their nuclear arsenals, forgo nuclear weapons testing, and support the development and spread of civilian applications of nuclear technology. In exchange, all other countries agreed to forgo nuclear weapons development and accept IAEA inspections over their nuclear facilities.

Actions and policies by the Bush administration, however, have undermined the Grand Bargain. The Bush administration fought for and won the repeal of the Spratt-Furse amendment (which had prohibited any research that could lead to new low-yield nuclear weapons), and supported research into low-yield nuclear weapons through its Advanced Concepts Initiative and a high-yield bunker-buster nuclear weapon designed to be used on a battlefield. Though the administration proposed in its FY 2006 budget not to continue the Advanced Concepts Initiative, it still supports research on the nuclear bunker-buster. It also is proposing work on a Reliable Replacement Warhead, about which little is known. Research on new, more “usable” nuclear weapons does not improve U.S. national security; it undermines it by violating the spirit of Article VI of the NPT, which calls for the gradual elimination of the nuclear arms race and the nuclear arsenals. With more and more countries conditioning their support for U.S. efforts to strengthen global nonproliferation rules on U.S. compliance with Article VI, this research threatens to obstruct achievement of our nonproliferation goals.

In 1996, President Clinton signed the Comprehensive Test Ban Treaty (CTBT), which bans nuclear testing and creates mechanisms for verifying states' compliance with the ban, but the Bush administration has refused to press for Senate ratification. The Bush administration has failed to support efforts to verifiably cease the production of weapons-grade fissile materials by supporting only a watered-down version of the Fissile Materials Cut-Off Treaty (FMCT). Finally, the Bush administration withdrew from the Anti-Ballistic Missile Treaty in order to build a National Missile Defense system that does not work for a threat that does not yet exist.

Additionally, the Bush administration failed to take strong, affirmative steps toward fixing basic weaknesses in the global nonproliferation framework. These weaknesses include: the ease with which states can use nuclear power and research facilities to secretly create weapons; the lack of clear and immediate global consequences for states that violate their nuclear nonproliferation commitments; and the lack of meaningful participation in global nonproliferation efforts by India, Pakistan, and Israel.

United States leadership is critical to correcting these weaknesses and strengthening global efforts to prevent the spread of these deadliest of weapons; no major nuclear nonproliferation treaty or initiative has ever succeeded without it. But the United States is also facing a world that is wary of its motives and scornful of how President Bush has used American power, and less willing to join with the United States in maintaining international peace and security. As long as the world disrespects our judgments about the proliferation threats we face and what to do about them, we will be powerless to inspire the world to commit to nonproliferation and the proliferation threat will grow.

## PROGRESSIVE POLICY RECOMMENDATION AND ACTION PLAN

The following recommendations are designed to address immediate security vulnerabilities, while positioning the United States to exercise essential leadership in updating the international nuclear nonproliferation regime to deal with 21<sup>st</sup> century threats.

### Secure weapons-grade nuclear materials, technology, and expertise

The most vulnerable weapons-grade fissile materials around the world should be secured within four years according to a uniform, global, and high standard of security. The following steps will achieve this goal:

- The president should issue a directive decreeing that fissile materials security is a top national security priority and appoint a presidential envoy on preventing nuclear terrorism. Supported by the National Security Council, the envoy should be responsible for developing a global action plan for improving fissile materials security and coordinating interagency work. The envoy would serve as the president's personal representative on missions to improve global cooperation and overcome implementation obstacles.
- The president should propose the creation of an international Contact Group on Preventing Nuclear Terrorism. The presidential envoy would represent the United States, and high-level representatives from the G8 (including the European Union), Brazil,

China, India, Israel, and Pakistan would participate. The purpose of the Contact Group would be to promote a common threat assessment, formulate a global security standard for fissile materials, and cooperate on implementing the global security standard.

- The president should make every effort to implement global nuclear security programs such as Nunn-Lugar and related programs at the Departments of State and Energy, including providing his personal involvement with Russian leaders to eliminate the bureaucratic, legal, and other obstacles that are hampering progress on existing efforts. Once these obstacles are overcome, the president should request and the Congress should provide \$10 billion over four years for achieving comprehensive security upgrades on vulnerable weapons-grade fissile materials in the republics of the former Soviet Union. To help achieve this goal, the president should initiate a bilateral summit with Russia on nuclear security and nuclear forces. The summit should be used to help overcome these obstacles and work towards renewing the Umbrella Agreement between the United States and Russia, set to expire in 2006, that authorizes many Nunn-Lugar programs.
- The president should seek sufficient programmatic flexibility to ensure steady progress on global nuclear security programs. Specifically, Congress should repeal legislative provisions that require the president to certify that Russia is meeting various disarmament obligations before spending funds. These requirements have no practical impact on Russian decision-making with respect to its disarmament obligations, but obstruct long-term strategizing over how to effectively prevent nuclear terrorism. The president should also work with Congress to develop reasonable performance measures to address congressional concerns about how funds earmarked for global nuclear security programs are spent.
- The president should fully implement Global Threat Reduction Initiative programs for securing vulnerable fissile materials at civilian installations and eliminating the use of highly enriched uranium in civilian reactors. The president should work with Congress to secure the approximately \$100 million a year for each of the next five years that he proposed in his FY 2006 budget proposal for these efforts.

The following steps should also be taken to stop the production of additional weapons-usable fissile materials:

- The president should direct the secretary of state to pursue a verifiable Fissile Materials Cut-Off Treaty (FMCT) that outlaws the production of weapons-grade nuclear materials no matter what their end purpose.
- The president should reinstate the moratorium on the export of separated plutonium.

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*When the administration tried to focus on Iran and North Korea, it could not agree on how to act because of deep divisions within President Bush's cabinet that he has failed to resolve.*

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The further spread of the technology and equipment needed to produce weapons-grade materials should be halted. This is a long-term undertaking, which the president should begin immediately by taking the following actions:

- The president should work to promote the International Atomic Energy Agency's (IAEA) Additional Protocol as the new standard for gauging states' compliance with the NPT's obligations. The president should work with the IAEA and other countries to restrict nuclear assistance to states that the IAEA cannot certify as being in compliance with the Additional Protocol.
- The president should work with the IAEA and all countries that manufacture and export sensitive nuclear equipment to develop global rules that will better prevent the spread of fuel cycle technology. In the short term, the president should support a global five-year moratorium on the production of highly enriched uranium and weapons-usable plutonium. To implement the moratorium, the president and countries that already have these facilities should commit to supply materials at fair market value, provided the recipient has signed the Additional Protocol and is in compliance with it. This measure is more politically feasible than the president's proposal to limit the export of fuel-cycle technology to states that already have it, yet still accomplishes key goals: reducing the quantities of fissile materials and fuel cycle technologies that must be tracked and secured and limiting the ability of states to use civilian nuclear programs as cover for nuclear weapons programs. During the moratorium period, the president should work to develop a global consensus over possible long-term solutions to the NPT fuel-cycle loophole.
- The president should work with the IAEA, the United Nations Security Council and other countries to adopt a Security Council resolution that establishes a presumption that withdrawal from the NPT threatens international peace and security, and that the Security Council will still hold a state that withdraws from the treaty accountable for violations committed while the state was a party. In addition, the resolution should require that any nuclear materials, facilities, equipment, technology, or related infrastructure acquired before withdrawal be verifiably dismantled, destroyed, or returned to the state that originally provided them. The Security Council should authorize enforcement actions to give teeth to these rules.
- The president should work to strengthen information-sharing and coordination regarding decisions about which items and technology to subject to export controls, as well as enforcement among participants in the Nuclear Suppliers Group and other global efforts to prevent sensitive nuclear equipment from falling into the wrong hands. The president should start by ensuring that the recommendations contained in the Government Accountability Office's report, *Strategy Needed to Strengthen Multilateral Export Control Regimes*,<sup>39</sup> are fully implemented. The United States should vigorously support—using political and financial incentives as appropriate—the implementation of United Nations Security Council Resolution 1540, which calls on all countries to adopt domestic laws to prevent proliferation, and authorizes the Security Council to seize illegal transfers of these materials pursuant to its authority under Chapter VII of the UN Charter.



- The president should condition military aid provided to Pakistan on allowing the United States and/or the IAEA direct access to A.Q. Khan for questioning. While our relationship with Pakistan is important in fighting the war on terror, Pakistan can do more to help the United States understand the true scale and scope of the global nuclear black market.

New sources of weapons expertise should be redirected toward more productive and peaceful pursuits:

- The president should continue to support ongoing initiatives designed to prevent former Soviet weapons scientists from selling their expertise to terrorists and rogue regimes.
- The president should request and Congress should provide no less than \$25 million to provide Iraq's and Libya's former weapons scientists with incentives, new training, alternative employment, and research grants to prevent them from selling their expertise to terrorists and rogue regimes. The appropriation would fund an initiative modeled on the proven programs implemented for former Russian weapons scientists.

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The United States should work to spread the burden of combating nuclear proliferation:

- At the July 2005 G8 Summit, the president should encourage his counterparts to approve a strategy and specific timetable for securing and spending the \$20 billion pledged by countries participating in the G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction.<sup>40</sup> The G8 Global Partnership, which focuses on Russia and other countries of the former Soviet Union, remains the most ambitious global effort to secure and/or destroy vulnerable weapons-grade materials, secure and/or dismantle excess nuclear warheads, and redirect weapons scientists to peaceful pursuits. But it is approximately \$3 billion short of achieving its \$20 billion goal, and much of the money pledged so far has yet to be spent on specific programs.

Efforts to prevent the theft of nuclear weapons should be accelerated and broadened:

- The president should support ongoing global nuclear security programs to secure and, where appropriate, dismantle Russia's strategic nuclear weapons arsenal.
- The president should work with Russia to include that country's tactical nuclear weapons arsenal in Nunn-Lugar programs. At the bilateral summit on nuclear security and nuclear forces, proposed above, the president should offer to verifiably dismantle the approximately 1,600 tactical weapons in the U.S. arsenal in exchange for Russia fully accounting for and verifiably dismantling its tactical arsenal. In today's security environment, these weapons serve no practical purpose that conventional alternatives cannot

fulfill, while the continued existence of Russia's tactical arsenal raises grave concerns that al Qaeda or a similar terrorist group could procure a Russian tactical nuclear weapon. The president should closely consult NATO allies on any measures relating to U.S. nuclear weapons deployed in Europe.

Efforts to prevent nuclear weapons from entering the United States must be strengthened and tailored to existing threats:

- The president should work toward broadening participation in the Proliferation Security Initiative (PSI). Securing China's full and active participation is a key priority.
- The president should urge the Senate Majority Leader to schedule the Oceans Treaty for a floor vote in order to put the Proliferation Security Initiative on more stable legal ground. Currently, the legal principles governing U.S. participation in the PSI are based upon uncodified customary international law. The Oceans Treaty codifies these principles and clarifies them, ensuring that the United States and other countries participating in the PSI are operating under the same set of rules and procedures.
- The president should support and Congress should pass proposed legislation to use customs duties to increase port security funding to at least \$500 million per year—up from the current annual appropriation of about \$150 million.<sup>41</sup>
- The president should direct the Coast Guard to amend its port security regulations to place greater emphasis on threat and consequence analysis.
- Working with the International Maritime Organization, the United States should adapt the International Ship and Port Facility Security Code to require all cargo vessels to have a global vessel identification capability similar to commercial airliner beacons. This will enable U.S. authorities to track and verify the courses ships take as they travel to the United States.
- The president should direct the secretaries of commerce and homeland security to convene a global shipping summit to reach agreement with major importers, shippers, and terminal operators to invest in a more transparent, efficient, and secure intermodal trading system. The emphasis should be on setting standards that will promote the rapid deployment of new technologies. Within three years, all shipping containers should be equipped with on-board Global Positioning System (GPS) tracking capability, a radiation detection device, tamper-proof secure seals, and a detailed computerized cargo manifest with prior imaging attached. All U.S. ports can then be configured with "green lanes" for rapid clearance of shipping containers conveyed by certified safe shippers utilizing smart technology. All shipping containers that fail to meet revised standards will be subject to "red lanes," creating a market incentive for security investments.
- The president should direct Customs and Border Protection (CBP) to take immediate steps to improve and better coordinate existing container security programs. The president should also request an additional \$100 million for FY 2007 to: (1) accelerate Phase III of the Container Security Initiative (CSI) and allow DHS to station up to 400

agents on extended overseas tours with proper language training; (2) increase trusted shipper certification inspections under the Customs-Trade Partnership Against Terrorism (C-TPAT) program;<sup>42</sup> (3) develop a next-generation ATS computer model that fuses more data from broader sources for more effective analysis of shipping risk factors and anomalies; and (4) strengthen CBP's cyber-security capabilities to ensure that it can detect computer intrusions and attempts to forge shipping documents.

- The president should support research on NMD, but cease further deployment efforts. The Congress should evaluate any future budget requests for research and development of NMD in light of the system's efficacy against then-current threats, the technical feasibility of improving the system to address threats that could emerge during the medium- to long-term, and the trade-offs associated with spending money on NMD as opposed to on other efforts to prevent nuclear attacks against the United States.

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### Combating Iran's and North Korea's nuclear ambitions

The president should work toward completely and verifiably ending Iran's efforts to build a nuclear fuel cycle:

- The president should immediately convene a National Security Council interagency working group to overcome the divisions within his cabinet over how to deal with Iran. The working group should undertake a comprehensive review of U.S. policy on Iran across the spectrum of our political, economic, security, and diplomatic relations with that country, and report its findings, with specific recommendations, to the president within six weeks. A key goal of the working group should be to identify an appropriate range of positive incentives that the United States can offer because the United States currently has little leverage over Iran in the form of negative incentives, such as economic sanctions or military threats. The working group should include representatives from the Departments of State, Defense, Energy, Treasury, and Commerce, and from the Office of the United States Trade Representative.
- The administration should communicate to Tehran its interest in opening a backchannel of communications. Recognizing the enormous complexities and historical baggage that accompany U.S. relations with Iran, the administration should communicate its openness to a "Grand Bargain" that addresses the broader range of issues and disputes between the United States and Iran. At the same time, the administration should recognize that achieving a Grand Bargain could be a long-term undertaking and may not resolve immediate concerns over Iran's nuclear ambitions.
- The president should actively encourage France, Germany, and the United Kingdom (the European Three) to use their significant leverage to encourage Iran to abandon its proliferation ambitions, and the president should offer to join the negotiations as an ac-

tive player. A referral of Iran's nuclear activities to the United Nations Security Council could be an important step towards raising the costs for Iran of pursuing a nuclear fuel cycle, but it is unlikely to have a decisive impact on Iran's nuclear calculations because China and Russia will veto any tough action against Iran. Instead, the president should encourage the European Three to tell Iran that they would consider joining the United States in levying sanctions against vital Iranian economic interests.

- The president should work with the European Three, Japan, and ideally China and Russia to agree in advance on a series of clear consequences for each negative step Iran takes relating to its nuclear program, and also specific benefits for each positive step Iran takes. The goal should be to present Iran with a clear choice: keep the fuel cycle and become a pariah state, or get rid of the fuel cycle and start down the path toward improved economic integration with leading countries. They should communicate these consequences to Iran privately, which would avoid putting Tehran in a position of appearing to give in to Western pressure.
- The president should develop contingency plans in the event negotiations fail. The United States should immediately consult with the IAEA, members of the United Nations Security Council, Gulf Cooperation Council states, and other key regional players as to how to manage a "near-nuclear" Iran, prevent it from becoming a source of nuclear weapons materials and technology, and minimize the prospects of a regional arms race.

The president must work toward completely and verifiably ending North Korea's nuclear weapons program:

- The administration should immediately engage in a process that leads to direct, bilateral discussions with North Korea, led by senior leadership of both countries. The Bush administration's refusal to deal directly with North Korea has proven utterly ineffective at addressing North Korea's nuclear ambitions. High-level bilateral talks would streamline communications, help U.S. leaders gauge North Korea's intentions more effectively, and allow the United States to convey its position more clearly.
- The United States must also continue to forge a consensus with South Korea, Japan, China, and Russia as to how best to peacefully, completely, and verifiably dismantle North Korea's entire nuclear weapons program. During the first North Korean nuclear crisis, the United States was successful in dealing directly with North Korea while maintaining close, productive consultations with others in the region, and can do so again.
- The United States should privately request that China convey to North Korea that the United States would consider any sale of nuclear weapons or weapons-grade fissile materials as an act of war. The United States should communicate this in advance to South Korea, Japan, and Russia. The reason for going through China, as opposed to telling North Korea directly at the bilateral talks, is that a direct statement carries a high risk of escalating the stand-off, reducing the prospects for a peaceful resolution.
- The administration should lay the political and operational groundwork for possible coercive action should bilateral talks fail. The United States should simultaneously strive

to develop a consensus within the United Nations Security Council, in close consultation with South Korea and Japan, as to what consequences North Korea would face for refusing to completely and verifiably disarm.

#### Updating the United States' nuclear posture for 21<sup>st</sup> century threats

The following steps will align the U.S. nuclear posture with our efforts to prevent the spread of nuclear weapons:

- The president should direct the secretary of defense to begin a Nuclear Posture Review (NPR). The goal of the review should be to formulate a nuclear strategy and targeting philosophy that: (1) sustains our capacity to deter strategic threats; (2) reduces the number of nuclear weapons pointed at Americans; and (3) reinforces U.S. efforts to control the spread and use of nuclear weapons. The president should request that, given existing and potential future threats, the NPR examine the feasibility of maintaining a strong, credible deterrent with a total arsenal of 1,000 strategic nuclear weapons, which would be taken off hair-trigger alert.
- The president should further direct that all research and development of new advanced nuclear weapons cease because these weapons offer no significant strategic or tactical advantages over conventional alternatives, but rather undermine our efforts to demonstrate the declining utility of nuclear weapons. The president should also work with Congress to reinstate the Spratt-Furse amendment banning research that could lead to the development of “usable” nukes such as a “mini-nuke” or low-yield bunker-buster.
- After the NPR is completed, the president should direct the chairman of the Joint Chiefs of Staff, in consultation with the secretary of defense and the national security advisor, to prepare a Single Integrated Operation Plan (SIOP) based on the NPR.<sup>43</sup> The president should further direct the chairman to develop a secure mechanism for timely briefing the chairperson and ranking member of the appropriate congressional committees on the full contents of the SIOP, which will facilitate the Congress's decisionmaking with respect to appropriations and its ability to exercise effective oversight.<sup>44</sup>
- Following completion of the NPR, the president should initiate a bilateral summit with Russia on nuclear security and nuclear forces. In addition to bringing tactical nuclear weapons into the Nunn-Lugar programs, the summit should be used to develop a timetable for de-alerting our nuclear forces, accelerate implementation of SORT, seek an agreement to destroy excess warheads, and develop a verification mechanism for these obligations.

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*The President should condition military aid provided Pakistan on allowing the United States and/or the IAEA direct access to A.Q. Khan for questioning.*

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#### Restoring U.S. leadership in strengthening the nonproliferation regime

The United States should take the following steps to restore its capacity for exercising nonproliferation leadership:

- The president should work with senators to secure the ratification of the Comprehensive Test Ban Treaty (CTBT). In addition to ensuring the survivability of the NPT and the world's cooperation in fighting proliferation, the CTBT's verification system will help the United States better monitor the spread of nuclear weapons by making it easier for us to detect nuclear tests.
- The president should direct the secretary of state to pursue a verifiable Fissile Materials Cut-Off Treaty (FMCT) that outlaws the production of weapons-grade nuclear materials no matter what their end purpose. In addition to eliminating a new source of fuel for nuclear weapons, this approach would further amplify the credibility of U.S. calls for strengthened nonproliferation rules, while serving as a stepping stone for better integrating India, Israel, and Pakistan into the global nuclear nonproliferation regime.
- Immediately prior to the April 2005 Nuclear Nonproliferation Treaty Review Conference, the president should host a summit of China, France, Russia, and the United Kingdom on how they can fulfill their disarmament commitments under Article VI of the NPT. At this Conference, the states that are party to the NPT should discuss current proliferation challenges and how to address them; how to achieve a verifiable FMCT; and a preliminary consensus on the need for eliminating the fuel cycle loophole in the NPT.

## ENDNOTES

<sup>1</sup> Matthew Bunn & Anthony Wier, *Securing the Bomb: An Agenda for Action*, at vii (May 2005). In addition to this monograph, the analysis and recommendations of this chapter were inspired in significant part by the following works: George Perkovich, et al, *Universal Compliance: A Strategy for Nuclear Security*, (2004); Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe* (2004); Lawrence Korb (with Peter Ogden), *The Road to Nuclear Security*, (December 2004); Stephen Flynn, *America the Vulnerable: How Our Government Is Failing to Protect Us from Terrorism* (2004).

<sup>2</sup> Barton Gellman & Dafna Linzer, *Unprecedented Peril Forces Tough Calls*, *Washington Post*, Oct. 26, 2004, at A1.

<sup>3</sup> Remarks of Senator Dick Lugar, Chairman of the Senate Committee on Foreign Relations, Aug. 11, 2004, *available at* <http://lugar.senate.gov/nunnlugar.html> (last visited Dec. 17, 2004).

<sup>4</sup> Matthew Bunn & Anthony Wier, *Securing the Bomb: An Agenda for Action*, Nuclear Threat Initiative and the Harvard University Project on Managing the Atom, at vii (May 2005).

<sup>5</sup> David Albright & Kimberly Kramer, *Stockpiles Still Growing*, *Bulletin of the Atomic Scientists*, November/December 2004, *available at* [http://www.isis-online.org/global\\_stocks/bulletin\\_albright\\_kramer.pdf](http://www.isis-online.org/global_stocks/bulletin_albright_kramer.pdf) (last viewed Dec. 17, 2004).

<sup>6</sup> Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe* (2004).

<sup>7</sup> David Albright & Kimberly Kramer, *Stockpiles Still Growing*, *Bulletin of the Atomic Scientists*, November/December 2004, *available at* [http://www.isis-online.org/global\\_stocks/bulletin\\_albright\\_kramer.pdf](http://www.isis-online.org/global_stocks/bulletin_albright_kramer.pdf) (last viewed Dec. 17, 2004).

<sup>8</sup> Mark Clayton, *Plutonium: Rising Terror Threat*, *Christian Science Monitor*, Oct. 7, 2004, *available at* [www.csmonitor.com/2004/1007/p13s02-wogi.html](http://www.csmonitor.com/2004/1007/p13s02-wogi.html) (last visited Dec. 17, 2004).

<sup>9</sup> Barton Gellman & Dafna Linzer, *Unprecedented Peril Forces Tough Calls*, *Washington Post*, Oct. 26, 2004, at A1.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

- <sup>12</sup> Selig S. Harrison, *Did North Korea Cheat?*, Foreign Affairs (January/February 2005) available at <http://www.foreignaffairs.org/20050101faessay84109/selig-s-harrison/did-north-korea-cheat.html> (last viewed Jan. 18, 2004). But see Mitchell Reiss & Robert Galluci, *Dead to Rights*, Foreign Affairs (March/April 2005), at 142.
- <sup>13</sup> *Ibid.*
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# GLOBAL EQUITY:

## An Action Plan for Global Economic Opportunity

*We cannot live for ourselves alone. Our lives are connected by a thousand invisible threads, and along these sympathetic fibers, our actions run as causes and return to us as results.*

—HERMAN MELVILLE

In a world rife with tensions—between powerful and powerless countries, between democracy and authoritarianism, and between vast technological innovation and grotesque deprivation—America has both the opportunity and obligation to lead. It is dangerously simplistic to chart our course based on a struggle between good and evil. Indeed, the future will more likely be driven by our success—or failure—in ensuring that an increasingly integrated world is more united than it is divided.

The president must lead America's reengagement with the world, and in leading ensure that global economic integration is driven by both an inherent logic and a fundamental ethic. His challenge is to narrow the gap between rich nations able to project power and influence and poor countries that have been unable to accumulate wealth or reap the benefits of globalization. Our security demands that we rise to this challenge, and our prosperity will be enhanced by the economic stability that a world comprised of capable states, functioning economies, and healthy producers and consumers can foster. But there also is a moral imperative at stake. Our commitments to human dignity, equity, and freedom from need can be realized only if we make every effort to transform them from ideals to reality. We need a new consensus rooted in the understanding that the management of globalization cannot focus solely on organizing for the accumulation of capital, but also must include ensuring that access to and the benefits accrued from global economic integration are more equitably shared.

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*It is dangerously simplistic to chart our course based on a struggle between good and evil. Indeed, the future will more likely be driven by our success—or failure—in ensuring that an increasingly integrated world is more united than it is divided.*

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The president must be prepared to undertake bold measures that extend well beyond tinkering with an approach to foreign aid that was crafted 45 years ago. To meet today's challenges, the administration must champion a strategic development policy, provide the resources to support it, and integrate the various overlapping and often contradictory aid agencies, programs, and initiatives into a single agency imbued with a strategic mission and diverse capacities.

We must transform fundamentally the scope and manner of U.S. economic engagement with the developing world. We can move toward that goal by immediately pursuing three key objectives. First, we must update U.S. foreign assistance legislation, strike new institutional arrangements, and develop new financing instruments that reflect the complexity of the world today and provide the United States with greater agility in responding to those complexities. Second, the United States needs a new development policy designed to support the emergence of capable states that are able to engage fully in the global economy, enhance

regional stability, foster economic stability, and counter transnational threats posed by terrorist and criminal networks, disease, and environmental degradation. Third, the United States should launch an initiative aimed at reinvigorating global trade negotiations to enhance market dynamism and encourage more equitable competition, and thereby set the stage for the more equitable distribution of trade benefits.

To position the United States to marshal its enormous capacity and authority behind a progressive strategy that can enhance our security and foster increased economic stability while at the same time setting the stage for greater global equity, our approach must be guided by:

- **A commitment to protecting our national interests and our core values by investing significant budgetary resources in the developing world.** Foreign aid should be a tool for making strategic investments in a safer and more equitable world, and not simply a reward for allies or palliatives for the world's poor. Foreign aid and trade benefits are the tools with which the United States can help to develop functional economies, knit together regional markets, and ensure that a majority of the world's countries are equitably engaged in the global economy. To assist the world's poorest countries to engage in globalization as competitive players and not simply as beggars, we must invest in structural change by shifting the current paradigm from simply compensating for state weakness to investing in the creation of capable and democratic states, transparent and effective institutions, and a sustainable human resource base. Rhetorical commitments to reducing poverty and expanding the benefits of trade must be reinforced by political will and backed with significant resources.
- **A commitment to leadership to leverage cooperation and change.** Forging a new consensus at the World Trade Organization, increasing global commitments to the Millennium Development Goals agreed to by world leaders in 2000, and using foreign aid effectively to consolidate peace and counter crisis all require multilateral

engagement. Collective donor action, meanwhile, has the benefit of maximizing resources, reducing transaction costs, and lessening the burden on developing countries by harmonizing diverse and sometimes conflicting donor policies. During the last five years—in Iraq, in the global fight against HIV/AIDS, and in international forums called to increase development financing—the United States has chosen repeatedly to make unilateral announcements, apparently designed to challenge other wealthy nations, instead of coordinating and using major new aid initiatives to leverage similar commitments from other donors. Reversing this course is critical.

- **A commitment to ensuring that trade works for the developed *and* developing worlds.** In an era of fast-moving change, the fact that globalization has not yet led to meaningful gains for the world's poor has undermined trade negotiations, hampered economic integration, and increased north-south tensions. By demonstrating that U.S. policies are driven by a commitment to shared values, the United States can break the current international trade impasse, forge a consensus at home, and set the stage for globalization driven by both economics and by ethics. Significantly, a new approach will also yield greater benefits for more people, thus enhancing global security, economic stability, and prosperity.

## CURRENT STATE OF PLAY

The United States is pursuing an incoherent set of policies that lack strategic focus and have little meaningful impact on global poverty, long-term stability, and growing inequality. The facts speak for themselves. Three of the world's six billion people live on fewer than two dollars per day, and more than a billion survive on half that amount. An estimated 115 million children are not in school, and 40 million people are suffering from AIDS. More than 50 countries are poorer today than they were in 1990. Against this backdrop, the disparity between the world's rich and poor is increasing. The world's ten wealthiest nations, which constitute only 14 percent of the world's population, are more than 75 times richer than the ten poorest and account for 75 percent of global GDP.<sup>1</sup> With the rise of the Internet and satellite television, globalization is making this divide more visible, including to those on the bottom.

Even with significant expansion, global trade has yet to yield sustainable benefits for a majority of the world's poorest countries. Low-income countries account for only three cents of every dollar generated through exports in the international trading system, and although 45 percent of America's exports are to the developing world, our investments in those markets are paltry.<sup>2</sup> Less than 1 percent of the total global flow of foreign direct investment is going to the world's least developed countries.<sup>3</sup>

The CIA forecasts that existing tensions in the Middle East will be exacerbated by “demographic pressures . . . to provide jobs, housing, public services, and subsidies for rapidly growing and increasingly urban populations.”<sup>4</sup> The lack of effective institutions in resource rich countries will continue to exacerbate problems and they “will foster political, ethnic, ideological, and religious extremism, along with the violence that often accompanies it.”<sup>5</sup> As was made evident by al Qaeda's use of Afghanistan as an operational base, weak states also pose a major challenge. “In dozens of developing countries,” notes the final report of the Commission on Weak States

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*Rhetorical commitments to reducing poverty and expanding the benefits of trade must be reinforced by political will and backed with significant resources.*

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and National Security, “the term ‘state’ is simply a misnomer. Governments are unable to do the things that their own citizens and the international community expect from them: offer protection from internal and external threats, deliver basic health services and education, and provide institutions that respond to the legitimate demands and needs of the population.”<sup>6</sup>

While we allocate substantial expenditures for defense to protect America, we make only paltry, disorganized and non-strategic investments in improving the conditions that give rise to a host of threats ranging from terrorism to disease and environmental degradation. Even with recent increases, the United States in 2004 was projected to spend \$15.88 billion on non-military foreign

aid (excluding Iraq) as compared with \$450 billion on defense.<sup>7</sup> As more than 1,500 nongovernmental organizations wrote to President Bush on the eve of the 2004 G8 Summit, “It is difficult not to question the balance between the allocation of funds for national security and for international development, neither of which is likely to be achieved if the other fails.”<sup>8</sup>

The end of the Cold War and the attacks on September 11 have made clear that we must urgently transform our military and adapt our intelligence system to meet the threats we now face. Efforts to address these needs have begun. But despite growing recognition that global poverty, economic disparities, and weak states constitute a modern threat to American security, there has been no parallel effort to modernize our foreign aid strategy or instruments to address these threats. As a result, we are relying on an outdated, incoherent system geared to the past. Signed into law in 1961 and amended countless times since, the 2,000-page Foreign Assistance Act includes 33 objectives and 75 priorities. Dissatisfaction with the effectiveness of foreign aid has led Congress and successive administrations to add layers of rules, regulations, and guidance to the operations of the U.S. Agency for International Development (USAID), resulting in a paralyzed bureaucracy that is increasingly unable to demonstrate either effectiveness or efficiency.

The Bush administration has overseen the proliferation of aid agencies, programs, and administrators but has failed to charge any single agency or cabinet member with the responsibility of managing one of the most powerful tools in our foreign policy arsenal. The administration has diminished USAID’s role, created a new aid agency—the Millennium Challenge Corporation—established a new office in the State Department to oversee the President’s Emergency Program for AIDS Relief, developed new aid instruments managed by the White House for complex emergencies and famine-affected countries, and enhanced significantly the role of the Department of Defense in managing foreign assistance. As development advocates have observed: “the administration is dispersing responsibilities and resources so widely that the delivery and impact of foreign aid may well fall short of expectations, both in countries of strategic interest and on a global basis.”<sup>9</sup>

Meanwhile, the Bush administration has not acted on the challenges posed by the world’s weakest states. The president’s Millennium Challenge Account (MCA) was presented as an antidote to weak and failing states, but in fact the foreign aid investments made through the MCA are targeted to well-governed countries. With the exception of Afghanistan, only a tiny

portion of U.S. foreign assistance is allocated to weak states. Though the term “failed state” was coined for Somalia, which is wracked by poverty and provides ungoverned access to terrorists, we provide that country less than \$1 million per year in development assistance.<sup>10</sup>

Finally, though successive administrations have advocated a strategy that includes aid *and* trade, little has been done to ensure that aid and trade policies are mutually reinforcing. Responsibility within government for aid and trade is divided between agencies and rarely coordinated. In some cases—including our agricultural subsidies program—U.S. positions on trade actually undercut our stated developmental objectives.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION ITEMS

Given the scope of the challenge, the administration must be prepared to lead a global effort to dramatically reduce global poverty and chart a new and more equitable course for global trade. To win support for that leadership role, the president must start at home by setting the stage for a new relationship between the United States and the developing world by launching a strategy carried out by revitalized and focused institutions working coherently together, guided by new development policies, and geared towards maximizing the benefits of globalization for the world’s citizens.

The president should immediately use the power of his bully pulpit to enlist the support of the American people and signal to the international community his willingness to lead, by reframing the issues and laying out a new vision. He must make the case that the “war on terror” is being waged *against* terrorism but also *for* a world in which the rule of law prevails, a majority of the world’s countries are united around common interests, and more of the world’s people live in peace and prosperity. He must persuade the American people that success requires increased spending for homeland security and defense to counter immediate threats, but also much greater investment in development and trade to counter the long-term threats we face. He should reframe the currently divisive trade debate and set out a vision of a global trade regime that provides benefits to working families at home and abroad. Finally, he must appeal to Americans’ strong desire that our country be respected around the world and that our values prevail.

In particular, the president should move forward on four broad fronts. He should work to transform foreign aid; support capable, democratic states; reinvigorate global trade negotiations; and ensure policy coherence.

### Transform Foreign Aid

Permanent authorization for foreign aid derives from the Foreign Assistance Act. At the height of the Cold War, most of the developing world was ruled by dictators, and U.S. foreign aid reflected the need to enlist anti-communist allies. It focused almost exclusively on states and the pursuit of strong bilateral ties. No new foreign aid authorization has been enacted since 1985, as legislators have instead opted to overcome policy and budgetary disputes by dealing with foreign aid issues through the relevant Senate and House appropriations committees.<sup>11</sup> Past attempts at reform have focused on who controls foreign aid programs, and thus have exacer-

bated tensions between the executive and legislative branches, fueled an adversarial relationship between the Agency for International Development and the State Department and, most importantly, failed to address the task of determining what institutions, policies, and tools we need to address the challenges of the 21<sup>st</sup> century.

In today's world, we need a foreign aid policy that reflects a host of new threats—ranging from terrorism to disease to environmental degradation—that transcend borders. Moreover, global stability and the structure of our economy demand that we expand the scope and benefits of global trade to the developing world. The president must confront these challenges, and lead a bold reform effort that: takes into account the equities of multiple government agencies; enables the executive branch to operate with flexibility and speed; and provides for appropriate congressional oversight. Specifically, to succeed on this first broad front, the president should pursue the following four efforts:

1. The president should immediately appoint a Task Force mandated to draft a new Foreign Assistance Act in order to enlist the support and involvement of a broad range of stakeholders from the outset.

The Task Force should be comprised of high-level representatives from USAID, the Departments of State, Treasury, Commerce and Defense, the Office of the U.S. Trade Representative (USTR) and the Office of Management and Budget. It also should include four representatives appointed by the ranking majority and minority leaders of the House and Senate. To ensure broad congressional engagement, House and Senate leaders should be encouraged to establish working groups, comprised of representatives of each of the committees with jurisdiction over the so-called “150 account,” which covers the international affairs budget. These working groups should both provide suggestions to the Task Force as well as review the proposals issued by it.

The Task Force should be directed to incorporate the following elements into its draft legislation:

*A. The consolidation of foreign aid programs under a single Department for International Development Cooperation headed by a cabinet-level secretary.* There is no single agency or official with overarching responsibility—or authority—to formulate development policy or to manage U.S. foreign aid investments. Consolidation is necessary to maximize the impact of foreign aid. Cabinet-level representation is required to ensure that development receives the high-level attention it warrants. American foreign aid programs are currently spread across agencies and unevenly weighted. The relatively independent Millennium Challenge Corporation (MCC), for example, is regarded as the crown jewel of foreign aid, while the more bureaucratized USAID has been treated by successive administrations as an afterthought. Global funding for HIV/AIDS is spread across four agencies: the State Department, the Department of Health and Human Services (HHS), USAID, and the Centers for Disease Control and Prevention. The disaggregation of foreign aid has yielded strategic and efficiency costs.

The new department would bring together under one roof what is now USAID, the MCC, the Office of the Global AIDS Coordinator, and a number of other aid programs currently administered by State, HHS, and other agencies. The new department would assume overall responsibility for U.S. international development policy and programs, as well as coordinate

closely with the Treasury and State Departments, which would retain authority over policies towards the international financial institutions and security assistance, respectively. The new department should, however, have the authority to program Economic Support Funds, or security assistance, consistent with development goals.

*B. Budgetary flexibility.* Mirroring the proliferation of aid instruments across government agencies, foreign aid allocations in the 150 account are spread across a number of objectives and programs, with the result that in most countries, program priorities have been legislatively determined before U.S. government field personnel undertake even a preliminary analysis. Moreover, conditions placed on aid programming, particularly with regard to Development Assistance (DA), are such that it can take as long as 24 months to program funds after they are allocated, and there are more restrictions covering what cannot be done than there are incentives for innovation. As a consequence, strategic opportunities are frequently missed.

To move swiftly and with greater efficiency, the new Department for International Development Cooperation should be allowed greater budgetary flexibility. So as to ensure appropriate congressional oversight, the Department should provide quarterly reports to Congress and seek congressional approval for special provisions afforded to countries designated as “good performers.” Specific provisions that would increase flexibility include:

- Line-item contingency funding, set at no more than 10 percent of the aggregate budget, to allow for prompt investments in transitions or other targets of opportunity. By releasing funds that are otherwise tightly programmed against specific objectives, the department could respond swiftly to both opportunities and challenges, ranging from post-conflict transitions to preventive investments designed to shore up weak states.
- The equivalent of “notwithstanding authority” for DA funds allocated to countries with a satisfactory performance record of at least three years. Easing the considerable contracting, procurement, and reporting requirements governing DA would allow the department to make longer term investments in countries that are performing well and reduce significantly the time required to program funds.
- Consistency in proposal, programming, and reporting requirements for humanitarian, transitional, and development assistance. Currently, humanitarian assistance provided by the Office of Foreign Disaster Assistance, post-crisis aid managed by the Office of Transition Initiatives, and development aid programmed by regional bureaus each have distinct and inconsistent requirements. Harmonizing these requirements would allow aid recipients, and particularly nongovernmental organizations (NGOs), to prevent interruptions when implementing programs in countries moving from relief to development.
- Authority to pool resources and harmonize aid delivery with other bilateral donors. Specific bureaucratic requirements presently preclude the United States from harmonizing aid requirements—such as reporting—with other donors, and also prevent the United States from combining its aid with that of other donors to foster greater consistency in aid implementation. Removing these restrictions would reduce transaction costs and lessen the burden on developing countries.

- Increased flexibility for balance of payments support to “good performers.” Current arrangements preclude balance of payments support except to a tiny minority of countries and instead require that aid be “projectized,” or delivered in support of specific activities. With greater flexibility, the United States could empower countries that are performing well to allocate resources according to their national development priorities, and also help to reduce the burden on governments forced to manage multiple donor programs.
- The easing of restrictions on tied aid, consistent with agreements reached in the Organization for Economic Cooperation and Development (OECD). At the OECD’s Development Assistance meeting in April 2001, the United States agreed to—but has still yet to implement—the recommendation that foreign aid be “untied,” or freed from the provision that aid inputs be procured only from the donor country.<sup>12</sup> The procurement of goods in the recipient country allows for faster delivery and the opportunity to leverage our aid by investing in the recipient country’s private sector.
- The significant reduction of congressional earmarks. Earmarks added to aid appropriation bills reduce aid effectiveness by predetermining aid priorities, restricting flexibility, and, in some cases, allocating taxpayer dollars to programs that have no relevance to the developing world. A cap on earmarks would significantly enhance aid program effectiveness.

*C. A grant facility for indigenous NGOs.* The new Foreign Assistance Act should include a special grant facility for indigenous NGOs that provides a streamlined approval process, umbrella grants that can be used to provide smaller grants to community-based organizations, and reporting requirements that reflect local capacity while also meeting reasonable demands for accountability. An expanded indigenous NGO sector in the developing world has increasingly compensated for state weakness and, more importantly, served to mobilize and respond to the needs and aspirations of local communities. However, their ability to secure and utilize foreign aid is constrained by bureaucratic demands, and these organizations are required to meet an extremely high bar to obtain U.S. funding.

2. The administration should demonstrate American leadership by increasing our share of international development financing to 0.7 percent of GDP by 2015.

Foreign aid is not the solution to global poverty, but it is a necessary component of a strategy designed to increase the capacity of the world’s poorest countries and people to improve their economies, engage in global trade and, over time, reduce their dependence on the developed world. This level of funding is within our means; under the Marshall Plan, the United States committed 2.5 percent of GDP over three years.<sup>13</sup> But even as overall federal spending has increased, U.S. foreign aid levels have fallen dramatically since the end of the Cold War, from an average of 0.2 percent of GNP to approximately 0.14 percent in 2003.<sup>14</sup>

Despite growing international consensus that the world’s wealthiest countries should allocate 0.7 percent of GDP to international development, and even with the increases in aid levels under the Bush administration, the United States remains last out of 22 OECD donors in official foreign aid as a share of national income.<sup>15</sup> In terms of aid levels as a share of GDP, Sweden ranks first among the world’s donors while the United States ranks last.<sup>16</sup> By contrast, the Brit-



ish government recently agreed to a 9.2 percent increase in foreign aid by 2008, or an increase from 0.34 percent to 0.47 percent of Gross National Income (GNI). The government also announced its intention to make additional increases aimed at achieving the 0.7 percent target by 2013.<sup>17</sup>

By moving towards a goal of 0.7 percent of GDP by 2015, the United States would make a genuine commitment towards doing its share and, specifically, to meeting the Millennium Development Goals agreed to by the UN General Assembly in 2000 and endorsed by the United States at that time.<sup>18</sup> The eight goals—ranging from halving global poverty to dramatically increasing gender equality—cannot be met unless and until donors, including the United States, significantly increase overseas development commitments.

Non-military foreign aid allocations for FY 2004, exclusive of Iraq, constitute approximately 0.14 percent of GDP; by including the \$18.44 billion allocated for reconstruction in Iraq, the percentage of GDP for 2004 rises to .31 percent of GDP. Assuming that aid levels remain constant, reaching the 0.7 percent goal would require an increase of approximately \$34.68 billion, or the doubling of current total non-military aid levels.

Additional assistance should be allocated towards the proposals outlined in this chapter, including contributing the U.S. share towards paying down the debt in Heavily Indebted Poor Countries (HIPC); creating an initiative for weak and failing states, including a contingency fund for rapid response; providing full funding for the Millennium Challenge Account and the President's Emergency Program for AIDS Relief;<sup>19</sup> the provision of disaster management grants; creating the Africa Trade Fund; and creating an indigenous NGO grant facility window.

3. The new administration should increase debt relief in support of this expanded commitment.

The Heavily Indebted Poor Countries Initiative has allowed the write-off of \$50 billion in developing countries' debt stock and shifted \$1 billion annually from debt service payments to investments by developing countries in health, education, and other social sectors.<sup>20</sup> It has not, however, led to the resolution of the debt crisis. As a first step, the president should build on the agreement reached at the 2005 G8 Summit to cancel 100 percent of the debt of some poor countries by ensuring that relief is provided promptly and that similar benefits are extended to more poor countries over the next 12 months.

4. The administration should move to rationalize the distribution of foreign aid to reflect a better balance between short-term strategic imperatives and longer term investments in our security and economic prosperity.

The United States currently provides foreign assistance to 150 countries. Over \$27 billion of the approximately \$34 billion allocated for foreign aid in 2004 (including Iraq) goes to key countries in the Middle East, allies in the war on terrorism, and the participating coun-

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*While we allocate substantial expenditures for defense to protect America, we make only paltry, disorganized and non-strategic investments to improve those conditions that give rise to a host of threats.*

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*Global stability and the structure of our economy demand that we expand the scope and benefits of global trade to the developing world.*

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tries in the campaign to control narco-trafficking in Latin America. Less than \$7 billion—or roughly 30 percent—is being invested in more than 135 of the world’s low- and middle-income countries.<sup>21</sup> While immediate national security interests will always demand a high percentage of aid investments, the United States should strive to achieve a 50:50 ratio by 2010 to ensure that we can meet short-term strategic demands while also making the meaningful investments required now to ensure our economic prosperity and security in the future.

### Support Capable, Democratic States

At present, the primary policy goal of development assistance is to promote sound macroeconomic policies. Critical as this may be, there is also a need to focus on state capacity across sectors to promote security, economic stability, and greater global equity. The administration should incorporate capacity assessments into the planning and program development processes to determine a country’s capacity to: build and sustain democratic institutions; provide a macroeconomic environment that is conducive to increased trade and greater equity; ensure the security and rights of citizens; and provide for social development. This approach is consistent with the philosophy driving the Millennium Challenge Account, which aims to consolidate the gains made by countries that are investing in their people, promoting economic reform, and ruling justly. Moreover, it is consistent with an approach to weak and failing states that aims to fill critical gaps in security, capacity, and legitimacy.

The administration and Congress should work together to ensure that a new policy focus on capacity building guides all foreign aid investments. Specifically, they should:

*A. Launch a major initiative to respond to the challenge posed by weak and failing states.* The rise of extremism across the developing world and the ability of terrorist and criminal networks to exploit state weakness in Africa, Asia and Latin America make clear the threats posed to the United States by weak and failing states. The initiative should be consistent with the recommendations of the Commission on Weak States and National Security and based on three goals:

- Invest in prevention by promoting opportunities for broad-based growth and poverty reduction, including through increased market access; by supporting legitimate and democratic institutions by better targeting aid, improving U.S. sanctions policy, and addressing the link between the extractive industries and local corruption; and by providing effective U.S. assistance to police and military forces.
- Seize opportunities by allocating resources and expertise to surge capacities unencumbered by bureaucratic constraints; by providing prompt and symbolic “peace dividends” in areas such as debt relief to boost the legitimacy and prestige of struggling governments; by supporting the development of dependable regional peacekeeping capacities; and by backing up active and sustained diplomatic efforts.

- Organize for success by establishing an integrated development strategy implemented by a single cabinet-level development agency and by building an effective information and intelligence strategy that devotes increased resources to monitoring key weak and failed states.<sup>22</sup>

*B. Modify the Millennium Challenge Account.* The MCA provides grants to countries considered “good performers” according to criteria established to judge their commitments to economic reform, social sector investment, and the rule of law. While the basic approach is sound, the MCA’s impact is limited by the small number of countries that qualify and by shortcomings in the selection criteria. Three key revisions would expand the MCA’s coverage, increase the ability of the MCA to consolidate gains made in some of the world’s poorest countries, enhance regional economic integration in the developing world, and allow greater investments in democratization.

First, the criteria should be modified to include a country’s commitment to democratization (in addition to the rule of law) and to allow for the provision of additional points to so-called economic anchor countries whose markets are strong and diverse enough to support the development of regional markets. Second, no less than 15 percent of the MCA’s overall budget should be set aside to assist “near miss” countries that almost meet the criteria but require additional, specific investments to qualify. Third, MCA eligibility should be reserved for low-income and low-middle-income countries, and prohibited for countries that receive more than \$250 million annually in U.S. foreign assistance from other accounts.

*C. Reorient the President’s Emergency Program for AIDS Relief (PEPFAR).* Announced as a \$15 billion five-year program (but funded at slightly less), PEPFAR can and should be used to leverage better international coordination, foster more strategic investments in fighting the global AIDS pandemic, and signal that the U.S. favors good science over ideology. In the short term, the president should:

- Announce his intention to increase the United States contribution to the Global Fund for AIDS, Malaria, and Tuberculosis (TB), from \$547 million to \$1.9 billion,<sup>23</sup> so long as that amount does not exceed 33 percent of total donor contributions;
- Immediately sign an Executive Order rescinding the “global gag rule” covering other aid accounts. The rule prohibits U.S. funding to any entity that provides abortion services or counseling or advocates for a woman’s right to choose and its imposition has resulted in the closure of health care facilities in many poor countries;
- Shift policy from an exclusive emphasis on abstinence to one that includes safe sex education; and
- Authorize the program to purchase and buy generic drugs, consistent with regulations developed by the World Health Organization, but without the current time-consuming

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*Consolidation is necessary to maximize the impact of foreign aid. Cabinet-level representation is required to ensure that development receives the high-level attention it warrants.*

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*In terms of aid levels as a share of GDP, Sweden ranks first among the world's donors while the United States ranks last.*

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requirement that WHO-approved drugs be re-approved by the Federal Drug Administration.

Over the longer term, the president should reorient the program towards two primary priorities: supporting long-term research and development and addressing the long-term impact of the epidemic across sectors, with the goal of increasing the capacity of affected governments and their citizens to manage and plan for the structural impact of this AIDS pandemic and other health crises that may arise in the future. For legitimate reasons, the in-

ternational response to the AIDS pandemic is focused on lowering infection and death rates. Though laudable, this limited objective drives a response that is more oriented to emergency relief than to development. While the epidemic is killing literally millions of people, it is also undermining the very fabric of societies and the capacity of governments: death rates are highest among able-bodied producers; critical institutions ranging from the military to educational systems are being ravaged; and the management of national budgets is being undermined by the need to make increased investments in health.

*D. Expand the scope of humanitarian assistance programs to include substantially greater investments to prevent, mitigate, and manage disasters.* As long as there is poverty, man-made and natural disasters will continue to have enormous impacts on the developing world. In light of this, the administration should issue a directive requiring that 10 percent of funding for the Office of Foreign Disaster Assistance be set aside for transferring disaster management expertise to local responders. This would mean, for example, that the United States could help create and invest in a regional Institute for Disaster Management in Nairobi, Kenya, which has been the central hub for relief operations in Ethiopia, Somalia, Rwanda, Burundi, Tanzania and the Democratic Republic of the Congo at various times during the past decade.

*E. Invest in the capacity of the world's poorest emerging markets by creating an African Trade Fund linked to the African Growth and Opportunity Act (AGOA).* Passed in 2000 with strong bipartisan support, AGOA has created jobs and expanded exports for more than 30 eligible countries by providing a broad range of trade benefits.<sup>24</sup> The ability of countries to exploit the opportunities afforded by AGOA or to attract foreign investment, however, has been uneven, in part because of critical capacity gaps. The president should direct the U.S. trade representative to convene representatives from the Departments of Labor, State, Treasury and Commerce, USAID, and the trade agencies (*i.e.*, Export-Import Bank, Overseas Private Investment Corporation (OPIC), and the Trade and Development Agency) to develop a comprehensive African Trade Fund to provide training to all AGOA-eligible countries in: assessing regional competitiveness; identifying new markets; gaining access to U.S. and other financial markets; meeting phytosanitary and other guidelines; meeting core labor and environmental standards; developing new credit facilities for small and medium enterprises; and improving revenue collection.

### Reinvigorate Global Trade Negotiations

The president must make clear that he can both deliver to constituencies that are currently at odds on trade and chart a course that answers legitimate domestic and international concerns. Significantly, he must move away from “competitive liberalization” and its focus on multiple

bilateral trade agreements targeted to relatively small markets and instead shift toward making a genuine commitment to multilateral trade arrangements. To signal a new approach, the president should:

1. Propose a “grand bargain” on agricultural subsidies at the next round of World Trade Organization (WTO) talks by agreeing to act innovatively upon the recent WTO ruling on U.S. cotton subsidies.

In response to these developments, the president should announce that the United States intends to transfer funds previously allocated to cotton subsidies to incentive-based investments in the research and development of clean biofuels and offer developing countries assistance in diversifying their energy policies in exchange for their agreement to a six-year deadline for the transition. Such a “grand bargain” would be a first step towards overhauling U.S. agricultural subsidies policies in preparation for the 2007 Farm Bill, with significant benefit to our domestic competitiveness and considerable gain for the developing world.

Protectionism and subsidies by industrialized nations cost developing countries approximately \$24 billion annually in lost agriculture and agricultural income, while trade-distorting measures displace more than \$40 billion of net agricultural exports annually from developing countries.<sup>25</sup> New research suggests that the elimination of tariffs and other barriers globally would “lift at least 500 million people out of poverty during the course of 15 years; create long-term economic benefits to developing countries of \$200 billion per year; and enable industrial countries to convey approximately twice as much gain to developing countries as they currently provide through foreign aid.”<sup>26</sup> Meanwhile, the benefits to the United States also are significant, as the production of biofuels would open up a new competitive agricultural sector and, over time, reduce America’s dependence on foreign oil.

In September 2004, the WTO ruled against the United States and in favor of Brazil when it determined that U.S. cotton subsidies are in fact export subsidies and not, as the United States contends, production subsidies. Brazil’s victory signals a day of reckoning for a policy that sustains the U.S. agricultural sector but provides for little of the innovation that might render domestic agriculture globally competitive. The landmark legal case also marks a fundamental shift in the balance of power within the WTO, where developing countries have begun to assert their positions more effectively in the “Doha Development Round” of international trade talks, which began in 2001. To address this shift, and also to pave the way for more constructive negotiations in the Doha Round, the president should propose to Tony Blair that representatives of the “G20,” the developing countries that have joined forces in WTO negotiations, be invited to the June 2005 G8 meeting for consultations on the next trade round.

2. Appoint a high-level panel comprised of labor, business, and development community representatives to outline the concrete steps to be taken by the United States in support of the International Labor Organization’s (ILO) World Commission on the Social Dimensions of Globalization.<sup>27</sup>

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*The administration should issue a directive that 10 percent of funding for the Office of Foreign Disaster Assistance be set aside for transferring disaster management expertise to local responders.*

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Comprised of representatives of labor, business, government, and NGOs from the developed and developing worlds, the ILO Commission has put forth concrete recommendations that take into account the need for balance between global governance and national priorities, reflect the need for productive yet equitable markets, and foster coherence between economic and social objectives. The European Union has already issued a report outlining how it is now implementing and how it intends to implement the Commission's recommendations, but the United States has not responded in detail.<sup>28</sup> Given the Commission's success in forging a common vision shared by labor, business, wealthy and poor countries, the United States has an opportunity to promote greater consensus at home and abroad by outlining its plans for implementation. The high-level panel should be appointed immediately and be required to report within 120 days so that consultations can be completed within the executive branch and with Congress as soon as possible. Members should include representatives of organized labor, the domestic agricultural sector, major as well as small and medium business enterprises, former government officials, NGOs, and academic experts.

3. Mobilize export credit agencies to expand the role of small- and medium-sized American enterprises and increase local investment.

The share of America's GDP that comes from exports has tripled since 1960, and small- and medium-sized businesses in the United States have expanded significantly their share of export credit agency facilities since that time. At present, the export credit agencies of the OECD countries together provide in the range of \$70 billion per year in debt capital. Despite these facts, the Bush administration has reduced the budget of the Export-Import Bank by 25 percent, even while the United States counts on the developing world for 45 percent of our total exports. To expand the benefits to small- and medium-sized American businesses and to the emerging private sector in the developing world, the administration and Congress should reinstate Export-Import Bank funding and restore it to FY2001 levels.<sup>29</sup>

Furthermore, in a manner consistent with the Commission on Capital Flows to Africa's recommendations, the Department of the Treasury, the Department of State, and the Export-Import Bank should mount an aggressive campaign to secure OECD agreement to: (1) extend repayment terms from 10 to 20 years for the world's least developed countries (LDCs); (2) raise the credit ceiling for local costs in LDCs from the current 15 percent to 50 percent of the export value, thus increasing financing for critical projects in infrastructure and other sectors where local costs are high; and (3) offer guarantees and loans in local currency for LDCs.<sup>30</sup> Taken together, these steps would expand U.S. exports while increasing the volume of capital invested in the developing world.

4. Launch a public-private partnership with major financial firms to create Global Development Bonds to generate increased capital investments in the developing world.

The president should immediately instruct the Department of the Treasury to determine the viability of Global Development Bonds, a concept developed by the Energy Future Coalition, which would provide a new class of debt securities that could be created by any country with a capital market and would increase the percentage of development financing provided by the private sector.<sup>31</sup> Treasury should be mandated to consult with representatives of the U.S. financial markets on the development of these bonds, and to work with Congress on authorizing

OPIC to provide risk insurance as soon as practicable. The use of these bonds would engage capital markets more broadly in the developing world by providing a securitized, rated, and tradable product that uses private sector market enhancement mechanisms and limits government involvement to political and foreign exchange risk management.

### Ensure Policy Coherence

The president should create a joint National Security Council-National Economic Council directorate within the Executive Office of the President. The directorate should be staffed by experts with experience in the Departments of State, Treasury, and Defense, the Agency for International Development, the Office of the U.S. Trade Representative, the Office of Management and Budget, and the intelligence community. Its mandate should be to liaise with the Task Force created by the president to draft a new Foreign Assistance Act, manage its review by relevant agencies and by principals, and over the longer term, coordinate development and trade policies to ensure that the government can more effectively and systematically promote mutually enforcing policies across departments.

## ENDNOTES

<sup>1</sup> Oxfam International, Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty, at 7 (2002).

<sup>2</sup> Ibid at 7-8.

<sup>3</sup> *Foreign Direct Investment on the Rise in World's Poorest Countries*, UN News, May 10, 2001, available at <http://www.un.org/apps/news/storyAr.asp?NewsID=1056&Cr=poor&Cr1=> (last viewed Dec. 16, 2004).

<sup>4</sup> National Intelligence Council, Global Trends 2015: A Dialogue about the Future with Nongovernment Experts, (2000) available at <http://www.cia.gov/cia/reports/globaltrends2015/> (last viewed Apr. 1, 2005).

<sup>5</sup> Ibid.

<sup>6</sup> Center for Global Development, Commission on Weak States and U.S. National Security, On the Brink: Weak States and U.S. National Security, at 6 (2004), available at [http://www.cgdev.org/docs/Full\\_Report.pdf](http://www.cgdev.org/docs/Full_Report.pdf) (last viewed Dec. 16, 2004).

<sup>7</sup> Curt Tarnoff & Larry Nowels, *Foreign Aid: An Introductory Overview of U.S. Programs and Policy*, Congressional Research Service, Apr. 15, 2004.

<sup>8</sup> Moni Basu, *Focus on Poverty Urged; Agencies Write to G-8 nations*, Atlanta Journal-Constitution, May 25, 2004, at A5.

<sup>9</sup> InterAction, Foreign Assistance in Focus: Emerging Trends, at 1 (2003), available at [http://www.interaction.org/files.cgi/2287\\_EmergingTrendsElectronic10.29.03.pdf](http://www.interaction.org/files.cgi/2287_EmergingTrendsElectronic10.29.03.pdf) (last viewed Dec. 16, 2004).

<sup>10</sup> Department of State, FY 2005 Congressional Budget Justification for Foreign Operations, at 282 (2004), available at <http://www.state.gov/documents/organization/28975.pdf> (last viewed Dec. 16, 2004).

<sup>11</sup> Curt Tarnoff & Larry Nowels, *Foreign Aid: An Introductory Overview of U.S. Programs and Policy*, Congressional Research Service, Apr. 15, 2004.

<sup>12</sup> Organisation of Economic Cooperation and Development, *Development Assistance Committee Reaches Agreement on Untying Aid to the Least Developed Countries*, News Release, May 14, 2001, available at [http://www.oecd.org/document/44/0,2340,en\\_2649\\_201185\\_1915628\\_119690\\_1\\_1\\_1,00.html](http://www.oecd.org/document/44/0,2340,en_2649_201185_1915628_119690_1_1_1,00.html) (last viewed Dec. 16, 2004).

<sup>13</sup> Based on the success of the Marshall Plan, world leaders began pressing for more aid to the developing world in the late 1950s, when the Austrian chancellor called for a “Marshall Plan for the South,” and the World Council of Churches, and then the UN General Assembly, called on the world’s rich countries to allocate one percent of GNP to assist developing countries. See Christian Aid, The Politics of Poverty: Aid in the New Cold War, at 10 (2004), available at <http://www.christian-aid.org.uk/indepth/404caweek/index.htm> (last viewed Dec. 16, 2004). Years later, Canadian Prime Minister Lester Pearson called for a slightly reduced 0.7 percent commitment, as did the Independent Commission into International Development Issues, otherwise known as the “Brandt Report.” Ibid.

<sup>14</sup> Curt Tarnoff & Larry Nowels, *Foreign Aid: An Introductory Overview of U.S. Programs and Policy*, Congressional Research Service, Apr. 15, 2004.

<sup>15</sup> Statement of Steven Radelet, Center for Global Development, *U.S. Foreign Assistance After September 11<sup>th</sup>*, Before the House Committee on International Relations, 108<sup>th</sup> Congress (2004).

<sup>16</sup> Center for Global Development, Ranking the Rich: The 2004 Commitment to Development Index, (2004), available at <http://www.cgdev.org/rankingtherich/aid.html> (last viewed Dec. 16, 2004).

<sup>17</sup> HM Treasury, Department of International Development, UK Aid Budget, available at [http://www.hm-treasury.gov.uk/documents/international\\_issues/international\\_development/development\\_aid\\_budget.cfm](http://www.hm-treasury.gov.uk/documents/international_issues/international_development/development_aid_budget.cfm) (last viewed Dec. 16, 2004).

<sup>18</sup> United Nations, UN Millennium Development Goals, available at <http://www.un.org/millenniumgoals/> (last viewed Dec. 16, 2004).

<sup>19</sup> Contrary to the major announcements that launched the MCA and PEPFAR, President Bush has consistently requested less funding from Congress than is necessary to meet his pledges. In the case of PEPFAR funding, Congress has actually increased funding to levels greater than those requested by the White House. Meeting President’s Bush’s original commitments would entail a combined \$1 billion increase in FY2005, with \$800 million allocated to the MCA and \$200 million to PEPFAR. To meet his stated future goals, total MCA funding for FY2006 should be \$5 billion, and total PEPFAR funding should be \$4.5 billion.

<sup>20</sup> DATA, Debt Relief for the Poorest Countries, available at <http://www.data.org/archives/DATADebtAnalysis5-23-04.pdf> (last viewed Dec. 16, 2004).

<sup>21</sup> Curt Tarnoff & Larry Nowels, *Foreign Aid: An Introductory Overview of U.S. Programs and Policy*, Congressional Research Service, Apr. 15, 2004.

<sup>22</sup> Center for Global Development, Commission on Weak States and U.S. National Security, On the Brink: Weak States and U.S. National Security (2004), available at [http://www.cgdev.org/docs/Full\\_Report.pdf](http://www.cgdev.org/docs/Full_Report.pdf) (last viewed Dec. 16, 2004).

<sup>23</sup> DATA, AIDS, MCA and Other Core Accounts, available at <http://www.data.org/archives/2005BudgetAIDSMCACore5-25-04.pdf> (last viewed Dec. 16, 2004). President Bush requested only \$200 million for FY2004 and for FY2005, but in FY2004, Congress approved an increased contribution of \$547 million so long as that amount does not exceed 33% of the total contributions for that year.

<sup>24</sup> African Growth and Opportunity Act, AGO Country Eligibility, available at [http://www.agoa.gov/eligibility/country\\_eligibility.html](http://www.agoa.gov/eligibility/country_eligibility.html) (last viewed Dec. 16, 2004).

<sup>25</sup> Xinshen Diao, et al., International Food Policy Research Institute, How Much Does it Hurt? The Impact of Agricultural Trade Policies on Developing Countries (2003), available at <http://www.ifpri.org/media/trade/tradebrief.htm> (last viewed Dec. 16, 2004).

<sup>26</sup> Institute for International Economics, *Global Free Trade Could Lift 500 Million People Out of Poverty*, News Release, June 17, 2004, available at <http://www.iie.com/publications/newsreleases/clinepoverty.htm> (last viewed Dec. 16, 2004).

<sup>27</sup> World Commission on the Social Dimension of Globalization, A Fair Globalization: Creating Opportunities for All (2004), available at <http://www.ilo.org/public/english/wcsdg/docs/report.pdf> (last viewed Dec. 16, 2004).

<sup>28</sup> Commission of the European Communities, The Social Dimension of Globalization – the E.U.’s Policy Contribution on Extending Benefits to All (2004).

<sup>29</sup> Ex-Im Bank funding for FY2001 was \$906 million. The Bush administration reduced funding annually, requesting only \$471.4 million for FY2005. Returning to FY2001 levels would constitute an increase of \$434.6 million.

<sup>30</sup> Commission on Capital Flows to Africa, A Ten Year Strategy for Increasing Capital Flows to Africa (2003), available at <http://www.iie.com/publications/papers/africa-report.pdf> (last viewed Dec. 16, 2004).

<sup>31</sup> Energy Future Coalition, About the Coalition: International Working Groups, available at [http://www.energyfuturecoalition.com/about/work\\_groups/international/program\\_summary.shtm](http://www.energyfuturecoalition.com/about/work_groups/international/program_summary.shtm) (last viewed Dec. 16, 2004).



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## SECURING OUR ENERGY FUTURE

*It is not what we have that will make us a great nation;  
it is the way in which we use it.*

—PRESIDENT THEODORE ROOSEVELT, JULY 4, 1886

Our economic security, our national security, our health, and the future of the global environment are fundamentally linked to the choices we make about energy. With greenhouse gas emissions from human activities growing and oil supplies increasingly concentrated in the Persian Gulf, the imperative has never been greater to reshape the future of our energy supply and energy use in a way that enhances our security, provides our economy with a new engine for growth and prosperity, and protects us against climate destabilization and its dangerous consequences.

The technologies necessary to dramatically transform our energy future are well within our reach. Yet for too long the will to implement the keys to our independence, security, and well-being has been lacking. The potential for the United States to pursue a course of innovation that would create good, high-wage jobs has been largely abandoned, leaving our economy dangerously vulnerable to price shocks and upheavals that dampen economic growth and burden middle-class families with unpredictable gas and utility bills. It is time to change course.

Progressive change is needed and possible. To secure a sound and sustainable energy future, the Center for American Progress proposes a progressive energy plan that:

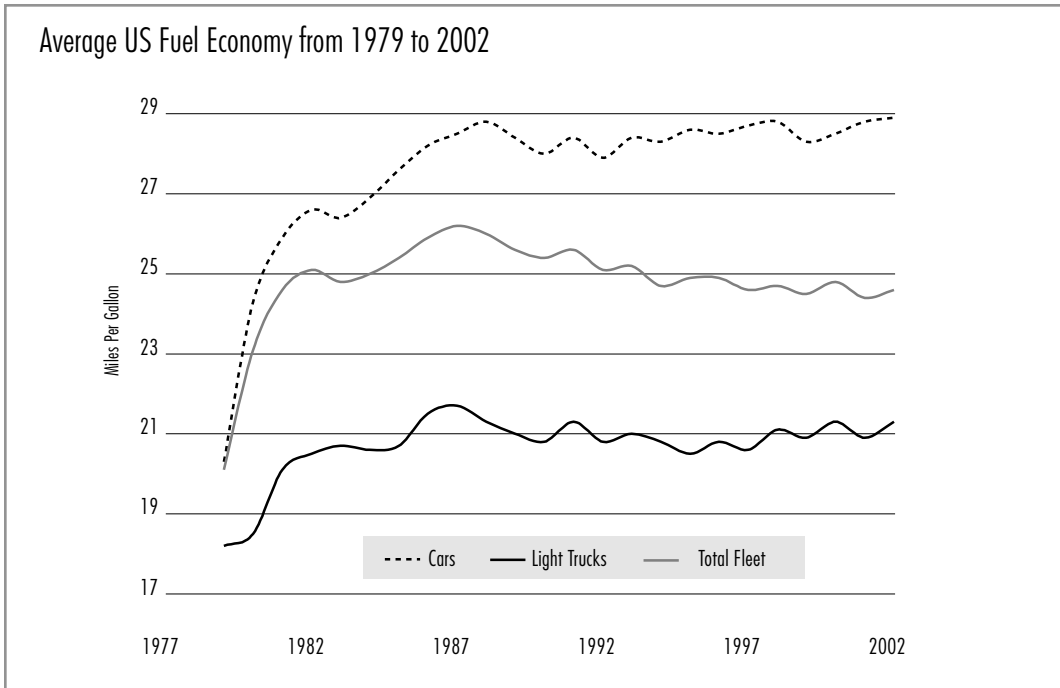
- Diversifies and expands domestic and renewable supply options, makes smarter use of the energy sources we have today, and reduces over-reliance on energy from any particular nation or source.
- Invests in American ingenuity and actively engages the private sector to innovate and implement technologies to help create an energy system for the 21<sup>st</sup> century.
- Recognizes that the scope of the challenge and the identification of solutions cannot be left to the exclusive domain of energy technology experts and industry lobbyists, but rather must engage a broader range of stakeholders, including economists, national security experts, scientists, environmental specialists, and the public.
- Recognizes that global climate change and its effects are a threat to our national security, requiring urgent action.

The Bush administration came into office five years ago with an energy policy based on the technologies and fuels developed early in the last century. Energy legislation rooted in these old, polluting technologies recently became law, but it just entrenched the status quo instead of providing the bold action on energy that the country needs. We call upon the president to launch a fresh start by directing his secretary of energy to engage the rest of the president's cabinet, the Congress, and industry leaders to implement the progressive recommendations that follow. Furthermore, we call upon the president to rejoin discussions on climate change with international leaders, his cabinet, and the Congress. Immediate action is needed to set the nation on a new energy path that will provide our economy and our people with the energy we need while protecting our national security, enhancing our economy, and preserving the health of the world and its people for generations to come.

## CURRENT STATE OF PLAY

The nation's current oil addiction and energy habits have been encouraged by an alliance between the administration and an entrenched oil-first energy industry. This dependence has hurt and endangered us in several ways. It has constrained our liberties, often forcing us to choose between our economic interests and our democratic ideals in foreign policy. It has exacerbated the tensions that breed extremism and terrorism and strangled the economic engine of our nation. More ominously for the long term, the nation's dependence on oil is propelling us toward dangerous climate destabilization.

The Bush administration's response to the energy challenges has forsaken our role as leaders in innovating cutting-edge technology in order to pursue an aggressive supply-side plan to drain our nation's remaining oil and gas supplies. This approach has continued to allow oil interests to trump our stated desire to promote democracy and stability in the Middle East. The Bush administration has not, for example, begun to confront the difficult challenges posed by our reliance on Saudi Arabia's oil production. In Iraq, it chose to prioritize the protection of oil facilities over and above other government ministries in the immediate aftermath of the invasion. Little has been done to curb U.S. oil consumption habits or to diversify our energy supply to include domestic renewable sources of energy. Indeed, the problem has been made worse.



Despite continued declines in automobile fuel economy, the Bush administration granted purchasers of Hummers, the least efficient vehicles on the road, a new tax break more than 10 times the size of the tax break for hybrid cars, the most efficient vehicles.<sup>1</sup> The Bush plan to drill and burn our way out of the problem simply will not work.

The nation's energy supply and use—particularly our dependence on foreign oil—has significant implications for our economic security, our national security, our environmental security, and our health security.

America now spends more than \$200,000 a minute on foreign oil imports.<sup>2</sup> Nearly 60 percent of our oil is imported.<sup>3</sup> Even if we drained every last drop of U.S. supply, the nation has just 2 percent of the world's remaining oil reserves to accommodate what amounts to a quarter of global demand.<sup>4</sup> The Department of Energy (DOE) predicts that by 2025, domestic petroleum sources will be meeting less than a third of our oil needs.<sup>5</sup>

The largest and most promising future oil fields lie in Saudi Arabia, Iran, Iraq, the United Arab Emirates, Kuwait, and Venezuela.<sup>6</sup> Dependence on these countries for our energy needs puts our economic security at risk. Members of the Organization of Petroleum Exporting Countries (OPEC) control the global supply of oil, sometimes in ways that cause huge disruptions in the U.S. economy. The oil market upheavals of the last 30 years have cost our economy an estimated \$7 trillion.<sup>7</sup> Federal Reserve Chairman Alan Greenspan called the higher value of imported oil a tax on citizens that cost us three-quarters of a percent of our economic output in 2004.<sup>8</sup> And our oil addiction is part of a vicious cycle. More than \$25 billion a year for oil imports goes to Persian Gulf states,<sup>9</sup> most of them governed by corrupt, undemocratic regimes whose policies fuel the extremism that breeds terrorism.

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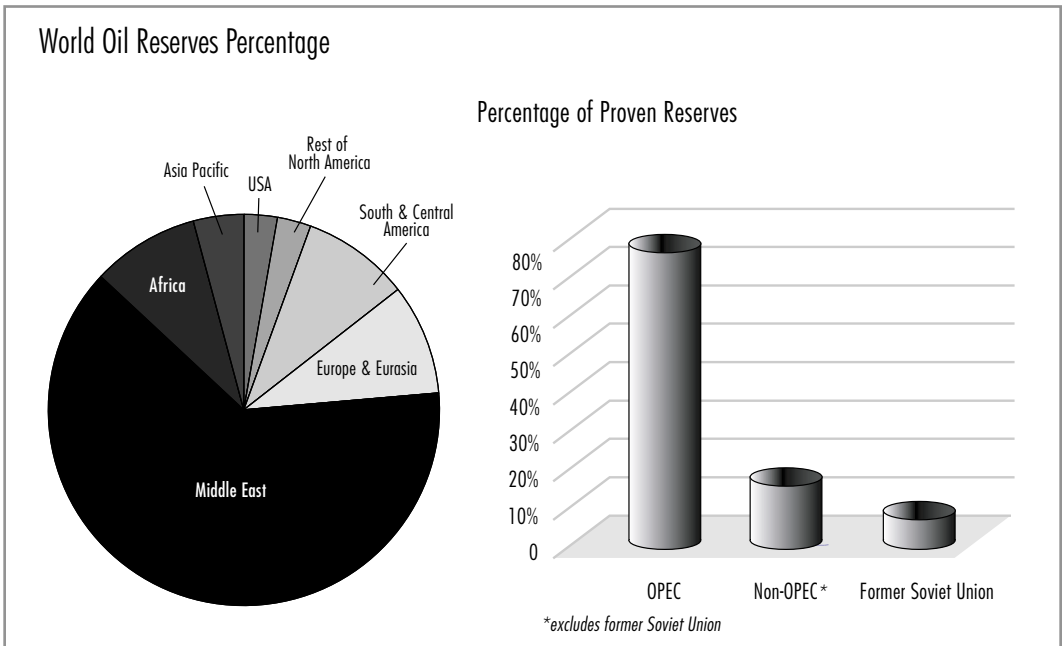
*The technologies necessary to dramatically transform our energy future are well within our reach.*

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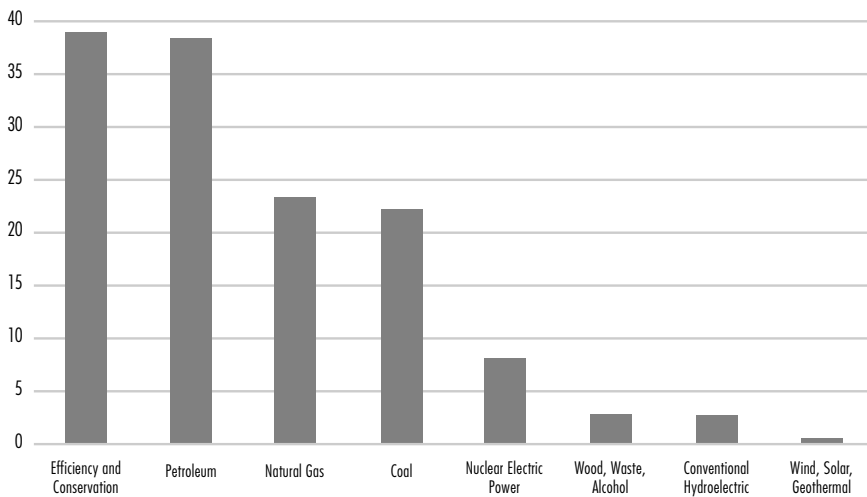
A surge in oil prices has preceded every recession since the early 1960s. With oil prices having reached over \$60 a barrel of late, economists are voicing concerns. Chairman Greenspan attempted to calm the fears of investors by stating that as the world runs out of oil in the middle of this century, the transition to the next major source of energy will have begun.<sup>10</sup> But these transformations will not happen by themselves. They require strong political leadership that will promote and support innovation toward a new energy future.

Adding to these economic risks is the danger to our national security caused by the increasing physical vulnerability of the sprawling energy infrastructure. The delivery of oil and gas to market requires a major commitment of troops and budgetary resources because of the geography of the oil supply and the threat of terrorist networks targeting oil assets. Two years ago, for example, suicide bombers attacked a tanker near Yemen, killing one crew member and spilling 90,000 gallons of oil.<sup>11</sup> In May 2004, terrorists with ties to al Qaeda claimed responsibility for an attack killing 22 oil workers in Khobar, Saudi Arabia.<sup>12</sup> One expert's estimate put the cost of military investments in securing oil supplies at the equivalent of 10 cents per gallon of gasoline.<sup>13</sup> Meanwhile, in the United States, 17 percent of domestic oil production is carried through the 800-mile Alaska pipeline, which was shot by an intoxicated hunter in October 2001, causing a 285,000-gallon oil spill.<sup>14</sup> Furthermore, the aging U.S. electricity grid is vulnerable to attack and poses additional risks of blackouts and interrupted service from simple capacity overload.

Compounding the economic and national security imperatives is a crisis of the fundamental health of our planet: global warming, which is caused by excess emissions of heat-trapping gases from human activities like the combustion of fossil fuels. Continued use of fossil fuels is dramatically escalating the risks of global climate change, endangering relationships between



### Energy Produced from each Sector in 2003 (Quads)



Data from the Alliance to Save Energy based on information from the Energy Information Administration

the north and south as rich nations adapt while poorer regions suffer the effects of flooding, agriculture disruptions, and storm surges. The problem is only going to get worse unless we change course. With only 4 percent of the world's population, the United States accounts for almost 25 percent of the world's carbon dioxide (CO<sub>2</sub>) emissions.<sup>15</sup> Vehicles are the largest source of global-warming emissions in the United States, accounting for nearly 1.9 billion tons of CO<sub>2</sub> in 2003.<sup>16</sup>

Unless we curb this pollution, average temperatures are predicted to rise 2 to 10°F (1.4 to 5.8°C) by the end of the century.<sup>17</sup> The State Department released a report in which it predicted that an increase in temperatures would cause a rise in sea levels, threatening coastal areas where 53 percent of Americans live; more frequent and severe storms; the widespread destruction of ecosystems; and more frequent heat waves and droughts, particularly in the country's interior.<sup>18</sup> An October 2003 report for the Pentagon underscored the magnitude of the problem, urging that climate "be elevated beyond a scientific debate to a U.S. national security concern," as catastrophic climate change "would challenge United States national security in ways that should be considered immediately."<sup>19</sup>

An energy plan for the future must therefore begin to break away from greenhouse gas emissions. In February 2005, the Kyoto Protocol, the international agreement to address climate change, came into force while the United States remains on the sidelines. Business leaders operating internationally are beginning to incorporate climate change concerns into their planning horizon, and it is imperative that the United States join the global effort while also controlling carbon dioxide emissions at home.

United States leadership is necessary to engage developing countries—particularly China and India—which already face major pollution challenges and will eventually produce emissions

well in excess of the United States and other industrialized countries. Many parts of the developing world have the opportunity to implement clean-energy strategies as they establish and expand their energy systems, which is much easier and less expensive than overhauling existing systems. Developed nations are doing little to encourage this, however, even though it is overwhelmingly in their interest to do so. Clean-energy incentives for the developing world are woefully inadequate (to the extent they exist at all) and poorly coordinated by developed nations. Without U.S. leadership, this is unlikely to change. And the consequences are significant. Not only will CO<sub>2</sub> emissions from the developing world continue to skyrocket, accelerating the pace of global climate change, but our economic and national security will be further destabilized. Roughly two billion people still lack even basic energy services.<sup>20</sup> Unless we help change the global energy path, the ranks of competition for increasingly scarce energy supplies will swell dramatically.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

A responsible path forward is outlined below, and there is good reason to be optimistic about the potential for implementing it. The last time the country embraced an energy security agenda, in response to the Arab oil embargo in the early 1970s, the nation cut its energy use by 17 percent while GDP grew by 27 percent. Oil imports fell by half and imports from the Persian Gulf declined 87 percent in less than a decade.<sup>21</sup> Energy efficiency has become our greatest energy resource. Because of energy efficiency gains since 1973, the United States now saves more energy each year than it uses from any one source.<sup>22</sup> A recent study for the Pentagon found that investing \$180 billion over the next decade to eliminate oil dependence could save \$70 billion every year.<sup>23</sup> We can and must launch a robust set of initiatives to transform our energy future.

To start off, the secretary of energy should identify energy and climate security as major priorities. He should call on citizens, business, government, environmental groups, and workers to unite in an effort to reshape the energy landscape in order to create a stronger economy, a safer world, and a cleaner environment. He should announce an energy security plan that seeks to accomplish the following four broad goals. First, it must dramatically reduce oil consumption by the transportation sector, which accounts for roughly two-thirds of the oil we use. Second, it should enhance domestic energy supplies by making significant investments in clean, renewable energy sources such as biomass, wind, geothermal, and solar energy. Third, it should ensure that we better utilize existing energy sources, adopting efficient technologies, and modernizing the energy grid to curb pollution and reduce costs for consumers and business. Research to identify an appropriate future for coal and nuclear energy is an essential component of this, as is a hard look at the infrastructure barriers to tapping existing natural gas supplies. Finally, a new energy security plan should allow us to reassert American leadership on climate change by limiting our own emissions and providing incentives to developing countries to join the effort. Working with allies such as Great Britain's Prime Minister Tony Blair, who has made climate change a top priority, President Bush could ensure that our businesses and workers help lead a technology revolution to overcome the challenge at home and abroad. The following specific recommendations will help accomplish these important objectives.

## Transitioning Away from Oil Dependence

The transportation sector consumes roughly two-thirds of the oil we use, accounting for 13 million barrels of oil per day.<sup>24</sup> Reducing our dependence on oil would enhance our national security, substantially reduce carbon dioxide emissions, boost our economy, and save consumers billions at the pump. We can do this by requiring oil savings from the transportation sector, making efficient vehicles affordable, investing in domestically produced biofuels as an alternative to oil, and promoting the development of super-efficient hybrid vehicles.

### SETTING OIL SAVINGS AS AN URGENT PRIORITY

The United States currently uses about 20 million barrels of oil a day.<sup>25</sup> That number is expected to grow to nearly 25 million barrels a day by 2015.<sup>26</sup> The president should direct the secretary of energy to develop a plan, in conjunction with the secretary of transportation and the administrator of the Environmental Protection Agency (EPA), to achieve 2.5 million barrels of oil savings a day by 2012—an amount roughly equivalent to the oil currently imported from the Persian Gulf. To achieve these savings, the secretary should also solicit input from the public and industry in order to develop such a plan for the president within 12 months.

The plan should identify options for saving oil in all sectors and should indicate needed legislative action and any additional resources required for implementation.

### MAKING EFFICIENCY AFFORDABLE

Except for housing costs, low- and middle-income households in the United States spend more of their earnings on transportation than anything else.<sup>27</sup> High gasoline prices squeeze household budgets in the families least able to adapt and most in need of reliable, affordable transportation. As a way to help drivers invest in fuel efficiency, the administration and Congress should:

- Establish a feebate program for all new passenger vehicles sold in the United States. Feebates provide a direct signal of the value of efficiency to consumers in the sticker price. A fee or a rebate is assigned to each individual vehicle type based on a fuel economy benchmark set annually for each vehicle size class. Buyers of more efficient vehicles receive a rebate; buyers of less efficient vehicles pay a fee. Feebates should be designed to be revenue, technology and vehicle size neutral in order to preserve customer choice.
- Create a scrap and replace program for low-income drivers. Just as the Low Income Home Energy Assistance Program helps low-income households meet their home energy needs, a scrap-and-replace program would help low-income drivers reduce their transportation costs by replacing their inefficient vehicles with efficient cars. Various options have been proposed,<sup>28</sup> and the administration should contract with the National Research Council to determine which policies would save the most fuel and provide the greatest social benefit.

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*America now spends more than \$200,000 a minute on foreign oil imports. Nearly 60 percent of our oil is imported. Even if we drained every last drop of U.S. supply, the nation has just 2 percent of the world's remaining oil reserves to accommodate what amounts to a quarter of global demand.*

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## HOW DO FEEBATES WORK?

Feebates assess a rebate or fee on the sale price of a new vehicle and are reflected immediately in the sticker price. Buyers who purchase fuel-efficient vehicles will see a rebate, while purchasers of less-efficient vehicles will pay a fee. Feebates are based on a “pivot point”—a level at which more efficient vehicles are eligible for a rebate, and less efficient ones a fee.

Take, for example, a pivot point of 24 miles per gallon (mpg). A vehicle that gets more than 24 mpg will be eligible for a rebate, while a vehicle falling below that level will be assessed a fee.

How will this work in reality? As an example, assume a feebate of \$1,000 per 0.01 gallons per mile (gpm, the inverse measurement of mpg) above or below the “pivot.” Using a “pivot point” of 24 mpg, or 0.0417 gpm:

- A 6-cylinder Toyota Camry getting 23 mpg, which equals 0.0435 gpm, would be 0.0018 gpm above the pivot, meaning that the Camry would be assessed a fee of \$180.
- A Toyota Prius getting 55 mpg, or 0.0182 gpm, would be 0.0235 gpm below the pivot, meaning that the buyer would receive a rebate of \$2,350.

How will this affect the final sticker prices of the two cars? A standard 6-cylinder Toyota Camry has a retail price of \$22,530. Adding \$180, the final price of the Camry would be \$22,710. The Prius has a retail price of \$20,975, meaning that after the \$2,350 rebate, its final cost would fall to \$18,625, costing \$4,085 less than the Camry.

- Require replacement tires to be as efficient as new car tires. Under federal fuel-economy standards, automakers equip new vehicles with tires that have a lower rolling resistance, which leads to higher fuel efficiency. By requiring replacement tires to be as efficient as new car tires, gasoline savings would begin immediately, saving over 7 billion barrels of oil over the next 50 years.<sup>29</sup> These low rolling resistance tires cost consumers only \$5 to \$12 more than conventional tires. Within a year, the average driver would recover the additional cost of the more efficient tires, and over the 50,000-mile life of the tires, the typical driver would see a return of \$50 to \$150.<sup>30</sup>

## PROMOTING BIOFUELS

The secretary of energy should launch a major initiative to spur the development of domestic biofuels (liquid fuels derived from plants) as a cleaner, domestic alternative to oil. A broad coalition of business, labor, environmental groups, farmers, and policy officials has embraced a robust commitment to domestic biofuels research and deployment as a cornerstone element of a plan to reduce dependence on oil and curb carbon emissions.<sup>31</sup> A 1997 report from the President’s Committee of Advisors on Science and Technology recommended a replacement of oil by biomass feedstock, with a goal of 10 percent of the petroleum feedstock replaced by 2010 and 30 percent by 2030.<sup>32</sup> In 2003, ethanol, the most widely used biofuel, accounted for just under three billion gallons of the nearly 200 billion gallons of gasoline we use per year, far short of these goals.<sup>33</sup>



Currently, ethanol is produced from the starch in corn kernels. Biodiesel, produced from first-press or recycled vegetable oils, is also gaining in popularity as an alternate fuel. New breakthroughs offer the opportunity to make fuel out of the woody (cellulosic) material in the corn stalk and leaves, as well as other materials, such as grasses and wood wastes. Conversion of agricultural waste to fuel would provide a double dividend to farmers and boost rural economies, while providing the country with an immediate, domestically sustainable, low-carbon fuel alternative to oil. Another benefit is that, unlike conventional ethanol, which is produced primarily in the Midwest, cellulosic sources of ethanol can be produced in other regions, cutting down on the need to transport the fuel over long distances.

The private sector is already beginning to demonstrate the potential for widespread use of bio-products, but government must play a leading role in hastening these investments and minimizing risk. For example, the Department of Energy has built several pilot-scale plants to convert crops to energy, but the investments have not yet brought costs down to allow commercial production investments. Government investment is necessary to continue to develop technologies that can reduce investment risks to attract conventional financing. As part of this initiative, the administration and Congress should:

- Require annual increases in the amount of gasoline produced from cellulosic biofuels. Congress has been considering proposals to double the use of renewable fuels by 2010, but the legislation has languished.
- Direct the Department of Defense to launch a one-time competition aimed at building five to 10 commercial-scale biofuel demonstration plants over the next five years. Participants would receive a prize to deploy plants that test a range of conversion processes using different resources and producing different end products. Current estimates of the cost of building biofuel refinery plants are on the order of \$100-300 million. The competition would spur investments to help bring down the costs of commercial-scale plants.<sup>34</sup>
- Provide full funding for an intensive national research and development program for bioenergy sources, especially from cellulosic material. The Biomass Research and Development Act of 2000 authorized \$245 million over five years, but this money has not been appropriated.
- Gradually shift subsidies from agricultural exports to develop and deploy biofuels as a cleaner, domestic alternative to oil. Shifting current agricultural subsidies from export commodities to domestic bioenergy crops could serve as a major incentive for countries to reduce carbon dioxide emissions, while stimulating economic growth in America's rural areas. The administration and Congress should identify and take immediate steps to begin shifting these subsidies during the next reauthorization of the farm bill.

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*Compounding the economic and national security imperatives is a crisis of the fundamental health of our planet: global warming, which is caused by excess emissions of heat-trapping gases from human activities like the combustion of fossil fuels.*

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- Contract with the National Research Council to assess and report on the long-term impacts of refocusing domestic farm subsidies from food and fiber crops to conservation, energy crops, and the bioenergy industry. This report should be completed within one year and should evaluate the effects of this shift on energy supply, national security, and the environment, as well as on economic conditions in rural America and the developing world.

#### PROMOTING THE DEVELOPMENT OF SUPER-EFFICIENT VEHICLES

The president should seek and Congress should provide an aggressive set of tax incentives and grants for consumers and for industries that are retooling plants to promote the manufacturing and purchase of hybrid vehicles, which run on a combination of gas and electric power to sharply increase efficiency. As an additional incentive for early adopters, single occupant hybrids should be allowed in high occupancy vehicle (HOV) lanes. While advanced vehicles remain a limited portion of the market, this would further stimulate purchase and use of efficient hybrid vehicles. Widespread adoption of hybrid vehicles—which are available today—promises enormous, immediate energy savings as well as substantial reductions in carbon dioxide emissions.

At the same time, the Congress should provide funds to sponsor a competition to promote the development and deployment of even more fuel efficient vehicles. Under this competition, the Department of Energy would offer a cash prize for the first company that develops and sells one million vehicles that achieve efficiency of at least 80 miles per gallon. A smaller prize would go to the second place finisher. The president should direct the Department of Energy to evaluate the award needed to serve as a meaningful incentive, structured so that the full prize would be available through 2012, at which time it would decline each year, at an amount set by DOE, thereby creating an additional incentive to meet the goal quickly.

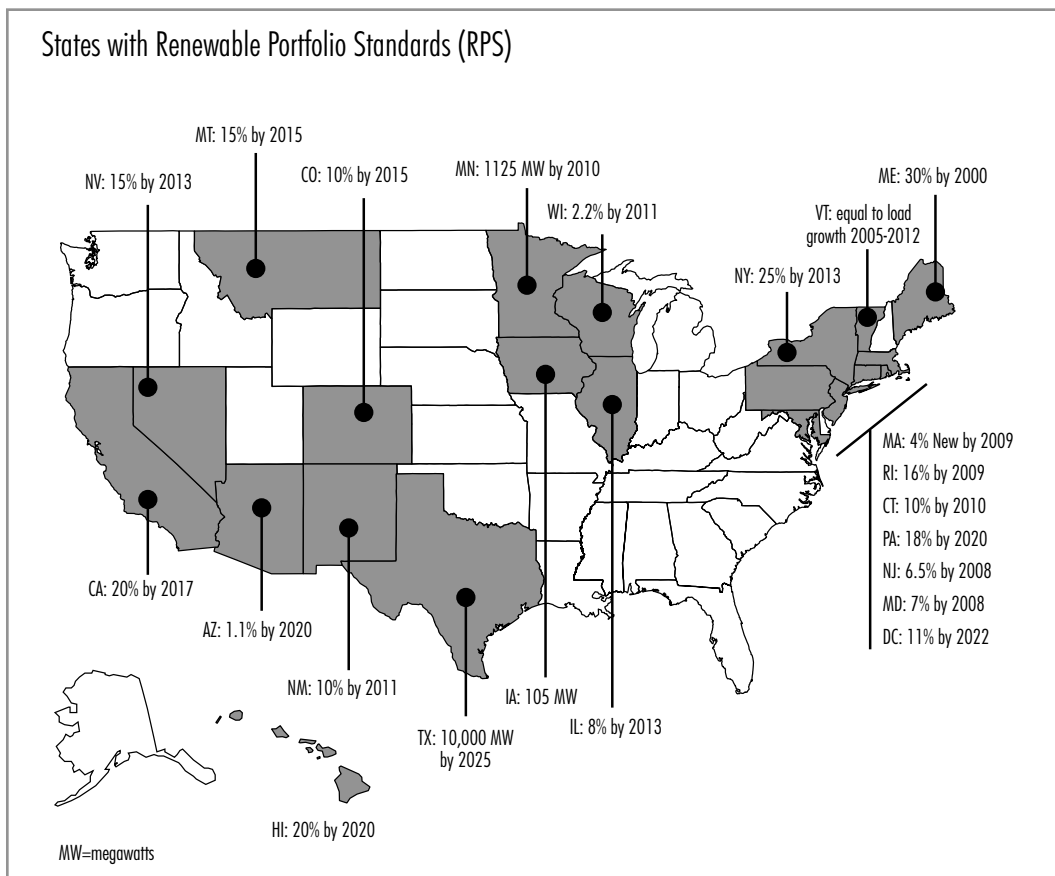
In addition to those policies mentioned, the secretary should work with Congress to pursue several legislative avenues to improve fuel efficiency. He should seek, and Congress should provide, generous tax credits to encourage the purchase of super-efficient vehicles that achieve at least 80 miles per gallon. Again, the value of these credits should decline over time to encourage early adopters. Second, he should work with Congress to close a loophole in the gas guzzler tax so that a surcharge is levied on all passenger vehicles that consume more than 20 percent of the fleet average.<sup>35</sup> Congress should eliminate the loophole that exempts very large vehicles (those over 8,500 pounds, such as the Hummer H2 and the Lincoln Navigator) from fuel economy requirements. And finally, the secretary should work with Congress to ensure that fuel economy credits awarded to automakers for producing vehicles that can run on a combination of gasoline and cleaner fuels be granted only for the time that cleaner fuels are actually used. Currently, awards are granted to “dual-fuel” vehicles that are being fueled with conventional gasoline.

### Enhancing Domestic Energy Supply

#### EASING PRESSURES ON NATURAL GAS SUPPLIES WHILE PRESERVING OUR HISTORIC TREASURES

Natural gas use has been surging over the past five years, causing prices to spike despite industry estimates that existing domestic reserves could meet the nation’s energy needs for the next 60 years.<sup>36</sup> While supplies are relatively abundant, pipeline capacity to deliver gas to mar-

## States with Renewable Portfolio Standards (RPS)



ket remains an obstacle. The secretary should work with governors to review impediments to pipeline siting and develop a plan to improve natural gas delivery potential within 12 months. Congress has taken some important steps to support a pipeline to bring gas to the lower 48 states from Alaska and to enhance the recovery of ultra-deep gas deposits offshore. More must be done to remove impediments to pipeline siting while retaining appropriate public and environmental reviews.

The increased pressure on natural gas supplies is due in part to the rapid expansion of natural-gas fired electrical generation which has occurred to reduce air pollution. Consequently, increasing the amount of electricity generated by renewable power will ease pressures on natural gas supplies. The president should build on the work of states that have implemented renewable energy purchase requirements by directing DOE to seek an aggressive federal renewable energy purchase requirement and work with Congress to establish a national Renewable Energy Portfolio Standard of 25 percent by 2025.

Twenty-one states and the District of Columbia have implemented market-based Renewable Energy Portfolio programs that require utilities to gradually increase the portion of electricity produced from renewable resources such as wind, biomass, geothermal, and solar energy. A study by the Union of Concerned Scientists found that under the Energy Information Administration's 2004 gas price forecast, a renewable standard of 20 percent by 2020 would save \$26.6 billion and that commercial and industrial customers would be the biggest winners.<sup>37</sup>

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*Conversion of agricultural waste to fuel would provide a double dividend to farmers and boost rural economies, while providing the country with an immediate, domestically sustainable, low-carbon fuel alternative to oil.*

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Over the last decade, residents of the west have identified and proposed lands for federal protection as wilderness or monuments, such as the redrock canyonlands in Colorado and Utah. In September 2004, despite significant opposition in Congress, the administration leased 360,000 acres of public land for oil and gas development, some of which included lands that even the Bureau of Lands Management (BLM) has found to qualify for possible wilderness designation. Included in this sale are lands immediately adjacent to Dinosaur National Monument in Utah.<sup>38</sup> The Congress should utilize its oversight role to assess and correct the damage resulting from the administration's aggressive drilling policy in the west.

Almost 90 percent of oil and natural gas resources on BLM managed lands in the west are available for development.<sup>39</sup> Tens of millions of acres of public land are already under leases that have not been developed and thousands of existing drilling permits are going unused.<sup>40</sup> Utilizing these and other existing reserves in the Gulf of Mexico, including ultra-deep wells, should be the first priority for development. Oil and gas development should not run roughshod over our most wild remaining public treasures.

In 2006, we will celebrate the centennial anniversary of the Antiquities Act, the law passed by President Theodore Roosevelt giving presidents the authority to preserve unique historic monuments such as the Grand Canyon and the Petrified Forest.<sup>41</sup> In preparation for this event, President Bush should direct the Council on Environmental Quality to identify the next ten great historic lands—both on land and in our coastal waters—to be considered for protection as national monuments.

#### DETERMINING THE POSSIBILITY OF NUCLEAR POWER'S FUTURE

Nuclear power plays a significant role in the global supply of electricity, supplying nearly a quarter of the developed world's electricity. Yet significant questions remain about its safety, long-term disposal options, and proliferation risks. Natural gas, cleaner coal, deployment of renewables, and efficiency improvements should be the near-term priority for improving energy security and addressing climate change, but a progressive energy agenda should also evaluate the future of nuclear energy in a carbon constrained world. A serious effort to develop safe, proliferation-resistant, cost-effective nuclear power technologies, as well as secure long-term waste disposal options, must be undertaken.

Currently, disposal of nuclear waste at Yucca Mountain and reprocessing of the waste stream for reuse are the primary nuclear waste alternatives being pursued. Both have unaddressed problems. Reprocessing fuel involves separating waste products from unused fissionable material that is later re-cycled as fuel in reactors. A recent study on the future of nuclear power found that the cost and proliferation concerns of reprocessing should lead government and industry to focus on more conventional nuclear power for the next decade.<sup>42</sup> Given the remaining uncertainties about Yucca Mountain as a safe, long-term waste repository, the government should look into other alternatives. Research on deep bore hole disposal should be expanded

to determine its viability as an alternative. Therefore, the 2007 budget request should redirect research funding at DOE from programs focused on reprocessing spent nuclear fuel to a research program to determine the viability of geologic disposal of nuclear waste in deep bore holes within a decade.

#### Prioritizing Energy Efficiency to Enhance Supply and Improve Reliability

In addition to developing new sources of energy, we must make better use of available energy. New technological advances in appliances, energy grid systems, and buildings can boost productivity, create jobs, improve the reliability and safety of the energy infrastructure, and make dramatic inroads in reducing air pollution. Principally, this means giving energy efficiency top priority, developing timely standards and providing incentives for more efficient household appliances and buildings, and modernizing our electricity distribution system. A National Research Council (NRC) report found that every dollar invested in the 17 DOE energy-efficiency research and development programs that the NRC studied returned nearly \$20 to the U.S. economy in the form of new products, new jobs, and energy cost savings to American homes and businesses.<sup>43</sup> Between 1978 and 1996, the federal government invested \$8 billion in energy efficiency and leveraged \$150 billion in savings.<sup>44</sup>

Energy efficiency investments are crucial for meeting our near-term energy needs. In September 2003, the National Petroleum Council issued a report concluding that supply from traditional North American production will not be able to meet projected natural gas demand, and that “greater energy efficiency and conservation are vital near-term and long-term mechanisms for moderating price levels and reducing volatility.”<sup>45</sup> The secretary should work with Congress to reverse the trend of declining energy efficiency investments that occurred during the first term of the administration.<sup>46</sup> The secretary should also jumpstart the process for finalizing efficiency standards that have been delayed.

#### SETTING STRONGER EFFICIENCY STANDARDS FOR BUILDINGS AND APPLIANCES

The secretary should ensure that DOE develops national “model standards” to make new buildings at least 30 percent more energy efficient and updates appliance efficiency standards and standards for manufactured homes, which account for almost one-third of new housing construction. The secretary should report immediately to the president on the resources needed to do this and work with Congress to ensure that funds are provided.

The National Appliance Energy Conservation Act of 1987 requires DOE to develop new appliance efficiency standards on a continuous schedule. Since their inception, energy efficiency standards have saved consumers over \$200 billion—about \$2,000 per household—while cutting electricity use 5 percent and reducing levels of pollution that come from the power plants that produce the electricity by over 2 percent. These savings could be tripled by modernizing these standards, but DOE has fallen years behind its statutory schedule. For example, new standards for residential furnaces and boilers are ten years behind schedule. Similar delays afflict rulemakings for large air conditioners and distribution transformers. No new rules (other than two test procedures) have been issued in the past three years.<sup>47</sup>

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*Widespread adoption of hybrid vehicles—which are available today—promises enormous, immediate energy savings as well as substantial reductions in carbon dioxide emissions.*

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To ensure that new appliance efficiency standards are developed in a timely fashion, the president should seek and the Congress should pass legislation that will:

- Lift the federal preemption if DOE falls more than three years behind its statutory schedule. States should be allowed to pursue their own appliance efficiency standards if DOE fails to live up to its end of the bargain. Currently, states are preempted from acting.
- Require that updated standards be reevaluated every five years for most appliances. We will become more energy efficient over time. Thus, it is important that DOE revisit new standards every five years to evaluate whether they should be strengthened.<sup>48</sup>

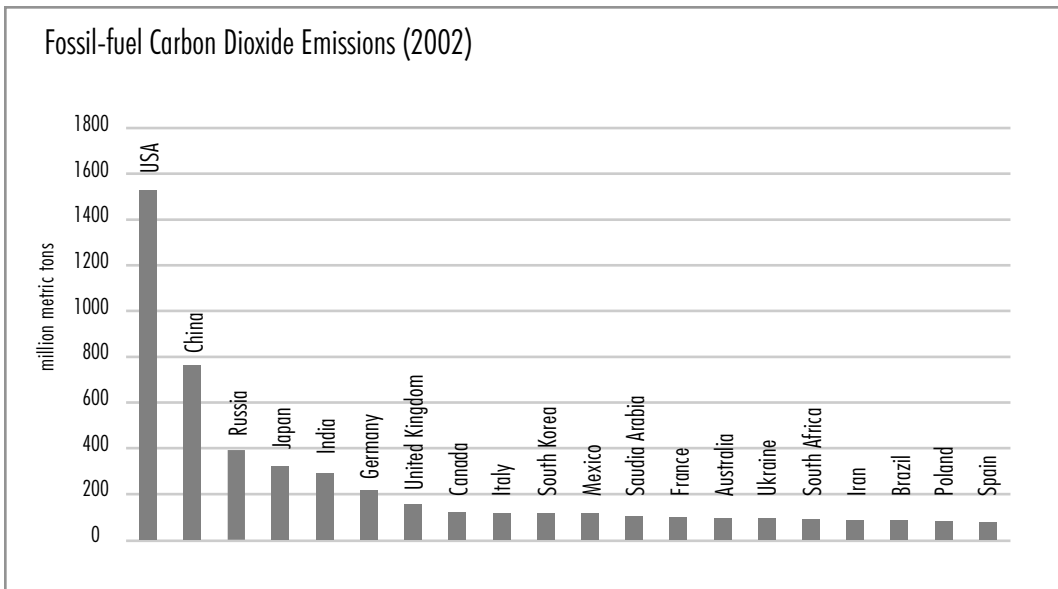
#### MODERNIZING THE ELECTRICITY DISTRIBUTION SYSTEM

In August 2003, the United States experienced the largest power outage in history, leaving more than 50 million people in the United States and Canada without power and costing over \$6 billion.<sup>49</sup> Major contributing factors were the voluntary regulatory system that oversees power operators who must balance loads on the system and an aging, outdated electricity grid. Over two years have passed, yet little has been done to modernize and secure our electrical grid, leaving the country vulnerable to another system overload or a terrorist strike on the system. The secretary should work with Congress and the Federal Energy Regulatory Commission (FERC) to enforce the recently passed mandatory electricity reliability standards and to obtain substantial funding to modernize the nation's electric power system.

At present, the management of power flows through the electrical system is guided by a private, industry-sponsored organization. After the blackout of 2003, the U.S.-Canada Power System Outage Task Force concluded that the most important step needed to prevent future blackouts is for Congress to enact mandatory reliability provisions with penalties for noncompliance.<sup>50</sup> These have just become law, and the administration and Congress must ensure that the FERC implements them quickly and efficiently.

In addition, investments are needed to modernize and improve the transmission of energy across the grid. Much of the U.S. electricity grid runs on inefficient, 50 year-old technology that is dangerously vulnerable to disruption. There are a host of new technologies that show promise for improving the way energy is delivered, further reducing inefficiencies and improving energy reliability.<sup>51</sup> New wire technology, like high-temperature superconductor wire, could overcome current bottlenecks in the electric grid and significantly increase the grid's capacity using the current infrastructure and rights-of-way. Smart grids, which incorporate high-tech monitoring systems, information technology, and updated communications components are one option. Grid improvements would reduce the strain on an overloaded energy system, sending energy where it is needed on a real-time basis. It would reduce the risk of blackouts, which can have catastrophic effects on businesses operating at the margins or in industries where computerized data flows are critical. A smarter grid would also protect against the mounting risk of damage to the energy infrastructure from terrorism. Moreover, it would allow energy produced from solar panels, fuel cells, and wind farms to be connected to the electricity grid, dramatically expanding the potential for growth in renewable, local forms of energy.

## Fossil-fuel Carbon Dioxide Emissions (2002)



### INCORPORATING EFFICIENCY AND ALTERNATIVE ENERGY INTO REGULATORY DECISIONMAKING

As part of his effort to promote a supply-side energy policy, President Bush issued Executive Order 13211, which directs federal agencies to identify any adverse impacts on energy supply that result from regulatory decisions. E.O. 13211 should be replaced with a new executive order that promotes greater energy independence by requiring agencies to give priority to projects that can curb energy demand and increase renewable, domestic supplies. It should require agencies to identify proposed and final rules expected to increase consumption of fossil fuels and require that efficient and renewable technology alternatives are fully considered.

### Tackling Global Warming

The Bush administration cannot continue to stay at the sidelines of the battle to combat global climate change. Several initiatives are needed to curb domestic emissions of carbon dioxide and other greenhouse gases. Congress, the states, and businesses should: press for a national, market-based plan to limit greenhouse gas emissions; require reductions from the transportation sector modeled on California's effort; and pursue strategies for carbon dioxide capture and storage, recognizing that coal is likely to remain a major energy source for the foreseeable future.

A global pollution problem requires a global solution. The president and the Congress must look toward global solutions to climate change as well. Since withdrawing from the Kyoto Protocol, the United States has been completely disengaged from the international discussion on how to reduce greenhouse gas emissions. In addition to domestic actions, the president should assert American leadership to reinvigorate international negotiations on a global, binding climate agreement, promote an international cap-and-trade system to control emissions, and provide incentives to the developing world to adopt clean energy strategies.

### DEVELOPING A DOMESTIC CAP-AND-TRADE PLAN FOR GREENHOUSE GAS EMISSIONS

The president should direct the National Economic Council (NEC) to develop a detailed plan, within one year, for a national, mandatory, market-based cap-and-trade system to control carbon dioxide and other greenhouse gas emissions. In developing this plan, the NEC should

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*According to the National Petroleum Council, “greater energy efficiency and conservation are vital near-term and long-term mechanisms for moderating price levels and reducing volatility.”*

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convene an interagency advisory panel, including representatives of the Council on Environmental Quality, the EPA, DOE, and other relevant federal agencies. The NEC should also solicit input from state and local officials, business representatives, the environmental community, and the public.

At the same time, the president should seek and the Congress should pass legislation to establish enforceable national limits on emissions, coupled with a program for trading emissions “credits” (*i.e.*, allowing industrial actors to sell credits earned for reductions below the national limits). Modeled on the Climate Stewardship Act,<sup>52</sup> this legislation should:

- Set an initial modest limit on carbon dioxide emissions to begin an emissions trading program. As part of this program, auto companies should be allowed, on a pilot basis, to trade emissions credits with industrial facilities, providing further incentive to shift to hybrid vehicles.
- Establish a transition period of 10 to 15 years, during which time we should invest heavily in technologies to reduce carbon emissions.
- Make clear that carbon dioxide emissions will be sharply and rapidly limited at the end of this transition period.

This strategy will create powerful incentives to invest in renewable energy, increase efficiency, and pursue other low-carbon options. At the same time, it will accelerate the turnover of capital stock—including power plants and industrial equipment—and stimulate economic growth. Previously, the cap-and-trade approach was employed to dramatically reduce power-plant emissions of sulfur dioxide, a principal cause of acid rain, producing far greater economic benefits than costs.

In early 2005, the Kyoto Protocol came into force and the European Union launched a cap-and-trade system covering 12,000 companies that account for roughly half of Europe’s total global warming emissions. Businesses operate in a global environment, and market efficiencies are enhanced by tackling emissions reductions on a global basis. Ideally, the U.S. cap-and-trade system will be designed in a way to maximize transparent accounting systems that can be linked with the European and other regional trading programs over time.

#### CONTROLLING CARBON DIOXIDE EMISSIONS FROM THE TRANSPORTATION SECTOR

The president should direct the Environmental Protection Agency to issue a national proposal to control carbon dioxide emissions from the transportation sector modeled on California’s successful program. Carbon dioxide emissions from automobiles comprise roughly 40 percent of California’s total emissions.<sup>53</sup> In an effort to curb this pollution, California enacted a law in 2002 that requires automakers to begin selling vehicles with reduced greenhouse gas emissions by model year 2009. According to the California Air Resources Board, this action will reduce



average emissions from new cars and light trucks by about 22 percent by 2012 and about 30 percent by 2016. The new requirements are anticipated to add about \$325 in costs per vehicle in 2012 and about \$1,050 per vehicle in 2016, but consumers are expected to see overall net savings through fuel savings.<sup>54</sup>

#### INVESTING IN CARBON DIOXIDE CAPTURE AND STORAGE

The Congress should provide substantial funds to invest in research and development on cheaper capture and storage of carbon dioxide emissions from coal-fired power plants and incentives for advanced coal technology for sale in domestic and overseas markets. Coal remains an abundant source of domestic energy but it must be developed in a way that limits the emissions that cause global warming, acid rain, and other forms of air pollution. Doing so will require substantial investments to advance carbon dioxide capture and storage, whereby CO<sub>2</sub> is removed from flue gases and disposed underground.

It is difficult to extract carbon dioxide from the gases of most conventional power plants, but new Integrated Gasification Combined Cycle (IGCC) plants offer much lower incremental costs for carbon capture. Currently, no fully commercial IGCC plants are in use, as they are more expensive than conventional plants. However, federal investments coupled with limits on carbon emissions could bring down relative costs of IGCC plants and promote their widespread deployment. More important is the issue of storage. In order to realize the benefits of carbon capture, federal investments should be targeted toward hastening solutions to store the carbon stream that is produced.

#### PARTICIPATING IN INTERNATIONAL NEGOTIATIONS ON CLIMATE CHANGE

The president should immediately designate a high-level interagency task force to reengage in international negotiations on climate change. In addition, the president should work with Prime Minister Blair and other G8 partners to capitalize energy efficiency and renewable energy investments in the developing world to expand options for business and further engage developing countries in a global agreement on climate change.

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## SECURING AMERICA, Protecting Our Freedoms After September 11

*History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure ... when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.*

—THURGOOD MARSHALL<sup>1</sup>

In a matter of minutes, the horrific attacks of September 11 shattered our sense of invulnerability and unleashed a security challenge of enormous dimensions. As our leaders rushed to respond to an enemy they did not understand well—but nonetheless knew must be defeated—many concluded that the danger we faced was unlike any other in American history and that new approaches were needed to secure our nation, even if certain constitutional rights were curtailed in the process.<sup>2</sup> Justice Robert Jackson’s famous statement—that the Bill of Rights is not a “suicide pact”<sup>3</sup>—has taken on a nearly talismanic importance since September 11.

This impulse to strike a new “balance” between liberty and security—or as some have argued, to allow the government nearly unfettered power during times of war<sup>4</sup>—is in some sense understandable. Three thousand innocent Americans died on September 11, an event that al Qaeda’s leaders have warned was merely a precursor to future, and possibly more catastrophic, attacks.<sup>5</sup> Yet the Constitution has survived many threats, including civil insurrections and world wars. It is designed to function during periods of crisis, and only in the most extreme circumstances does it contemplate congressional action to suspend certain rights.<sup>6</sup> Indeed, as

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*Being safe and being free are not mutually exclusive. The Constitution has survived many threats, including civil insurrections and world wars. It is precisely during times of crisis that rights must be most steadfastly defended.*

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Thurgood Marshall cautioned, it is precisely during these times when rights must be most steadfastly defended.

Our experience during a national crisis 60 years ago is illustrative. After the Japanese attack on Pearl Harbor in December 1941, the government moved quickly to forcibly relocate and intern over 100,000 Japanese-Americans, more than two-thirds of whom were U.S. citizens.<sup>7</sup> The government's action was based not on individual suspicion or a sensible assessment of the threat, but on membership in a particular ethnic group.<sup>8</sup> Although we now regard this as a shameful episode in our nation's history,<sup>9</sup> we must not forget that at the height of this war the Supreme Court upheld this evacuation policy.<sup>10</sup> One of the dissents, now celebrated with the benefit of hindsight, offers useful guidance regarding the incursions on constitutional rights made in the name of security today:

[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.<sup>11</sup>

The protection of constitutional liberties need not, and indeed should not, deprive the government of the authorities necessary to vigorously apprehend terrorists at home and abroad, prosecute them, and defend the homeland. Although a number of provisions in the USA PATRIOT Act have infringed on constitutional rights, there is little disagreement over most of the Act's provisions—they provide useful new counterterrorism tools for law enforcement, financial regulators, and intelligence agencies, and update laws to reflect advances in technology.<sup>12</sup> Indeed, the years since September 11 have shown the “choice” between liberty and security to be a false one. Being safe and being free are not mutually exclusive. We do not gain more of one by giving up the other.

The analysis and recommendations set forth in this chapter seek to secure America *and* protect our freedoms after September 11. The recommendations follow a framework of three core principles that aim to offer useful guidance for the president and Congress as they debate our nation's response to terrorism: government actions and official proceedings should be as transparent as possible; the government should be held accountable for its actions through our system of checks and balances; and measures undertaken by the government should be narrowly tailored to the goal of enhancing our security.

*Transparency.* The public has a right to know how the government is making decisions to protect the nation. Greater transparency within government arms people with the information needed to best respond to threats and enhances public confidence in our law enforcement and intelligence communities. Yet from the secret arrest of foreign nationals in the United States to

the shielding of “ghost detainees” at detention facilities around the world to secret “sneak-and-peak” searches of private homes and businesses, the Bush administration has maintained a shroud of secrecy over its actions.<sup>13</sup>

*Accountability.* The Founders carefully crafted a political system that prevents a single branch of government from possessing unchecked power.<sup>14</sup> In order for that system to function properly, each branch must hold the other branches accountable. But since September 11, the powers of the executive branch have increased at the expense of Congress and the judiciary. Federal judges have been stripped of their longstanding role in determining whether the facts justify search warrants, physical and electronic surveillance, and deportation orders, and the administration has withheld even the most basic information about counterterrorism measures from Congress.<sup>15</sup>

*Narrow Tailoring.* Since September 11, the Bush administration has repeatedly cast a wide net of suspicion over entire groups of people rather than require individualized evidence of wrongdoing. In an effort to identify possible terrorist activity within immigrant communities, the administration ordered hundreds of thousands of foreign nationals to “register” with the government, sowing fear and suspicion among millions of immigrants, breaking apart families, and destroying the careers of productive, hard-working immigrants.<sup>16</sup> This program not only relied on a crude form of ethnic profiling, it severely strained government resources without uncovering significant terrorist activity.<sup>17</sup> Similarly, law enforcement agencies have monitored, infiltrated, and attempted to disrupt peaceful political organizations merely because they opposed the war, not because of any security threat they posed.<sup>18</sup>

These principles are especially important when applied to the three major issue areas below which warrant special scrutiny as the national debate continues on how to reconcile security concerns with civil liberties, and as Congress considers the reauthorization of expiring provisions of the USA PATRIOT Act in 2005.<sup>19</sup>

- *Surveillance and law enforcement.* Law enforcement and intelligence officials must be empowered to do their jobs, but they must do so within constitutional limits. While new powers are clearly needed to combat the threat of terrorism in the digital age, many of the powers granted in the Act have not been used for counterterrorism purposes and some have raised serious constitutional concerns. Law enforcement must pursue efficient, targeted, and effective counterterrorism strategies that do not waste precious resources or infringe on civil rights and civil liberties.
- *Immigration.* Establishing effective border security and respecting the rights of immigrants should be a primary goal of the president and Congress. In the wake of September 11, the failures of our border security and immigration enforcement systems were painfully evident. Unfortunately, many of the steps taken to remedy these failures have been both overzealous and ineffective. Sensible immigration policies would encourage cooperation among the many immigrant communities that live in our nation,<sup>20</sup> and

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*The protection of constitutional liberties need not, and indeed should not, deprive the government of the authority necessary to vigorously apprehend terrorists at home and abroad, prosecute them, and defend the homeland.*

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create goodwill around the globe by facilitating the travel, study, and work of foreign nationals, including scientists, artists, and students, who can make a positive contribution to our nation.<sup>21</sup>

- *Executive branch policymaking.* As noted by the 9/11 Commission, many civil rights and civil liberties violations could be prevented if appropriate safeguards were instituted within the executive branch.<sup>22</sup> High-level personnel at federal agencies and the White House should be required to consider the impact of government policies on our civil rights and civil liberties. Complaints of possible abuses of civil rights and civil liberties by government officials should be investigated fully.

This list, of course, is not exhaustive. Many important civil liberties issues remain outside the scope of this chapter. Chief among these is recognizing that respect for civil liberties encompasses an international dimension. American credibility in the world has been dangerously impaired by the current administration's disregard for the rule of law. The president must comply with all international agreements to which the United States is a party and with customary international law, including the Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Only by respecting the rule of law can the United States enlist the international cooperation and goodwill on which its security—and the safety of its armed forces—depend.

## CURRENT STATE OF PLAY

The Bush administration has offered Americans a false choice between security and liberty. Government policies have undermined constitutional protections without making the nation more secure. Instead of enlisting the help of immigrant communities in identifying terrorist activity, the government has alienated them through measures that violate due process and yield little useful counterterrorism information.<sup>23</sup> The Justice Department has brought criminal investigations with much fanfare, only to see prosecutions collapse due to prosecutorial misconduct, leaving ruined lives in their wake and a nation still susceptible to attack.<sup>24</sup>

Indeed, the threat we face today from terrorism remains as serious as it was before September 11, 2001.<sup>25</sup> The administration's response has in many ways damaged the liberties protected by the Constitution *and* failed to enhance our security. As we describe more fully below, the administration has:

- Eliminated longstanding restrictions on law enforcement's ability to engage in domestic surveillance of political speech and activity protected by the First Amendment;
- Detained individuals for months and years without bringing criminal charges or allowing them to consult with an attorney, sometimes holding them incommunicado and in highly punitive conditions, by improperly using the material witness statute;
- Engaged in ethnic profiling and harassment of innocent individuals through the arbitrary use of terrorist "watchlists" at airports, financial institutions, car rental agencies, and numerous other businesses;



- Made extensive use of legal authorities granted under the USA PATRIOT Act in cases that have nothing to do with terrorism; refused to disclose basic information to Congress and the public about the use of these authorities; and sought to evade congressional and judicial oversight over executive branch decisions;
- Secretly detained hundreds of Arab and Middle Eastern immigrants after September 11, denying them access to legal counsel and family members, subjecting some to solitary confinement and mental and physical abuse;
- Alienated immigrant communities and damaged our international standing by requiring all adult male foreign nationals from 24 predominantly Muslim countries to complete “special registration requirements” (including photographing, fingerprinting, and interrogation);
- Failed to secure our borders and implemented an entry/exit system that has been ineffective and has raised significant concerns about safeguarding the privacy and civil liberties of millions of travelers;
- Deprived immigrants of their right to argue their appeal before an independent, neutral decisionmaker by substantially impairing the immigration court system; and
- Disregarded civil liberties and privacy concerns within the executive branch policymaking process by failing to create a meaningful civil liberties board sufficiently empowered to help shape policy formulation and investigate abuses by government agencies.

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*The public has a right to know how the government is making decisions to protect the nation. Greater transparency within government arms people with the information needed to best respond to threats and enhances public confidence in our law enforcement and intelligence communities.*

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These measures have weakened our nation and our standing in the world while doing little to make us safer.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION PLAN

### Surveillance and Law Enforcement

Surveillance and law enforcement practices should improve public safety and safeguard civil rights and liberties. As outlined in greater detail below, the president and Congress should take steps to protect First Amendment activity; prevent abuse of the material witness statute; eliminate the arbitrary and discriminatory use of watchlists; and determine which powers authorized by the USA PATRIOT Act warrant renewal.

*Protect First Amendment activity.* After September 11, Attorney General John Ashcroft unilaterally weakened longstanding restrictions on the FBI’s ability to conduct domestic surveillance

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*Law enforcement must pursue efficient, targeted, and effective counterterrorism strategies that do not waste precious resources or infringe on civil rights and civil liberties.*

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by revising the Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations.<sup>26</sup> He did this without consulting Congress. The Guidelines govern the conduct of the FBI and the law enforcement community. First established during the Ford administration (and amended thereafter), the Guidelines were created in response to serious abuses of constitutional rights by the FBI,<sup>27</sup> such as the infamous COINTELPRO program, a covert campaign to target political dissidents and illegally wiretap civil rights and anti-war leaders.<sup>28</sup> The revised Guidelines remove important safeguards limiting the scope and length of federal investigations and decrease internal supervision once those investigations have begun.<sup>29</sup> While the attorney general claimed these changes were necessary to enable the FBI to carry out terrorism investigations, the 9/11 Commission did not conclude that any of the failures leading to September 11 were due to restrictions required by the Guidelines.<sup>30</sup>

There is evidence that activity protected under the First Amendment is being monitored by the FBI. An FBI bulletin issued on October 15, 2003, called for monitoring anti-war rallies, stating that even “peaceful techniques can create a climate of disorder” and that law enforcement should be particularly wary of individuals who wear “goggles, scarves . . . and sunglasses” and extremists with “body protection equipment (layered clothing, hard hats and helmets, sporting equipment, life jackets, etc.) to protect themselves during marches.”<sup>31</sup> Federal agents have also investigated and attempted to disrupt legitimate political activities, including protests at the Republican National Convention in New York City.<sup>32</sup> Department of Justice (DOJ) resources should be focused on criminal and counterterrorism investigations, not investigations of protected First Amendment activity. Therefore, the Center for American Progress recommends that:

- The president should direct the attorney general, in consultation with the FBI director, to restore restrictions on domestic surveillance in the Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, and share those revisions with the Congress.
- The Congress should consider whether additional legislative remedies are appropriate.

*Prevent abuse of the material witness statute.* The material witness statute permits the detention of witnesses for the narrow purpose of ensuring that they provide testimony for a criminal proceeding when the government believes they pose a risk of flight.<sup>33</sup> Since September 11, however, prosecutors have used the statute as a means of preventive detention when they lack sufficient evidence to make an arrest on criminal or immigration charges. The Justice Department has refused to disclose the full extent to which it has relied on the statute since September 11,<sup>34</sup> but it is known that dozens of persons have been detained for months on end, often held incommunicado in highly punitive conditions.<sup>35</sup> Although judges must approve the detention of all material witnesses under the statute, the government has limited the availability of counsel to detainees, seriously undermining their ability to refute accusations brought against

them.<sup>36</sup> The material witness statute should not be used as an end-run around the constitutional guarantee of due process. Congress should:

- Enact legislation requiring the attorney general to release to Congress all case files, reports, and relevant data (subject to customary protocols governing classified information) regarding DOJ's use of the statute in counterterrorism investigations after September 11.
- Amend the material witness statute to include a requirement that witnesses be detained for no more than 15 days unless the government presents clear and convincing evidence that: (1) the individual poses a flight risk; (2) the individual possesses information of such importance that, if the individual became unavailable, the government's ability to investigate or prosecute serious criminal activity would be substantially damaged; and (3) no less restrictive alternatives are adequate to prevent the individual from fleeing.

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*As the 9/11 Commission concluded, the burden of proof should remain on the government to explain that each power “materially enhances security” and that adequate civil liberties protections are in place to oversee the use of that power.*

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*Eliminate the arbitrary and discriminatory use of watchlists.* After September 11, reliance on watchlists greatly increased as agencies adopted measures to detect suspected terrorists. However, use of the lists was not coordinated among the agencies; a 2003 Government Accountability Office (GAO) report found nine security agencies used more than a dozen different watchlists.<sup>37</sup> This has resulted in inaccurate lists and conflicting information. In the days after September 11, for example, the FBI distributed a list of suspected terrorists to a wide array of companies in the private sector. The list was so riddled with errors that the FBI renounced its use, but because it had been widely circulated, particularly over the Internet, numerous innocent people were falsely accused of wrongdoing.<sup>38</sup> These errors were compounded by an ineffective administrative process to enable individuals to seek to have their names removed.<sup>39</sup>

The misuse of the lists has led to repeated instances of ethnic profiling (*i.e.*, many Arab-, Middle Eastern-, and Muslim-Americans have been placed on lists because of their ethnicity<sup>40</sup>) and harassment of individuals for their political beliefs (*e.g.*, peace activists have been included on “no-fly” lists<sup>41</sup>). Innocent individuals, including Senator Edward Kennedy and Representative John Lewis, have been stopped at airports because their names were similar to those of individuals on the list.<sup>42</sup> The administration created the Terrorist Screening Center (TSC) in September 2003 as a multi-agency effort led by the FBI in conjunction with the Central Intelligence Agency, the State Department, and the Department of Homeland Security (DHS) to consolidate, maintain, and operate the government's watchlists.<sup>43</sup> Confusion over which agency should direct the TSC has hampered its effectiveness. The inspector general of DHS concluded that the department has failed to fulfill its responsibility to lead the TSC, as directed by Congress.<sup>44</sup> The report also concluded that the TSC is understaffed and employs an “ad hoc” approach to watchlist consolidation.<sup>45</sup> Serious concerns have also been raised about the TSC's commitment to protecting privacy and civil liberties; a required privacy impact assessment was never completed due to the haste in which the TSC was created, and extensive data-mining operations are being conducted without sufficient oversight.<sup>46</sup>

Maintaining accurate, up-to-date watchlists is a critically important counterterrorism measure. But without proper oversight and quality control, watchlists are an ineffective tool, inviting discrimination and infringing on legitimate political activity. The president should:

- Establish an interagency working group to identify and direct necessary resources to operate successfully the TSC and expedite the development of a master watchlist.
- Direct the secretary of homeland security to establish a process for individuals to challenge their inclusion before an administrative law judge with a right of appeal in federal court.<sup>47</sup>

*Evaluate the efficacy of the USA PATRIOT Act.* The USA PATRIOT Act was signed into law just 45 days after the attacks of September 11. Recognizing that many of the new powers granted by the Act received little consideration by members of Congress, an agreement was reached to “sunset” some of the provisions on December 31, 2005 so that Congress could evaluate the implementation of the Act.<sup>48</sup> Of the more than 150 new provisions in the law, only 16 are scheduled to sunset, and some of these are less controversial than others that do not expire.<sup>49</sup> All of the Act’s provisions, regardless of whether they are scheduled to sunset, should be evaluated for their efficacy in accordance with the following three guidelines.

First, powers granted under the USA PATRIOT Act should be evaluated to assess how they have been employed and whether they are necessary. The administration promoted the Act as necessary to address the threat of international terrorism. Yet many of the new authorities granted in the Act have been used in hundreds of cases—ranging from local corruption to drug trafficking—that have nothing to do with terrorism. Law enforcement officials have relied on the Act’s broad powers to wiretap phones, monitor private Internet communications, and obtain private financial records in the course of traditional criminal cases.<sup>50</sup> Before Congress renews these powers, in whole or in part, it must be satisfied that there is a continuing need for them and that they will not be abused. As the 9/11 Commission concluded, the burden of proof should remain on the government to explain that each power “materially enhances security” and that adequate civil liberties protections are in place to oversee the use of that power.<sup>51</sup> It is even more important that the government meet this burden with respect to powers in the Act whose relevance to counterterrorism is tenuous or nonexistent.

Second, powers granted under the USA PATRIOT Act should be evaluated to assess whether they provide sufficient transparency and public accountability. Some provisions in the Act explicitly prohibit disclosure of actions taken by the government, most notably section 215.<sup>52</sup> That provision permits the government to request “any tangible thing . . . including books, records, papers, documents, and other items” from any entity, yet forbids disclosure that such a request has been made.<sup>53</sup> Thus, a business owner who received a request under section 215 is not only obligated to turn over the requested records, but could face criminal prosecution if he or she mentions the request to anyone. This lack of transparency has been exacerbated by the Bush administration’s needless insistence on withholding or classifying even the most rudimentary information about how the Act has been used. Repeated, bipartisan requests from Congress have been rebuffed.<sup>54</sup> Such information should be disclosed unless a credible threat to national security would be posed by its release (and in such instances, customary protocols should be observed that provide access under appropriate safeguards to the relevant congressio-

nal committees). Permitting law enforcement to operate in secret not only undermines effective counterterrorism measures, but it erodes public confidence in the legal system.<sup>55</sup>

Third, powers granted under the USA PATRIOT Act should be subject to meaningful review by a neutral magistrate that includes written findings of fact whenever possible. Many provisions of the Act strip the courts of their ability to conduct a meaningful review of executive branch actions, leaving power unchecked in the hands of law enforcement officials. For example, section 215 permits the government to obtain the records it seeks merely by making a certification to the Foreign Intelligence Surveillance Court that such records are sought for a counterterrorism or foreign intelligence investigation. The court has no authority to refuse the request as long as it is submitted properly.<sup>56</sup> Section 412 of the Act permits the attorney general to detain unilaterally any alien for up to seven days without judicial review.<sup>57</sup> Judicial oversight is essential to preventing arbitrary acts by the government and making certain that the rule of law is scrupulously observed.

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## Immigration

For immigration policies to be fair and improve security, the president should end secret arrests and secret hearings, encourage cooperation with immigrant communities, improve border security, and reform the immigration court system.

*End secret arrests and secret hearings.* The Bush administration has made secrecy a hallmark of its arrest, detention, and deportation efforts, which has too often led to abuse and mistreatment of immigrants and a loss of public trust in our government.<sup>58</sup> Over 1,000 Arab and Muslim men were secretly arrested in a nationwide dragnet after September 11, many for minor civil immigration violations; some were held in 23-hour lockdown, denied access to legal counsel and family members, and subjected to mental and physical abuse.<sup>59</sup> Not one was publicly charged with terrorism.<sup>60</sup> Such secrecy was permitted because the government closed all hearings in the cases of detainees determined to be of “special interest” to the government. Basic information—including the very existence of the case—was withheld from families of the detainees, the press, and public.<sup>61</sup> The names of the detainees remain secret even today.<sup>62</sup> Denying basic due process to individuals who stand accused of a civil violation—absent compelling evidence that providing such due process would pose an imminent threat to national security—is repugnant to a modern democracy. As one federal judge declared in criticizing the government's policies, “Democracies die behind closed doors.”<sup>63</sup>

- Congress should enact legislation prohibiting the secretary of homeland security and the attorney general from closing immigration hearings absent a case-specific showing of national security need.

*Encourage cooperation with immigrant communities.* The National Security Entry-Exit Registration System (NSEERS) required adult male foreign nationals from 24 predominately Muslim countries to complete “special registration requirements” (including photographing, fingerprinting, and interrogation).<sup>64</sup> As documented by the 9/11 Commission, NSEERS un-

covered no significant terrorist activity, wasted precious counterterrorism resources, and damaged our relations with foreign nations.<sup>65</sup> The international fallout was so significant that the White House issued a “global message” that attempted to explain and justify NSEERS in order to help “avoid misunderstandings with foreign partners.”<sup>66</sup> The program’s greatest cost was its severe alienation of immigrant communities in the United States, who are the very people the government needs to cooperate with in order to identify and defeat terrorists most effectively.<sup>67</sup> Although the administration suspended several of its components, NSEERS remains in effect on a case-by-case basis.<sup>68</sup>

- Congress should enact legislation prohibiting the attorney general and secretary of homeland security from using federal funds for “special registration” programs, such as the National Security Entry-Exit Registration System (NSEERS), unless justified by specific and credible intelligence and no other alternatives exist to carry out a legitimate law enforcement objective.

*Improve border security.* The challenges we face in securing our nation’s borders were exposed by the September 11 plot in which the 19 hijackers were able to gain admission to the United States and travel frequently abroad and within the country.<sup>69</sup> In order to improve screening at the nation’s airports, seaports, and land ports of entry, the Department of Homeland Security created the US VISIT program,<sup>70</sup> a system that uses biometric identifiers (digital finger scans and photographs) to process visitors upon arrival in the United States.<sup>71</sup> Implementation of the program has been slow; current reports estimate the system could take 10 years and \$15 billion to build.<sup>72</sup> Questions have also been raised about its efficacy. US VISIT uses a two-fingerprint system rather than the 10-fingerprint system used by the Justice Department, drastically reducing its accuracy in identifying suspected terrorists and criminals.<sup>73</sup> If properly implemented, the use of biometrics can advance civil liberties by reducing dependence on ethnic profiling. But careful research is needed to ensure that such systems are implemented in a manner that is both accurate and respectful of privacy and civil liberties.

- Congress should enact legislation that provides for more funding and technical assistance to expedite rapid implementation of the US VISIT program. Such legislation should also safeguard privacy and other civil liberties.

*Reform the immigration court system.* The attorney general controls the immigration court system, both at the trial level and the appellate level (the Board of Immigration Appeals (BIA)).<sup>74</sup> After September 11, Attorney General Ashcroft issued new policies that sharply curtailed due process protections for immigrants, limited the discretion of immigration judges, and reduced the BIA to little more than a rubber stamp.<sup>75</sup> He ordered the BIA to resolve 56,000 cases in little over a year, prompting BIA members to decide cases within minutes and to abandon their practice of employing three-judge panels.<sup>76</sup> Ashcroft also reduced the size of the BIA from 23 members to 11, retaining only those judges whose records indicated that they were least likely to grant immigrant appeals.<sup>77</sup> These changes not only compromised the quality and reliability of immigration decisions but they also created an enormous burden on the federal court system as the number of BIA decisions appealed to federal courts increased significantly.<sup>78</sup> This increase has so overwhelmed the federal court system that the Justice Department has been forced to enlist lawyers unfamiliar with immigration law to help handle cases.<sup>79</sup>

Decisions of the immigration courts have a profound impact on people's lives. Family unity, deportation, and even survival—for asylum seekers who face death or torture if returned to their home country—are often at stake. An independent agency charged with reviewing the decisions of immigration judges should be created to provide sufficient due process and to ensure that justice has not been forsaken for administrative expediency.

- Congress should enact legislation establishing a new independent agency, the Immigration Review Commission, to oversee and regulate the immigration court system.<sup>80</sup>

### Executive Branch Policymaking

The 9/11 Commission concluded that attention to civil rights and civil liberties must be integrated into the executive branch policymaking process in order to lessen the risk that they will be violated.<sup>81</sup> Moreover, the government has an obligation to ensure that when violations do occur, they are investigated thoroughly. In the recently enacted intelligence reform bill, Congress addressed this concern by creating a “Privacy and Civil Liberties Oversight Board.”<sup>82</sup> Unfortunately, as explained below, this board falls short of what is needed to protect civil liberties adequately.

*Strengthen the civil liberties board created by Congress.* To fulfill the recommendation of the 9/11 Commission, a board must have a meaningful opportunity to participate in the policymaking process, investigate complaints and possible abuses of civil liberties, ensure compliance with laws and regulations affecting civil liberties, and draw on outside experts to provide effective oversight of government officials. The board created by Congress is a useful starting point for ensuring that these goals are met, but, as currently constituted, it suffers from several core deficiencies.<sup>83</sup>

First, the board is too closely tied to the president. It resides in the Executive Office of the President and all five members are appointed by, and serve at the pleasure of, the president.<sup>84</sup> Making the board an independent agency, ensuring bipartisan composition of the board (by requiring two members to be nominated by the leaders of the minority party), and establishing staggered, fixed terms for members would increase its credibility and effectiveness.

Second, the board lacks important tools to carry out real oversight and investigative functions. The board currently may request information from any person outside the executive branch; but if information is not provided after 45 days, the board is merely permitted to “notify” the attorney general of the denial.<sup>85</sup> The attorney general then “may take such steps as appropriate.”<sup>86</sup> Similarly, the board may request information from government agencies, but if denied, has no recourse but to inform the head of the agency and request the information.<sup>87</sup> Even this modest power is subject to large loopholes. Both the director of national intelligence and the attorney general may prevent the release of information deemed to threaten national security or compromise ongoing investigations.<sup>88</sup> Such a vague standard invites excessive classification by government officials, a problem documented by the 9/11 Commission.<sup>89</sup> Board members

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should be granted the requisite security clearances to gain access to all necessary information. When necessary, the board should be able to raise concerns over access to information directly to the president.

Third, although the board is instructed to “consider” civil liberties principles when it provides advice to executive branch officials,<sup>90</sup> the board is not required to assess each regulation, policy, or law in writing. When considering new or revised regulations, agencies should be required to make an initial determination as to whether significant civil liberties implications are at stake; if so, agencies should conduct a thorough civil liberties impact assessment (akin to privacy impact assessments<sup>91</sup>) in order to determine whether the regulation should be promulgated. These requirements would help regularize consideration of civil liberties implications throughout the government.

Finally, the board is required to submit annual reports to Congress. More frequent reporting requirements, such as quarterly reports, would increase awareness of, and confidence in, the board’s work and enable the press and the public to monitor its findings—and for problems to be corrected more quickly.

- Congress should enact legislation strengthening the “Privacy and Civil Liberties Oversight Board” by: making the board and its members independent of the White House; providing the board access to all necessary information, including information held by intelligence and law enforcement agencies; requiring the use of “civil liberties impact assessments”; and increasing the frequency of reports the board must send to Congress.

## ENDNOTES

<sup>1</sup> *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

<sup>2</sup> A recent nationwide poll found that 44 percent of Americans favor some restrictions on the rights of Muslim-Americans. See William Kates, *Nearly Half in U.S. Say Restrict Muslims*, *Associated Press*, Dec. 18, 2004. One year after the September 11 attacks, only one in three Americans said the government was not doing enough to protect those being investigated for terrorist involvement. Richard Morin & Claudia Deane, *Altered Lives, Changing Attitudes: In Poll, Most Americans Say 9/11 Affected Them Permanently*, *Washington Post*, Sept. 8, 2002, at A1. In November 2001, only 30 percent of Americans believed the government was not doing enough to protect the civil rights of suspected terrorists; nearly three of four said the government should be able to wiretap conversations between suspected terrorists and their attorneys. Richard Morin & Claudia Deane, *Most Americans Back U.S. Tactics*, *Washington Post*, Nov. 29, 2001, at A1. And in October 2001, eight of 10 Americans supported police authority to stop and search individuals who fit the profile of a terrorist. Gary Langer, *Power to the Police*, *ABC News*, Oct. 10, 2001, available at [http://abcnews.go.com/sections/nightline/DailyNews/STRIKES\\_civilrightspoll011010.html](http://abcnews.go.com/sections/nightline/DailyNews/STRIKES_civilrightspoll011010.html) (last viewed Aug. 15, 2005).



<sup>3</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). See George P. Fletcher, *The Cliché That ‘The Constitution Is Not A Suicide Pact’: Why It Is Actually Pro-, not Anti-, Civil Liberties*, Jan. 7, 2003, available at [http://writ.news.findlaw.com/commentary/20030107\\_fletcher.html](http://writ.news.findlaw.com/commentary/20030107_fletcher.html) (last viewed Aug. 15, 2005).

<sup>4</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2674-5 (2004) (Thomas, J., dissenting) (“I do not think that the Federal Government’s war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government’s compelling interests and for our own institutional inability to weigh competing concerns correctly.”).

<sup>5</sup> Remarks of President George W. Bush, *President Thanks DHS Secretary Chertoff at Swearing-In Ceremony*, Mar. 3, 2005, available at <http://www.whitehouse.gov/news/releases/2005/03/20050303-1.html> (last viewed Aug. 15, 2005); The National Commission On Terrorist Attacks Upon The United States, *Overview of The Enemy, Staff Statement No. 15* at 12 (2004); John F. Burns, *Bin Laden Aide Threatens More Strikes*, *N.Y. Times*, Oct. 10, 2001, at B8.

<sup>6</sup> U.S. Const. art. I, 9, cl. 2 (suspension of habeas corpus “in cases of rebellion or invasion”). The fact that Congress did not suspend the writ of habeas corpus after September 11 led Justices Scalia and Stevens to disagree with the Supreme Court’s decision that the Bush administration had sufficient authority to detain U.S. citizen Yaser Hamdi as an enemy combatant. See *Hamdi v. Rumsfeld*, 124 S. Ct. at 2660 (Scalia, J., dissenting).

<sup>7</sup> Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *Yale L.J.* 489, 490 (1945).

<sup>8</sup> *Ibid.*

<sup>9</sup> President Gerald Ford rescinded President Franklin Roosevelt’s Executive Order authorizing the internment of Japanese-Americans, saying, “We now know what we should have known then—not only was that evacuation wrong but Japanese-Americans were and are loyal Americans.” President Gerald R. Ford, Remarks Upon Signing a Proclamation Concerning Japanese-American Internment During World War II, Feb. 19, 1976, available at <http://www.ford.utexas.edu/library/speeches/760111.htm> (last viewed Aug. 15, 2005); *Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Cal. 1984) (overturning 1942 conviction of Fred Korematsu).

<sup>10</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>11</sup> *Ibid.* (Jackson, J., dissenting).

<sup>12</sup> John Podesta, *USA Patriot Act: The Good, the Bad, and the Sunset*, *Human Rights Magazine* (Winter 2002), available at <http://www.abanet.org/irt/hr/winter02/podesta.html> (last viewed Aug. 15, 2005).

<sup>13</sup> See e.g., Memorandum from Chief Immigration Judge Michael Creppy, *Re: Cases Requiring Special Procedures*, (Sept. 21, 2001), available at [http://news.findlaw.com/hdocs/docs/aclu/creppy092101\\_memo.pdf](http://news.findlaw.com/hdocs/docs/aclu/creppy092101_memo.pdf) (last viewed Aug. 15, 2005); Letter from Assistant Attorney General Daniel J. Bryant to U.S. Senator Carl Levin (July 3, 2002), available at <http://www.immigration.com/newsletter1/752detained.pdf> (last viewed Aug. 15, 2005); Eric Schmitt & Thom Shanker, *Rumsfeld Issued An Order To Hide Detainee In Iraq*, *N.Y. Times*, June 16, 2004, at A1; Human Rights Watch, *The United States’ “Disappeared”: The CIA’s Long-Term “Ghost Detainees”* (October 2004); Letter of Acting Assistant Attorney General Jamie E. Brown to Chairman F. James Sensenbrenner (May 13, 2003) at 8-9, available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotwcover051303final.pdf> (last viewed Aug. 15, 2005).

<sup>14</sup> THE FEDERALIST NO. 47 (James Madison), *New York Packet*, Feb. 1, 1788 (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

<sup>15</sup> For example, Section 215 of the USA PATRIOT Act permits the government to obtain “any tangible thing” upon a mere certification to a judge without naming a specific target. Section 217 of the Act authorizes individuals to permit law enforcement to monitor their computer for “trespassers” without obtaining a warrant, exposing many computer users to unwarranted surveillance. And Section 412 permits the attorney general to detain unilaterally any alien for up to seven days without judicial review. USA PATRIOT Act, Pub. L. No. 107-56 (2001), §§ 215, 217, 412; Letter of Acting Assistant Attorney General Daniel J. Bryant to Chairman F. James Sensenbrenner (July 26, 2002) at 3 (refusing to disclose information), available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotactcombined responses3.pdf> (last viewed Aug. 15, 2005).

- <sup>16</sup> Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002); Flynn McRoberts, *Muslim Exodus From U.S. Unravels Tightknit Enclaves*, Chicago Tribune, Nov. 18, 2003, at 1; Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. Times, June 7, 2003, at A1.
- <sup>17</sup> Thomas R. Eldridge et al., *9/11 and Terrorist Travel*, Staff Report of The National Commission on Terrorist Attacks Upon the United States, at 157-161 (2004); Rachel L. Swarns, *Program's Value in Dispute As a Tool to Fight Terrorism*, N.Y. Times, Dec. 21, 2004, at A26.
- <sup>18</sup> Michelle Goldberg, *Outlawing Dissent*, Salon.com, Feb. 11, 2004, available at <http://archive.salon.com/news/feature/2004/02/11/cointelpro/> (last viewed Aug. 15, 2005).
- <sup>19</sup> Since this chapter was originally published, both houses of Congress have passed legislation to reauthorize the expiring provisions of the Act. The two bills, S. 1389 and H.R. 3199, diverge in significant respects, and a House-Senate conference is expected to conclude negotiations to reconcile them shortly after this book goes to press. On June 17, 2005, as the House and Senate prepared to consider these measures, the Center for American Progress released the report of a bipartisan working group of former government officials offering recommendations to Congress and the administration regarding the expiring provisions. The report is available at [http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/PATRIOT\\_ACT.PDF](http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/PATRIOT_ACT.PDF) (last viewed Aug. 15, 2005). While the Center continues to favor tougher standards with respect to a number of these provisions, we believe that, taken as a whole, the recommendations represented a constructive contribution to the debate. The Senate-passed bill adopted the majority of the recommendations, and current indications are that a number of them will be included in the conference report. In November 2005, in the midst of the House-Senate negotiations, *The Washington Post* published an article revealing that the enactment of the PATRIOT Act had brought about a 100-fold increase in the FBI's use of national security letters (NSLs), with more than 30,000 issued each year. Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, Washington Post, Nov. 6, 2005, at A1. These revelations led to bipartisan calls for stricter controls on the FBI's ability to demand and retain these records. See, e.g., Mark D. Agrast, *Reforming the Patriot Act*, Nov. 17, 2005, available at [http://www.americanprogress.org/site/apps/nl/content3.asp?c=bijRj8OVF&b=837367&content\\_id=%7BA2008D66-F383-4C9B-968A-8E7F3B877634%7D&notoc=1](http://www.americanprogress.org/site/apps/nl/content3.asp?c=bijRj8OVF&b=837367&content_id=%7BA2008D66-F383-4C9B-968A-8E7F3B877634%7D&notoc=1). It appears that the conference report will provide for enhanced oversight regarding the use of NSLs, but it is unlikely to address the core concerns regarding their use.
- <sup>20</sup> See e.g., Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. Times, Oct. 12, 2003, at A1 (describing tip from community to FBI in Buffalo).
- <sup>21</sup> Charles Piller, *Yanking the Mat for Scholars*, L.A. Times, Dec. 19, 2003, at A1; Lee Hockstader, *Post-9/11 Visa Rules Keep Thousands From Coming to U.S.*, Washington Post, Nov. 11, 2003, at A1.
- <sup>22</sup> The National Commission On Terrorist Attacks Upon The United States, *The 9/11 Commission Report*, at 393-395 (2004).
- <sup>23</sup> See e.g., U.S. Department of Justice Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003); Thomas R. Eldridge et al., *9/11 and Terrorist Travel*, Staff Report of The National Commission on Terrorist Attacks Upon the United States, at 154 (2004); The National Commission On Terrorist Attacks Upon The United States, *Threats and Responses in 2001*, Staff Statement No. 10, at 13 (2004).
- <sup>24</sup> David Cole, *The D.C. Gang That Couldn't Shoot Straight*, L.A. Times, Sep. 19, 2004, at M5; Danny Hakim and Eric Lichtblau, *After Convictions, the Undoing Of a U.S. Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A1.
- <sup>25</sup> Eric Lichtblau, *Under Ridge, Color Alerts and Mixed Security Reviews*, N.Y. Times, Dec. 1, 2004, at A26; see generally Stephen Flynn, *America The Vulnerable: How Our Government Is Failing to Protect Us From Terrorism*, (2004).
- <sup>26</sup> U.S. Department of Justice, *The Attorney General's Guidelines On General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations*, at 1-28 (2003), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last viewed Aug. 15, 2005).
- <sup>27</sup> Jerry Berman & James Dempsey, *CDT's Guide to the FBI Guidelines: Impact On Civil Liberties and Security—The Need for Congressional Oversight*, June 26, 2002, available at <http://www.cdt.org/wiretap/020626guidelines.shtml> (last viewed Aug. 15, 2005); Michael Duffy & Nancy Gibbs, *How Far Do We Want The FBI To Go?*, Time, June 10, 2002, at 24.
- <sup>28</sup> Select Committee to Study Governmental Operations With Respect to Intelligence Activities ("the Church Committee"), *Book III: National Security, Civil Liberties, and the Collection of Intelligence*, Apr. 23, 1976, available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIII.htm> (last viewed Aug. 15, 2005).

- <sup>29</sup> U.S. Department of Justice, The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, at 1-28 (2003), available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last viewed Aug. 15, 2005); Jerry Berman & James Dempsey, *CDT's Guide to the FBI Guidelines: Impact On Civil Liberties and Security—The Need for Congressional Oversight*, June 26, 2002, available at <http://www.cdt.org/wiretap/020626guidelines.shtml> (last viewed Aug. 15, 2005); see also Government Accountability Office, FBI Reorganization: Progress Made in Efforts to Transform, but Major Challenges Continue, at 26-32 (June 18, 2003); Don Van Natta, Jr., *Government Will Ease Limits On Domestic Spying of F.B.I.*, N.Y. Times, May 30, 2002, at A1. In November 2003, Attorney General Ashcroft also revised the Attorney General Guidelines for FBI National Security Investigations and Foreign Intelligence Collection. Although the public version of these guidelines is highly redacted, many of the changes made are similar to the revisions to the Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations. See Susan Schmidt, *Intelligence Guide Updated; FBI Standards Authorize Sharing Security Information*, N.Y. Times, Nov. 5, 2003, at A6; U.S. Department of Justice, The Attorney General's Guidelines on National Security Investigations and Foreign Intelligence Collection, at 1-42 (2003), available at <http://www.cdt.org/security/usapatriot/031031nsguidelines.pdf> (last viewed Aug. 15, 2005).
- <sup>30</sup> See generally National Commission On Terrorist Attacks Upon The United States, The 9/11 Commission Report (2004).
- <sup>31</sup> See Text of FBI Bulletin #89 (Oct. 15, 2003), available at <http://www.fas.org/irp/agency/doj/fbi/fbi112503.html> (last viewed Aug. 15, 2005); see also Richard Ben-Veniste, Remarks to the Hearing of The National Commission On Terrorist Attacks Upon The United States, at 28 (Dec. 8, 2003), available at [http://www.9-11commission.gov/archive/hearing6/9-11Commission\\_Hearing\\_2003-12-08.pdf](http://www.9-11commission.gov/archive/hearing6/9-11Commission_Hearing_2003-12-08.pdf) (last viewed Aug. 15, 2005).
- <sup>32</sup> Eric Lichtblau, *FBI Goes Knocking for Political Troublemakers*, N.Y. Times, Aug. 15, 2004, at A1.
- <sup>33</sup> The material witness statute provides: "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person." 18 U.S.C. § 3144.
- <sup>34</sup> Alison Parker & Jamie Fellner, Above the Law: Executive Power After September 11 in the United States, at 13-14 (Jan. 26, 2004), available at <http://www.hrw.org/wr2k4/download/8.pdf> (last viewed Aug. 15, 2005).
- <sup>35</sup> Human Rights Watch, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees, at 60-67 (Aug. 2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> (last viewed Aug. 15, 2005); Anjana Malhotra, *Material Witness Law is Being Abused*, available at <http://www.hrw.org/english/docs/2004/05/27/usdom8631.htm> (last viewed Aug. 15, 2005); Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. Times, Aug. 19, 2004, at A1.
- <sup>36</sup> Alison Parker & Jamie Fellner, Above the Law: Executive Power After September 11 in the United States, at 13 (Jan. 26, 2004), available at <http://www.hrw.org/wr2k4/download/8.pdf> (last viewed Aug. 15, 2005).
- <sup>37</sup> Government Accountability Office, Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing (April 2003), available at <http://www.gao.gov/highlights/d03322high.pdf> (last viewed Aug. 15, 2005). Note that the General Accounting Office was renamed the Government Accountability Office in July 2004.
- <sup>38</sup> Ann Davis, *Far Afield: FBI's Post-Sept. 11 'Watch List' Mutates, Acquires Life of Its Own*, Wall Street Journal, Nov. 19, 2002, at A1.
- <sup>39</sup> *Ibid.*
- <sup>40</sup> See e.g., Kareem Shora, *Guilty of Flying While Brown*, available at <http://www.adc.org/index.php?id=456> (last viewed Aug. 15, 2005); Council on American-Islamic Relations, *Report: Western Union Blocks Funds Over Name 'Muhammad'*, Jan. 15, 2003, available at <http://www.cair-net.org/asp/article.asp?id=998&page=NR> (last viewed Aug. 15, 2005).
- <sup>41</sup> Sara Kehaulani Goo, *Faulty 'No-Fly' System Detailed*, Washington Post, Oct. 9, 2004, at A1.
- <sup>42</sup> Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy At Airport*, N.Y. Times, Aug. 20, 2004, at A1; Sara Kehaulani Goo, *Law Lets Passengers Appeal No-Fly List*, Washington Post, Dec. 18, 2004, at A21.
- <sup>43</sup> Eric Lichtblau, *Administration Creates Center for Master Terror 'Watch List'*, N.Y. Times, Sep. 17, 2003, at A20.
- <sup>44</sup> U.S. Department of Homeland Security Office of the Inspector General, DHS Challenges in Consolidating Terrorist Watch List Information, at 3-12 (August 2004); Eric Lichtblau & John Schwartz, *Disarray Thwarts Terrorist List, Inquiry Finds*, N.Y. Times, Oct. 2, 2004, at A12; Daniel B. Prieto, *Ridge's Mixed Legacy on Homeland Security*, Chicago Tribune, Dec. 5, 2004, at 9.
- <sup>45</sup> U.S. Department of Homeland Security, Office of the Inspector General, DHS Challenges in Consolidating Terrorist Watch List Information, at 11, 19-20 (October 2004).

<sup>46</sup> Ibid at 27-28.

<sup>47</sup> Some progress has been made on this issue but it is limited to the Transportation Security Administration (TSA), a unit within the DHS that guards the nation's airports. Section 4012 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (2004), requires the TSA to implement a coordinated watchlist system for airline passengers that includes the right of passengers to appeal their erroneous inclusion on such lists. See Sara Kehaulani Goo, *Law Lets Passengers Appeal No-Fly List*, Washington Post, Dec. 18, 2004, at A21.

<sup>48</sup> Robin Toner & Neil A. Lewis, *A Familiar Battle Fought and Won*, N.Y. Times, Oct. 26, 2001, at B5.

<sup>49</sup> Center for Democracy and Technology, *Patriot Act Sunsets*, available at <http://www.cdt.org/security/20040507sunsets.pdf> (last viewed Aug. 15, 2005). One additional, related provision of U.S. law—the so-called “lone wolf” provision (section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004)—is not contained within the original USA PATRIOT Act but is also scheduled to expire on December 31, 2005.

<sup>50</sup> Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes From Drugs to Swindling*, N.Y. Times, Sep. 28, 2003, at A1; Michael Isikoff, *Show Me the Money*, Newsweek, Dec. 1, 2003, at 36.

<sup>51</sup> The National Commission On Terrorist Attacks Upon The United States, The 9/11 Commission Report, at 394-395 (2004).

<sup>52</sup> USA PATRIOT Act, Pub. L. No. 107-56 (2001), § 215 (50 U.S.C. 1861).

<sup>53</sup> Ibid.

<sup>54</sup> See e.g., Letter of Acting Assistant Attorney General Daniel J. Bryant to Chairman F. James Sensenbrenner (July 26, 2002) at 3 (refusing to disclose information), available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotactcombinedresponses3.pdf> (last viewed Aug. 15, 2005); Letter of Acting Assistant Attorney General Jamie E. Brown to Chairman F. James Sensenbrenner (May 13, 2003) at 8-9, available at <http://www.lifeandliberty.gov/subs/congress/hjcpatriotwcover051303final.pdf> (last viewed Aug. 15, 2005).

<sup>55</sup> As Senator John McCain testified before the 9/11 Commission, “Excessive administrative secrecy on issues related to the September 11 attacks feeds conspiracy theories and reduces the public’s confidence in government.” See [http://www.9-11commission.gov/hearings/hearing2/witness\\_mccain.htm](http://www.9-11commission.gov/hearings/hearing2/witness_mccain.htm) (last viewed Aug. 15, 2005).

<sup>56</sup> USA PATRIOT Act, Pub. L. No. 107-56 (2001), § 215 (50 U.S.C. 1861).

<sup>57</sup> USA PATRIOT Act, Pub. L. No. 107-56 (2001), § 412.

<sup>58</sup> See, e.g., U.S. Department of Justice Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (June 2003); Human Rights Watch, Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees, at 60-67 (Aug. 2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> (last viewed Aug. 15, 2005)

<sup>59</sup> U.S. Department of Justice Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (June 2003) at 167-180.

<sup>60</sup> Susan Schmidt, *Ashcroft Wants Stronger Patriot Act*, Washington Post, June 6, 2003, at A11.

<sup>61</sup> Memorandum from Chief Immigration Judge Michael Creppy, *Re: Cases Requiring Special Procedures*, (Sept. 21, 2001), available at <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf> (last viewed Aug. 15, 2005).

<sup>62</sup> In response to a suit by the Center for National Security Studies, a federal appeals court upheld the authority of the government to keep the names secret. See *Ctr. for Nat’l Sec. Studies v. U.S. DOJ*, 331 F.3d 918 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1041 (2004).

<sup>63</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6<sup>th</sup> Cir. 2002) (Keith, J.).

<sup>64</sup> Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002).

<sup>65</sup> Thomas R. Eldridge et al., 9/11 and Terrorist Travel, Staff Report of The National Commission on Terrorist Attacks Upon the United States, at 157-161 (2004); Rachel L. Swarns, *Program’s Value in Dispute As a Tool to Fight Terrorism*, N.Y. Times, Dec. 21, 2004, at A26.

<sup>66</sup> Thomas R. Eldridge et al., 9/11 and Terrorist Travel, Staff Report of The National Commission on Terrorist Attacks Upon the United States, at 159 (2004).

- <sup>67</sup> Flynn McRoberts, *Muslim Exodus From U.S. Unravels Tightknit Enclaves*, Chicago Tribune, Nov. 18, 2003, at 1; Rachel L. Swarns, *Thousands of Arabs and Muslims Could Be Deported, Officials Say*, N.Y. Times, June 7, 2003, at A1; Rachel L. Swarns, *Program's Value in Dispute As a Tool to Fight Terrorism*, N.Y. Times, Dec. 21, 2004, at A26.
- <sup>68</sup> Department of Homeland Security, *Changes to National Security Entry/Exit Registration System (NSEERS)*, available at <http://www.ice.gov/graphics/news/factsheets/NSEERSfactsheet120103.pdf> (last viewed Aug. 15, 2005).
- <sup>69</sup> See generally Thomas R. Eldridge et al., *9/11 and Terrorist Travel, Staff Report of The National Commission on Terrorist Attacks Upon the United States* (2004).
- <sup>70</sup> Department of Homeland Security, *US-VISIT: Keeping American's Doors Open and Our Nation Secure*, available at [http://www.dhs.gov/dhspublic/interapp/content\\_multi\\_image/content\\_multi\\_image\\_0006.xml](http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml) (last viewed Aug. 15, 2005).
- <sup>71</sup> *Ibid.*
- <sup>72</sup> John Markoff & Eric Lichtblau, *Gaps Seen in 'Virtual Border' Security System*, N.Y. Times, May 31, 2004, at C1. See also The National Commission On Terrorist Attacks Upon The United States, *The 9/11 Commission Report* at 388, n.36 (2004).
- <sup>73</sup> Robert O'Harrow, Jr. & Scott Higham, *2-Fingerprint Border ID System Called Inadequate*, Washington Post, Oct. 19, 2004, at A8.
- <sup>74</sup> United States Department of Justice Executive Office for Immigration Review, available at <http://www.usdoj.gov/eoir/> (last viewed Aug. 15, 2005).
- <sup>75</sup> Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. Times, Jan. 5, 2003, at A1; Eric Lichtblau & Lisa Getter, *Seeking Speedier Deportations, Ashcroft Plans Judicial Reforms*, L.A. Times, Feb. 7, 2002, at A24.
- <sup>76</sup> *Ibid.*
- <sup>77</sup> Teresa Watanabe, *Federal Policy Becomes Family Matter*, L.A. Times, Oct. 27, 2003, at B1.
- <sup>78</sup> Eric Lichtblau & Lisa Getter, *Seeking Speedier Deportations, Ashcroft Plans Judicial Reforms*, L.A. Times, Feb. 7, 2002, at A24.
- <sup>79</sup> Dan Eggen, *Immigration Backlog Forces Justice to Shift Staffing*, Washington Post, Dec. 14, 2004, at A11.
- <sup>80</sup> See Section 204, Civil Liberties Restoration Act of 2004, S.2528, 108<sup>th</sup> Congress.
- <sup>81</sup> The National Commission On Terrorist Attacks Upon the United States, *The 9/11 Commission Report* at 395 (2004).
- <sup>82</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (2004), § 1061. On August 27, 2004, President Bush signed Executive Order 13353 creating the "President's Board on Safeguarding Americans' Civil Liberties." 69 Fed. Reg. 53585. While the fate of this Board is unclear in light of the Privacy and Civil Liberties Oversight Board created by Congress, the president's board is inadequate for safeguarding civil liberties and is designed to function more as an advisory body than an oversight board. The president's board resides in the Department of Justice and consists largely of high-level officials from the law enforcement and intelligence communities rather than individuals outside of government capable of exercising independent oversight. The president's board also lacks the power to investigate claims of civil liberties violations and is not required to issue annual reports to Congress. See Peter Swire, *The Wrong Civil Liberties Board*, Sept. 1, 2004, available at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=180251>; see also Richard Ben-Veniste & Lance Cole, *How to Watch the Watchers*, N.Y. Times, Sept. 7, 2004, at A23; States News Service, *Bush Stacks 9-11 Civil Liberties Board; Senators Call For Panel with Real Independence*, Sept. 21, 2004 (regarding letter from Senators Patrick Leahy and Edward Kennedy to President George W. Bush concerning civil liberties board).
- <sup>83</sup> Many of these deficiencies resulted from opposition to the board from the president and members of the House of Representatives who objected to the more robust proposal for a civil liberties board contained in the Senate version of the intelligence reform bill, which caused significant controversy among House and Senate conferees. Philip Dine, *Left, Right Alike Worry About Liberties*, St. Louis Post-Dispatch, Dec. 12, 2004, at B1; Charles Babington & Walter Pincus, *White House Assails Parts of Bills; House, Senate Remain Far Apart on Intelligence Legislation*, Washington Post, Oct. 20, 2004, at A10. Nearly nine months after the creation of the board, bipartisan frustration has mounted over its lack of funding and failure to convene. Caroline Drees, *Civil Liberties Panel Is Off to a Sluggish Start*, Washington Post, Aug. 8, 2005, at A10.
- <sup>84</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (2004), §§ 1061(b) & (e).
- <sup>85</sup> *Ibid.* at § 1061(d)(1)(D)(ii).
- <sup>86</sup> *Ibid.* at § 1061(d)(2)(B).
- <sup>87</sup> *Ibid.* at § 1061(d)(3).
- <sup>88</sup> *Ibid.* at § 1061(d)(4).

<sup>89</sup> The National Commission On Terrorist Attacks Upon the United States, The 9/11 Commission Report, at 410 (2004).

<sup>90</sup> *Ibid* at § 1061(c)(1)(D).

<sup>91</sup> For example, the E-Government Act of 2002, Pub. L. No. 107-347 (2002), requires federal agencies to conduct privacy impact assessments whenever new information technology is purchased or personally identifiable information is collected by the agencies.

## IDEOLOGY MATTERS:

### A Progressive View of the Judicial Confirmation Process

*Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.*

—ALEXIS DE TOCQUEVILLE<sup>1</sup>

Over the next four years, President Bush will almost certainly have the opportunity to nominate one or more justices to the Supreme Court of the United States and a substantial number of additional judges to the lower federal courts.<sup>2</sup> His choices will have a profound influence on the course of American society for decades to come.

As the ultimate interpreters of the Constitution, the federal courts play a central role in such sharply contested issues as abortion, voting rights, property rights, environmental protection, privacy, religious expression, the death penalty, the rights of criminal defendants and the financing of political campaigns. These issues will continue to dominate the courts' agenda in the coming years.

The judges who decide these questions should have the character, training, life experience, and breadth of understanding to appreciate the meaning and significance of the cases that come before them, both for the litigants and for society, and to make difficult choices among competing legal principles and social goods. Their decisions will also invariably reflect what is commonly referred to as their "ideology"—their beliefs about the Constitution and the role of the courts in interpreting it; their substantive views on the law; and the philosophical ideas and attitudes that inform their worldview. It is for this reason that it is important for the Senate to evaluate carefully the ideology of all judicial nominees to ensure that only individuals who operate within the constitutional mainstream and are committed to the protection of

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*It is important for the Senate to evaluate carefully the ideology of all judicial nominees to ensure that only individuals who operate within the constitutional mainstream and are committed to the protection of fundamental rights are confirmed to lifetime appointments on the federal bench.*

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fundamental rights are confirmed to lifetime appointments on the federal bench.

The importance of ideology in judicial decisionmaking is apparent from an examination of the line of decisions in which the courts have construed the scope of congressional power to enact national policies to protect civil rights and safeguard the citizenry against such threats as those posed by terrorism, lawlessness, and corporate irresponsibility. For the past quarter century, that authority has been under assault. The Supreme Court and the lower federal courts have become increasingly dominated by ultraconservative and “activist” judges who, far from deferring to the political branches, as they claim to do, have taken a restrictive view of Congress’s powers to regulate under the Commerce Clause<sup>3</sup> and to enforce the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In a series of 5-4 decisions, the Rehnquist Court has struck down more laws than any court in modern history, invalidating statutes that: prohibited the carrying of guns near school grounds;<sup>4</sup> required local police officers to carry out criminal background checks on gun purchasers;<sup>5</sup> permitted state employees to chal-

lenge discrimination based on age<sup>6</sup> and disability;<sup>7</sup> and permitted victims of sexual assault to sue their attackers.<sup>8</sup> Nor has the Court hesitated to strike down measures embraced by conservatives as well as progressives, such as the Religious Freedom Restoration Act, which mandated strict review of governmental actions that burden religious exercise.<sup>9</sup>

In light of these cases, it is surprising to hear it argued on the right that judges should simply “apply the law” and not second-guess the legislature; that ideology does not determine how judges decide particular cases, and therefore ideological considerations should play no role in the judicial selection process. Although many cases are decided on established law and precedent, it is clear that in many important and closely contested cases, a judge’s ideology plays a significant and often decisive role.

Thirty-four percent of the cases reported by the Supreme Court last term were decided by a 5-4 or 6-3 margin, and most of these decisions divided along recognizably conservative/progressive lines.<sup>10</sup> While not all Republican appointees have proven as reliably right-wing as progressives feared—or as the presidents who selected them might have wished—the rightward shift in the composition of the federal bench has resulted in a lack of balance and an increasingly narrow range of viewpoints.

Having done so much to accelerate this shift during his first administration, President Bush shows little inclination to correct it during his second. It is therefore essential that senators vigorously exercise their constitutional authority to give or withhold their “Advice and Consent”<sup>11</sup> to judicial nominations. They should carefully evaluate the fitness of the president’s nominees, confirming only those who recognize that the meaning of the Constitution has continued to evolve to meet the needs of a changing society, are committed to protecting fundamental



constitutional rights, and will consider each case with an open mind. Senators should object strenuously to any nominee whose views on the Constitution and the judicial function are antagonistic to due process, the right to privacy, and equal protection of the laws. And they should oppose those whose ideology is inimical to congressional efforts to defend these fundamental rights and promote a more just, equitable and inclusive society.<sup>12</sup>

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Most Americans would likely agree that presidents should nominate and the Senate should confirm individuals whose views on such matters can be located within the “constitutional mainstream.” It is unlikely, however, that many people who endorse this view have a clear idea of how the mainstream should be defined. One working definition can be derived from a celebrated opinion written by Justice John Marshall Harlan, who was appointed to the Court by President Eisenhower in 1955. Writing about the scope of the Due Process Clause of the Fourteenth Amendment, Harlan articulated an approach to constitutional interpretation that construes fundamental liberties, not in a narrow and literal fashion, but as part of a continuum that is greater than the sum of its parts:

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.<sup>13</sup>

That statement has become the touchstone for a long line of substantive due process cases in which the Supreme Court has recognized a protected liberty interest under the Fourteenth Amendment in personal decisions relating to marriage,<sup>14</sup> procreation,<sup>15</sup> and intimate personal relationships.<sup>16</sup> As the Court has affirmed, “Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”<sup>17</sup>

It is that approach to constitutional interpretation that remains under sharp attack from ultra-conservative judges who couch their antagonism to fundamental rights as “strict constructionism.” Those claiming to be strict constructionists refuse to acknowledge constitutional rights that are not explicitly stated within the language of the Constitution itself. Thus, Justice Scalia has written in regard to reproductive choice:

The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.<sup>18</sup>

While such restrictive theories of constitutional interpretation are favored in extreme right-wing circles, it is for the Senate to determine whether they fall within the “mainstream” or not. Before confirming nominees who share such views, senators should consider the implications for many “liberty interests” that today are taken for granted. For example, Justice Scalia’s reasoning would have left in place state laws barring interracial marriage that were held unconstitutional in 1967.<sup>19</sup>

As indicated above, similar doctrinal divisions can be found on such fundamental questions as the power of Congress to enact legislation under the Commerce Clause and section 5 of the Fourteenth Amendment. Such questions serve to illustrate that judicial ideology is neither an abstraction nor an irrelevancy: it lies at the core of the judicial function.

Presidents have always understood this, and have examined with care the ideology of their prospective nominees. The Senate must do so with equal diligence to ensure that judicial nominees bring to the bench not only sterling professional qualifications but also a judicial philosophy that is protective of fundamental rights and the legislation needed to effectuate them.

## CURRENT STATE OF PLAY

Looking at the composition of the Supreme Court in 1985, Professor Laurence Tribe observed, “Almost inevitably, a bench filled with older Justices leads to a spate of appointments that can radically reshape the Court.”<sup>20</sup> His prediction came true, with six of the nine justices leaving the Court between 1986 and 1994.

Since then, despite annual forecasts of retirements from the Court, not a single vacancy has occurred.<sup>21</sup> But with two justices in their eighties, including an ailing Chief Justice, and all but two over the age of 65, it is virtually certain that President Bush will have the opportunity to make at least one and perhaps several appointments to the Court. He will also name a substantial number of additional judges to the lower federal courts.<sup>22</sup>

The 13 federal courts of appeals generate thousands of decisions each year that represent the last word within their circuits in the overwhelming majority of cases that never reach the Supreme Court. These courts also play a powerful role in determining what Supreme Court rulings mean as they apply them to subsequent cases. In addition, it is increasingly from the ranks of the courts of appeals that nominees to the high court are chosen.

Of the 179 judgeships on the federal courts of appeals, 99 (59 percent) were filled by Republican presidents and only 68 (41 percent) were filled by Democratic presidents (the remaining 12 judgeships being vacant as of this writing).<sup>23</sup> Ten of the 13 circuit courts now have Republican-appointed majorities while only two (the Second Circuit and the Ninth Circuit) have a majority of active judges appointed by Democratic presidents (the remaining court, the Third Circuit, is evenly divided).<sup>24</sup>

## Ideology and Judicial Selection

In 1795, after months of fierce debate, the Senate rejected President Washington's nomination of former Supreme Court Justice John Rutledge to be Chief Justice of the United States. Rutledge was a distinguished jurist who was clearly well-qualified for the post, but his nomination was defeated over his opposition to the Jay Treaty with Great Britain. From that day forward, the history of the republic is replete with confirmation battles in which a nominee's views on political and doctrinal matters played a decisive role. As Professor Erwin Chemerinsky has stated, "Those who contend that ideology should play no role in judicial selection are arguing for a radical change from how the process has worked from the earliest days of the nation. Never has the selection or confirmation process focused solely on whether the candidate has sufficient professional credentials."<sup>25</sup>

In fact, while it has become fashionable on the far right to suggest otherwise,<sup>26</sup> presidents have always taken ideology into account in making nominations to the federal courts, and the Senate has always reserved the right to withhold its consent on the same basis. They have done so because they understand that judges' ideological views are a major factor in how they make decisions.<sup>27</sup>

While there are some well-known examples of judges whose behavior on the bench surprised the presidents who appointed them (Eisenhower, for example, famously remarked that he had made two mistakes in his presidency, both of which were sitting on the Supreme Court), recent studies show that "the political party of the appointing president is a fairly good predictor of how individual judges will vote" in ideologically contested cases.<sup>28</sup>

In a study published in March 2004, Professor Cass Sunstein and two of his colleagues examined 4,958 decisions by three-judge panels and the 14,874 associated votes by individual appellate judges in such areas as abortion, capital punishment, criminal appeals, property rights, affirmative action, race and sex discrimination, campaign finance reform, the scope of congressional power under the Commerce Clause, and "federalism" challenges to federal laws and regulations. They found that "Republican appointees vote very differently from Democratic appointees,"<sup>29</sup> with Democratic appointees issuing a "liberal" vote 51 percent of the time and Republicans doing so 38 percent of the time. The authors conclude that while ideology was hardly the only factor in these cases, "the litigant's chances . . . are significantly affected by the luck of the draw."<sup>30</sup>

The conclusions of the Sunstein study are supported by a new report by the nonpartisan Environmental Law Institute. The report examined 325 judicial rulings in cases brought under the National Environmental Policy Act (NEPA) and found a dramatic correlation between the outcome of NEPA cases and the party affiliation of the president who appointed the judge. Federal judges appointed by Democratic presidents are several times as likely to rule in favor

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*Judicial ideology is neither an abstraction nor an irrelevancy: it lies at the core of the judicial function.*

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of plaintiffs who sue the government claiming violations of environmental laws. On the district court level, Democratic appointees ruled for environmental plaintiffs nearly 50 percent of the time, while Republican appointees did so only 28 percent of the time. Judges appointed by the current president were even less sympathetic to environmental plaintiffs, voting with them just 17 percent of the time. In suits brought by industry or pro-development interests the results were reversed: Republican appointees ruled for the plaintiffs nearly 60 percent of the time while Democratic appointees did so just 14 percent of the time. On the

appellate level, Democratic-majority panels favored environmental plaintiffs 58 percent of the time, but Republican-majority panels did so just 10 percent of the time.<sup>31</sup>

### The Right-Wing Judicial Revolution

For the past quarter century, the far right has engaged in a concerted and methodical campaign to populate the judiciary with individuals who are ideologically committed to constitutional doctrines that constrain the ability of Congress to pass laws that further the national interest and limit the power of the courts to create remedies that protect fundamental rights. The 1980 Republican Party platform included the following declaration:

We pledge . . . the appointment of women and men . . . whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens, and is consistent with the belief in the decentralization of the federal government and efforts to return decisionmaking power to state and local elected officials. We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.<sup>32</sup>

Once in office, the Reagan administration set about implementing that pledge. According to U.S. Court of Appeals Judge Stephanie K. Seymour, Attorney General Edwin Meese hired a special assistant whose “sole and specific purpose was investigating the judicial philosophies of prospective nominees. While the administration insisted it was not quizzing candidates on how they would rule in specific cases, several nominees, especially women, claimed they were asked how they would rule in potential cases concerning abortion.”<sup>33</sup>

In 1988, the Justice Department’s Office of Legal Policy set about the task of formalizing its views on constitutional interpretation for the benefit of the incoming Bush administration. It issued two reports, remarkable for their boldness and candor, which challenged and sought to overturn a large body of established precedent that the Reagan administration regarded as “inconsistent” with those views.<sup>34</sup> The first of these documents, *Guidelines on Constitutional Litigation* (the “*Guidelines*”), took an exceedingly narrow view of congressional power under the Commerce Clause and the Fourteenth Amendment and called into question a host of settled precedents, including cases sustaining congressional power to regulate interstate commerce,<sup>35</sup> protecting the right to counsel for the accused,<sup>36</sup> and affirming the fundamental right to privacy.<sup>37</sup> The *Guidelines* did not merely challenge these precedents but sought to overturn them, departing from longtime departmental practice by directing government lawyers not to defend statutes that were inconsistent with the views of the administration.<sup>38</sup>

In the second document, a report to the attorney general entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, the department turned its attention from strategies aimed at persuading the courts to adopt its views to strategies aimed at peopling the courts with appointees who would share those views.<sup>39</sup> This report was presented as a guide to the administration's views on a series of major constitutional controversies "the resolution of which is likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court."<sup>40</sup> Far from urging that judicial philosophy has no relevance to the consideration of judicial nominations, the authors expressed their hope that the report "will allow Members of Congress of both parties, pursuant to their constitutional responsibilities, to assess judicial nominees in the most thorough and informed manner possible."<sup>41</sup>

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*The Senate must ensure that judicial nominees bring to the bench not only sterling professional qualifications but also a judicial philosophy that is protective of fundamental rights and the legislation needed to effectuate them.*

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President Reagan lost little time in selecting judges who could be relied upon to put into action the positions presented in the 1988 *Guidelines*. Among those whom he nominated that year was D. Brooks Smith, a state court judge whom he named to the federal district court for the Western District of Pennsylvania. Once ensconced on the court, Judge Smith gave a speech to the Federalist Society in which he outlined his exceedingly narrow view of congressional power under the Commerce Clause, stating, "The Framers' primary, if not sole, reason for giving Congress authority over interstate commerce was to permit the national government to eliminate trade barriers."<sup>42</sup> Judge Smith also argued that the Violence Against Women Act was unconstitutional, saying, "Notwithstanding whatever 'findings' Congress can muster regarding the alleged effects of domestic violence on interstate commerce, promiscuous invocation of the Commerce Clause should be avoided."<sup>43</sup> President George W. Bush evidently did not consider these positions too far "out of the mainstream;" in 2002, he elevated Judge Smith to the Court of Appeals for the Third Circuit.<sup>44</sup>

Early in the second Bush administration, a Republican counsel to the Senate Judiciary Committee published a candid account of the explicit ideological criteria employed by the Reagan administration to determine whether a judicial candidate would adhere to a consistent right-wing philosophy and advised the incoming administration to emulate this approach. The author quoted verbatim a memorandum by Reagan's Office of Legal Counsel which listed the attributes of an "ideal" Supreme Court candidate:

- (1) awareness of the importance of strict justiciability and procedural requirements; (2) refusal to create new constitutional rights for the individual; (3) deference to states in their spheres; (4) appropriate deference to agencies; (5) commitment to strict principles of 'nondiscrimination'; (6) disposition towards 'less government rather than more'; (7) recognition that the federal government is one of enumerated powers; (8) appreciation for the role of the free market in our society; (9) respect for traditional values; (10) legal competence; and (11) strong leadership on the court/young and vigorous.<sup>45</sup>

The approach to judicial nominations initiated by the Reagan Justice Department was continued under the first President Bush, whose White House counsel, C. Boyden Gray, acknowl-

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*The history of the republic is replete with confirmation battles in which a nominee's views on political and doctrinal matters played a decisive role.*

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edged that the goal of the Bush nominations was to “shift the courts in a more conservative direction.”<sup>46</sup>

As a result of their adoption of such explicit criteria, successive Republican administrations have made considerable headway in their efforts to remake the courts.<sup>47</sup> Thus, as noted above, the Rehnquist Court has struck down in the name of state sovereignty more laws than any court in modern memory, invalidating with the narrowest of majorities a series of progressive measures that provided remedies for a broad range of national problems, from religious freedom to age discrimination to gender-based violence to the purchase

of firearms by individuals with criminal records. While the right-wing justices have not been able to consolidate these gains completely, they are within one or two votes of doing so.<sup>48</sup>

## THE PROPER ROLE OF IDEOLOGY IN THE CONFIRMATION PROCESS

It is not only appropriate but necessary for both the president and the Senate to consider the myriad factors that may affect a nominee's discharge of her duties. It is proper for them to consider whether she has a genuinely open mind and whether her views will add an important perspective to the bench. It is proper for them to inquire into her beliefs about the Constitution and the role of the courts in interpreting it; her substantive views on the law and leading cases; and the philosophical ideas and attitudes that inform her view of the world. And it is proper for them to consider whether those views are sufficiently within the mainstream of legal and constitutional thought to enable her to uphold the rule of law and faithfully defend the Constitution as her oath of office requires.

It is also appropriate for the president and the Senate to consider the effect of a prospective appointment on the overall composition of the court on which the vacancy is to be filled to determine whether the nomination will preserve or enhance the ideological breadth of the court. Such considerations have particular salience when—as in the present period—ideological considerations have resulted in a conspicuous lack of balance and diversity of viewpoint in the federal courts.

It is partly for this reason that Senator Charles E. Schumer has argued that the role of ideology in the selection process should be frankly acknowledged and given “more open and rational consideration” in the course of Senate review of judicial nominees.<sup>49</sup> Schumer suggests that the failure to do this has degraded the confirmation process by causing those who oppose a nominee on ideological grounds “to seek out non-ideological disqualifying factors, like small financial improprieties from long ago, to justify their opposition.”<sup>50</sup>

Taking ideology into account does not require senators to seek pre-commitments or “litmus tests” as to how the candidate would resolve a given case or reach a particular result, nor should they do so.<sup>51</sup> Similarly, nominees should not be asked to predict how they might rule on an issue in the abstract without knowing the facts and circumstances in which it might arise.<sup>52</sup> Provided that they are careful to avoid such excesses, the members of the Senate are not only

entitled to consider ideology as the president has done, they have a responsibility to do so. The judicial nomination and confirmation process has been described as “a means by which the people influence the development of constitutional law through their choice of Presidents and senators.”<sup>53</sup> That can take place only if the Senate is a full partner in the process.

## PROGRESSIVE RECOMMENDATIONS

1. *The president should nominate, and the Senate should confirm, individuals of the highest qualifications and integrity who recognize that the meaning of the Constitution has continued to evolve to meet the needs of a changing society and who will interpret the Constitution to preserve and promote the ability of Congress and the courts to protect fundamental rights.*

Federal judicial appointees should be individuals of the highest professional distinction, character, and integrity, who will bring energy, openness and intellectual curiosity to the bench. The Senate should conduct a careful inquiry into the views of nominees to ensure that they see the Constitution not as a static document frozen in time, but as an organic document that has continued to respond to the challenges and complexities of modern life; that they will interpret the Constitution so as to preserve the ability of the courts to safeguard fundamental rights; and that they are not ideologically committed to constitutional or interpretive doctrines that would cause them unduly to constrain the ability of Congress to pass laws in furtherance of the national interest.

It is to be hoped that the president will select nominees who meet these standards. If instead he selects nominees with extreme views who are outside the constitutional mainstream, senators must be willing to use their political capital, and to employ all legitimate means consistent with their Advice and Consent power, to see that such nominees are rejected.

2. *The president, in consultation with the Senate, should seek nominees who will enhance the racial and ethnic diversity of the federal courts; who will expand the professional and intellectual breadth of the bench; who have been engaged in their profession and their community and enjoy the support of their peers; and who have demonstrated the intellectual and personal strengths that will enable them to become leaders of the courts on which they serve.*

A judge’s philosophy and worldview are informed by the totality of her experiences. The president, in consultation with the Senate, should look for nominees whose life experiences have broadened their minds by exposing them to diverse ways of thinking and being, and whose varied socioeconomic and professional backgrounds may offer them opportunities to educate and influence their fellow judges.

Efforts should be made to identify nominees with expertise in areas of the law that are likely to form a significant portion of their docket, and to ensure that the judges in each jurisdiction

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*While it has become fashionable on the far right to suggest otherwise, presidents have always taken ideology into account in making nominations to the federal courts, and the Senate has always reserved the right to withhold its consent on the same basis.*

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*For the past quarter century, the far right has engaged in a concerted and methodical campaign to populate the judiciary with individuals who are ideologically committed to constitutional doctrines that constrain the ability of Congress to pass laws that further the national interest and limit the power of the courts to create remedies that protect fundamental rights.*

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encompass a broad cross-section of the legal profession: prosecutors and public defenders; corporate counsel and plaintiff's attorneys; lawyers from large firms and solo practitioners; public interest lawyers and academics.

Particular attention should be given to increasing the demographic diversity of the bench by identifying and advancing women and people of color who have distinguished themselves within the legal profession. The president should take aggressive steps to ensure that the racial and ethnic composition of the courts more closely approximates that of the geographic jurisdictions they serve.

Attention should also be given to identifying nominees who have affirmed their commitment to improving the justice system, demonstrated their engagement with the needs of their communities, and earned the respect of their peers by assuming leadership roles in bar associations, charitable institutions, and other professional and civic enterprises.

Finally, the president and the Senate should look for intellectually vigorous and energetic nominees who demonstrate the curiosity, industry, collegiality and independence to become

leaders of the courts on which they serve and who may be expected to serve long enough to have an impact on the law.

3. *The president and the Senate should develop an orderly process that fosters broad consultation and input on prospective nominees.*

Pursuant to the Constitution, the president and the Senate are charged with significant responsibilities with respect to the selection, nomination, and confirmation of judges to the federal bench. Therefore, the president and the Senate should work together to develop an orderly process for vetting prospective nominees to the Supreme Court, the federal courts of appeals, and the federal district courts that is respectful of the constitutional role and prerogatives of each branch of government.

*Seek cooperation and consultation.* The president should meet with the bipartisan leadership of the Senate Judiciary Committee to signal his readiness to seek the advice of the Senate on judicial nominations and to work cooperatively with committee leaders to fill vacancies on the federal courts in a timely fashion. He should encourage senators who do not employ a bipartisan commission process in developing district court recommendations to consider doing so. And he should designate senior members of his administration with strong relationships with key senators and Senate staff on both sides of the aisle to serve as ongoing points of contact in the selection process.

*Restore independent review.* The Senate Judiciary Committee should reinstate a longstanding practice that dates from the Eisenhower administration: the confidential prescreening of



prospective nominees by the American Bar Association's Standing Committee on the Federal Judiciary. This will not only help ensure that nominees meet a threshold standard of integrity, professional competence and judicial temperament, but will avoid embarrassment to them and to the White House by enabling the names of prospective nominees who do not meet this standard to be withdrawn before they become public.

*Seek timely notice of vacancies and provide the Senate with an adequate opportunity to conduct a thorough and searching review.* The president should ask the chief justice of the United States, as presiding officer of the Judicial Conference, to urge all judges planning to retire or take senior status to give early notice to the president so he can move quickly to fill vacancies. He should consult widely with members of the Senate, other elected officials, and members of the bar in the effort to identify the most qualified nominees. Once he has decided to submit a nomination, he should give timely notice to the chairman and ranking member of the Judiciary Committee so that they can undertake a thorough review. He should provide timely access to dossiers, background checks, questionnaire responses, and such other documents concerning the nomination as they may request, subject to any procedures that may be necessary to protect sensitive information from unauthorized disclosure.

4. *Members of the Senate must be willing to exercise their constitutional prerogatives.*

In assigning shared responsibility for judicial appointments to the president and the Senate, the Framers contemplated that Advice and Consent would act as an effective check on the Executive Branch.<sup>54</sup> If they are to fulfill that constitutional role, senators must insist on full consultation and timely access to information pertaining to the president's judicial nominees. Should the president fail to consult or refuse to provide such information, or should senators determine after review that a nominee should not be confirmed, they are entitled to exercise the means afforded them under the rules of the Senate to ensure that their concerns are heard. As Senate historian Robert A. Caro has noted,

The writings of the framers of the Constitution make clear that Senators, whether acting alone or in concert with like-minded colleagues, are entitled to use whatever means the Senate rules provide to vigorously contest a President's assertion of authority with which they strongly disagree. One could say, in fact, that under the fundamental concept of the Senate as envisioned by the founding fathers, it is not merely the right, but the duty of Senators to do that.<sup>55</sup>

Where necessary, those means include the filibuster, one of a number of time-honored devices by which the Senate ensures respect for minority views. For more than a century, the Senate required unanimous agreement to end debate.<sup>56</sup> In its modern form, the filibuster enables the minority to extend debate until 60 senators agree to invoke cloture. The filibuster has been employed on numerous occasions by both conservatives and progressives to extend debate on judicial nominees. But it is the threat of a filibuster, rather than its actual use, that is perhaps the most potent weapon for encouraging the president to seek accommodation with the Senate on nominees whom senators will be willing to confirm.

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*Taking ideology into account does not require Senators to seek pre-commitments or "litmus tests."*

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After Democrats employed the filibuster to block a number of nominations by President Bush, the Senate majority leader threatened to seek changes to the rules that would eliminate or modify the use of the device in regard to judicial nominations. Such changes would have serious consequences for an institution that has functioned since its inception under such customs and traditions as senatorial courtesy and unanimous consent. Indeed, such is the Senate's regard for minority rights that in over 200 years, no rule has ever been adopted to allow a simple majority to cut off debate. Were the Senate to adopt such a measure now, it would encourage the president to select more extreme nominees and would surrender much of its ability to provide a counterweight to presidential power with respect to the appointment process. Such a profound shift should not be undertaken lightly or for short-term political advantage.<sup>57</sup>

## ENDNOTES

<sup>1</sup> Alexis de Tocqueville, 2 *Democracy in America* 280 (Phillips Bradley ed., Knopf 1945).

<sup>2</sup> There have been a number of important developments affecting the Court since this chapter was first published. On July 1, 2005, Associate Justice Sandra Day O'Connor notified the president of her intention to retire once a successor is confirmed. On July 19, 2005, the president nominated Judge John G. Roberts Jr. of the U.S. Court of Appeals for the District of Columbia Circuit to succeed her. With the death of Chief Justice Rehnquist on September 4, 2005, the president withdrew Judge Roberts' nomination and re-nominated him as Rehnquist's successor. He was confirmed on September 29, 2005, by a vote of 78-22 and took the oath as the 17th Chief Justice of the United States later that day. On October 3, 2005, the president nominated his white house counsel, Harriet Miers, to succeed Justice O'Connor, but she asked that her name be withdrawn from consideration on October 27, 2005. On October 31, 2005, the president announced his nomination of Judge Samuel A. Alito Jr. of the U.S. Court of Appeals for the Third Circuit to succeed her. The Senate Judiciary Committee will begin hearings on his nomination in January 2006. Meanwhile, Justice O'Connor remains on the Court pending confirmation of a successor.

<sup>3</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>4</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>5</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>6</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

<sup>7</sup> *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001). Garrett held that the Eleventh Amendment bars suits by state employees under Title I of the Americans with Disabilities Act. *But cf.* *Tennessee v. Lane*, 124 S.Ct. 1978 (2004), another 5-4 ruling in which the Court permitted a state to be sued under Title II of the Act. Similarly, a 6-3 decision in 2003 held that states can be sued under the Family and Medical Leave Act. *Nevada Department of Human Resources v. Hibbs* 538 U.S. 721 (2003).

<sup>8</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>9</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>10</sup> Charles Rothfeld, *The Supreme Court in a Time of Transition: A Fragile Balance as the New Term Begins*, A Report by the Center for American Progress (Oct. 8, 2004).

<sup>11</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>12</sup> As Dean Edley has written with respect to racial justice, "A president committed to progress on race must not pick judges through a process as indifferent to views on race as is the process we use to pick presidents." Christopher Edley Jr., *Leading the Races*, *American Prospect*, Aug. 2004, at 37. His words apply with equal force to senators charged with considering judicial nominees.

<sup>13</sup> *Poe v. Ullman*, 367 U.S. 497, 543 (1967) (Harlan, J., dissenting from dismissal on jurisdictional grounds), *quoted in* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992); *see also* *Rochin v. California*, 342 U.S. 165, 171-172 (1952) (Frankfurter, J., writing for the Court) (“To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges.”).

<sup>14</sup> *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married persons); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage).

<sup>15</sup> *See, e.g., Carey v. Population Services International*, 431 U.S. 678 (1977) (distribution of contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

<sup>16</sup> *See, e.g., Lawrence and Garner v. Texas*, 539 U.S. 558 (2003).

<sup>17</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992) (O’Connor, Kennedy and Souter, JJ., writing for the Court in an opinion expressly adopting the Harlan position).

<sup>18</sup> *Casey*, at 980 (Scalia, J., concurring in part and dissenting in part) (citing *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring)).

<sup>19</sup> *Casey*, at 847-48 (“Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th Century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause.”), *citing* *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>20</sup> Laurence Tribe, *God Save This Honorable Court* xvii (1985).

<sup>21</sup> *See supra* note 2.

<sup>22</sup> As of November 10, 2005, President Bush had appointed 219 judges to the federal bench, including 42 to the courts of appeals.

<sup>23</sup> Alliance for Justice, *Federal Judiciary by Court and Appointing President*, *available at* [http://www.allianceforjustice.org/judicial/judicial\\_selection\\_resources/selection\\_database/byCourtAndAppPres.asp](http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/byCourtAndAppPres.asp) (last viewed Aug. 15, 2005).

<sup>24</sup> Alliance for Justice, *Active Judges Report*, *available at* [http://www.allianceforjustice.org/judicial/judicial\\_selection\\_resources/selection\\_database/activeJudges.asp](http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/activeJudges.asp) (last viewed Aug. 15, 2005).

<sup>25</sup> Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. Davis L. Rev. 619, 625 (2003).

<sup>26</sup> For example, C. Boyden Gray, who as White House Counsel in the first Bush administration presided over the ideological vetting of judicial candidates, testified in June 2001 before a subcommittee hearing chaired by Senator Charles E. Schumer on the question, “Should Ideology Matter?” He replied to the question as follows:

I can answer in one word: No. The only legitimate question on this subject—from the White House, the Senate, the Judiciary Committee, or an individual Senator—pertains to the proper Constitutional role of a federal judge. The question is very simple: “What is the proper role of a federal judge, or of the federal judiciary?” If the nominee’s answer is “to interpret and apply the law,” or words to that effect, then you have a nominee who understands the limited role of a judge. If, on the other hand, a nominee views the judiciary as a vehicle for favoring particular interest groups or particular outcomes, then the nominee is unfit to be a judge and should consider running for legislative office instead.

Prepared Statement of C. Boyden Gray before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts (June 26, 2001) at 1.

<sup>27</sup> As one conservative judge has acknowledged, “Anyone who is realistic about the American judicial process knows that ideology affects decisions, especially the ‘hot button’ decisions that engage the attention of politicians. . . .” Hon. Richard A. Posner, *20 Questions for Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit*, *available at* [http://legalaffairs.org/howappealing/20q/2003\\_12\\_01\\_20q-appellateblog\\_archive.html#107025481874565902](http://legalaffairs.org/howappealing/20q/2003_12_01_20q-appellateblog_archive.html#107025481874565902) (last viewed Oct. 21, 2004).

<sup>28</sup> Cass Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 305 (March 2004).

<sup>29</sup> *Ibid* at 304.

<sup>30</sup> Ibid at 306. The authors also identified a phenomenon they refer to as the “panel effect,” by which a judge’s ideological tendency “is likely to be dampened if she is sitting with two judges of a different political party” and “to be amplified if she is sitting with two judges from the same political party.” Ibid at 304. Thus, they found that panels composed of three Democratic appointees issued a “liberal” ruling 61 percent of the time, whereas panels of three Republican appointees did so only 34 percent of the time. Panels composed of two Democratic appointees and one Republican appointee issued a liberal ruling 50 percent of the time, while panels composed of two Republican appointees and one Democratic appointee did so 39 percent of the time.

<sup>31</sup> Jay E. Austin, John M. Carter II, Bradley D. Klein & Scott E. Schang, *Judging NEPA: A “Hard Look” at Judicial Decision Making Under the National Environmental Policy Act*, A Report by the Environmental Law Institute (October 2004).

<sup>32</sup> 38 Cong. Q. Wkly. Rpt. 2030, 2046 (July 19, 1980), *quoted in* Hon. Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?* 34 Tulsa L. Rev. 691, 699-700 (Spring 2004). Judge Seymour was appointed to the U.S. Court of Appeals for the Tenth Circuit by President Carter in 1979 and assumed senior status on October 16, 2005.

<sup>33</sup> Ibid at 700.

<sup>34</sup> Office of Legal Policy, U.S. Dep’t of Justice, *Guidelines on Constitutional Litigation* (1988); Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988).

<sup>35</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>36</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>37</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>38</sup> See Dawn Johnsen, *Presidential Influences on Constitutional Change*, 78 *Indiana L. J.* 363, 391 n. 151 (2003).

<sup>39</sup> See Dawn Johnsen, *Tipping the Scale*, *Washington Monthly* (July/Aug. 2002), at 17.

<sup>40</sup> Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988) at iii.

<sup>41</sup> Ibid at v.

<sup>42</sup> D. Brooks Smith, Speech to the Pittsburgh Chapter of the Federalist Society, June 29, 1993, *quoted in* Alliance for Justice Report: Judge D. Brooks Smith’s Judicial and Ethical Record (May 22, 2002), at 15.

<sup>43</sup> Ibid.

<sup>44</sup> Following a contentious confirmation fight, Judge Smith was confirmed by the Senate in July 2002 only after renouncing the views expressed in the speech. Neil A. Lewis, *Mixed Results for Bush in Battles Over Judges*, *N.Y. Times*, Oct. 22, 2004, at A1.

<sup>45</sup> Ed R. Haden, *Judicial Selection: A Pragmatic Approach*, 24 *Harv. J. L. & Pub. Pol’y* 531 n. 24 (Spring 2001) (*quoting from* a report by Roger Clegg, Special Assistant to the Attorney General, *discussed in* David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* 143-44 (1999)).

<sup>46</sup> Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, *N.Y. Times*, Apr. 10, 1990, at A1; *see also* David Johnston, *In Justice Dept. of the 90’s, Focus Shifts From Rights*, *N.Y. Times*, Mar. 26, 1991, at A1 (“The Reagan Administration’s efforts to reshape the Federal judiciary by appointing conservative judges have continued under Mr. Bush.”).

<sup>47</sup> If anything, this effort has accelerated under President George W. Bush, who had appointed 219 judges to the federal bench as of November 10, 2005, including 42 to the courts of appeals. Many of these are extreme conservatives: “Of Mr. Bush’s first batch of nominees, 8 of 11 were proposed by the [Federalist Society, a right wing lawyers’ group]. There could have been no clearer signal that Mr. Bush intended to follow the pattern set by his father and President Ronald Reagan of shifting the courts rightward and reaping the political benefit of pleasing social conservatives.” Neil A. Lewis, *Mixed Results for Bush in Battles Over Judges*, *N.Y. Times*, Oct. 22, 2004, at A1.; *see also* Editorial, *John Kerry for President*, *N.Y. Times*, Oct. 17, 2004, § 4, at 10 (“Thanks to Mr. Bush, Jay Bybee, the author of an infamous Justice Department memo justifying the use of torture as an interrogation technique, is now a federal appeals court judge. Another Bush selection, J. Leon Holmes, a federal judge in Arkansas, has written that wives must be subordinate to their husbands and compared abortion rights activists to Nazis.”).

<sup>48</sup> It is often noted that a large proportion of the cases decided by the Court are relatively non-controversial, and result in unanimous decisions based on law and precedent rather than ideological considerations. But 25 of the 73 cases (34 percent) reported by the Court last term were decided by a 5-4 or 6-3 margin, and 23 these decisions divided along recognizably conservative/liberal lines. Rothfeld, *supra* note 10.

<sup>49</sup> Prepared Statement of Senator Schumer, *Should Ideology Matter? Judicial Nominations 2001*, Hearing before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts (June 26, 2001) at 2.

<sup>50</sup> *Ibid.*

<sup>51</sup> See, e.g., Justice Held Hostage: Politics and Selecting Federal Judges, The Report of the Citizens for Independent Courts Task Force on Federal Judicial Selection 7 (1999).

<sup>52</sup> Tribe, *God Save This Honorable Court* 122 (1985) (“Nominees should not be asked to travel forward in time to guess how an issue will next arise; Justices should decide cases on the basis of considered judgments made in full context, not of inflexible predispositions held in the abstract.”). See also Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 *Geo. J. Legal Ethics* 127 (Fall 2001).

<sup>53</sup> Johnsen, *supra* note 35, at 407 (describing the theory of “partisan entrenchment” advanced in Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045 (2001)).

<sup>54</sup> See Michael J. Gerhardt, Testimony before the Senate Committee on Rules and Administration on S.Res. 138, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., June 5, 2003 at 3 (“The [Appointments Clause] does not . . . vest the President with a privileged role within the appointments process. Relegating the Senate to a secondary or even subservient role within the appointments process is inconsistent with the clause and the Senate’s historic role in counter-balancing the President’s nominating authority.”).

<sup>55</sup> Letter from Robert A. Caro to Senator Trent Lott and Senator Christopher J. Dodd, June 3, 2003, at 1 (on file with the Center for American Progress). As then-chairman of the Senate Committee on the Judiciary Orrin G. Hatch has remarked, “The Senate’s power of Advice and Consent, after all, is not a rubber stamp.” Statement of Orrin G. Hatch on “Judicial Nominations” before the Executive Business Meeting of the Senate Committee on the Judiciary (Sept. 28, 2000), *available at* [http://judiciary.senate.gov/oldsite/9282000\\_ogh.htm](http://judiciary.senate.gov/oldsite/9282000_ogh.htm) (last viewed Nov. 13, 2004).

<sup>56</sup> *Ibid.* at 3.

<sup>57</sup> After this chapter was first published, a vote on the so-called “nuclear option” to curtail the judicial filibuster was averted when a bipartisan group of 14 senators (seven Republicans and seven Democrats) signed a memorandum of understanding on May 23, 2005, under which the signatories agreed: (1) to vote for cloture on three pending nominations to the courts of appeals, while making no commitment to vote for or against cloture on two other pending nominations; (2) to reserve the judicial filibuster for “extraordinary circumstances,” leaving it to each signatory to “use his or her own discretion and judgment in determining whether such circumstances exist”; and (3) to “encourage the Executive Branch to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination to the Senate for consideration.” While the memorandum put an end to the nuclear brinkmanship for the immediate future, the long-term viability of the agreement remains uncertain.



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## MOVING GOVERNMENT DECISIONMAKING

Into the Information Age

*Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives.*

—JAMES MADISON, 1822

Three decades of strong public health and safety laws have resulted in tremendous gains: Our air and water are cleaner; our food, workplaces, and roads are safer; and corporations and government are more open and accountable to the public. These improvements have saved thousands upon thousands of lives and raised the quality of life for all Americans—while our industry and economy have thrived.

Nonetheless, numerous significant health, safety, and environmental problems remain. For instance, every year more than 40,000 people die on our nation’s highways,<sup>1</sup> while power-plant pollution causes an estimated 24,000 premature deaths.<sup>2</sup> Foodborne illnesses kill 5,000 and sicken 76 million annually.<sup>3</sup> Nearly 6,000 workers die as a result of injury on the job, with an additional 50,000 to 60,000 killed by occupational disease.<sup>4</sup> And major new global challenges such as climate change, exposure to multiple chemical pollutants, and rapid deterioration of ocean habitats require urgent attention.<sup>5</sup>

Our ability to address these problems could be greatly enhanced through better information. Currently, there are large unanswered questions that make effective policymaking more difficult. What environmental contaminants are acutely dangerous to children? How does the

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interaction of multiple toxic substances affect human health? What neighborhoods are most imperiled by polluted air and water? What is the air quality inside American workplaces and industrial facilities?

Information-age technologies have the power to help answer these questions and bring our problems into focus as never before. Low-cost wireless sensors can provide up-to-the-minute air and water quality data at the neighborhood level or in the workplace. Distributed database technology can make multiple databases function as one, allowing us to test the interaction of an array of different variables. Data-mining systems can sift through data to more precisely identify health, safety, and environmental risks. And the Internet can make this information instantaneously available to the public.

The Center for American Progress recommends that the president and Congress work together to invest in and harness these new technologies to build an information infrastructure for stronger health, safety, and environmental protection. The Center envisions a host of important benefits flowing from this effort that could transform government decisionmaking. Problems and priorities would be crystallized. Many health, safety, and envi-

ronmental risks are hidden from public view. For example, it is impossible to actually see toxic chemicals causing cancer or polluted air causing childhood asthma. More robust data collection and analysis would help bring these risks to light and make it easier to spot adverse trends. When we have a clear picture of our problems, we can set sensible priorities—focused on the greatest threats—and craft targeted policy solutions that make maximum use of available resources.

Effective policies would also be easier to identify and expand. Frequently, we lack sufficient data to evaluate the results of our efforts to limit health, safety, and environmental harms. More information on program performance would help us determine what policies to extend and what to revise or discard. At the same time, performance data, packaged to highlight good and bad practices, could be used to spur constructive competition among federal agencies, states, local governments, and private companies. Improvements are often encouraged by the recognition of good performance and the threat of embarrassment associated with bad performance. The hope is that such spotlighting would push government and the private sector to adopt top-performing policy models and technology options to control health, safety, and environmental harms.

All of this would make political consensus easier to achieve. By clarifying problems and effective policies, we would narrow the zone in which political judgment plays out and potentially break the bitter stalemate over health, safety, and environmental regulation. Enhanced data promises to empower the public and create the political imperative for action. When hazards are exposed, experience shows the public will become engaged and demand solutions, offsetting the influence of special interests, which now dominate regulatory decisionmaking.



The private sector has already invested heavily in technology to collect and analyze data, enabling companies to manage inventories in real-time, measure the performance of product lines and marketing strategies, and identify priorities for capital allocation. In short, data is driving sound business decisions. Government should follow the private sector's lead. The Center proposes three broad steps to move government decisionmaking into the information age:

- *First, we should modernize data collection to address gaps in our knowledge about health, safety, and environmental dangers.* This includes, for example, adopting wireless sensor technology and expanding the use of electronic reporting, which can improve data quality, slash administrative overhead, and reduce reporting burdens on industry.
- *Second, we should manage and disseminate data in a way that allows for easy analysis.* In particular, this means integrating health, safety, and environmental data across government and making this data searchable through the Internet.
- *Third, we should develop systems to analyze data to set priorities, measure program performance, and guide effective policymaking.* Data should drive governmental decisionmaking. Crucial to this are comparative rankings that place health, safety, and environmental dangers in a context that is easily understood to policymakers and the public alike.

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While this chapter focuses on health, safety, and the environment, data-driven policymaking holds similar promise for a host of other progressive priorities. A government-wide commitment to enhance information through new technology would improve decisionmaking across an array of policy areas. For example, the areas of health care, immigration, homeland security, and education policy are similarly plagued by problems of data collection, management, and analysis. The Center for American Progress is committed to promoting data-driven decisionmaking in these areas as well.

The Center has chosen to focus on health, safety, and the environment for this chapter as a response to the policies pursued by the current administration, which has swept aside a host of crucial safeguards and turned its back on emerging problems, such as global warming. For decades, special interests and their allies in an array of industry-funded right-wing think tanks have developed and promoted policies designed to undermine government's ability to protect public health, safety, and the environment. The administration's actions are the culmination of this effort. In her recent book, Christine Todd Whitman, President Bush's former EPA administrator, laments the influence exerted by "antiregulatory lobbyists and extreme antigovernment ideologues."<sup>6</sup> Progressives have offered vigorous opposition to these lobbyists and ideologues, but—lacking a similar organizational infrastructure—have not provided a competing vision.

The recommendations below take a first step in providing a progressive vision. The administration has been able to avoid public scrutiny by exploiting and hiding behind the complexity of the regulatory system. Data-driven decisionmaking promises to make this more difficult by bringing the consequences of government action—and inaction—out in the open.

## CURRENT STATE OF PLAY

### The Problem

In 1984, a massive chemical release at a Union Carbide plant in Bhopal, India, killed thousands and sickened or injured tens of thousands. Worried about the possibility of a similar event here, Congress responded with a novel and innovative law that embraced the power of new information technologies to promote health and safety improvements. Pursuant to this law, the Environmental Protection Agency (EPA) established the Toxic Release Inventory (TRI) to disseminate information on industrial toxic releases through the Internet. The disclosures made under the TRI had immediate and long-lasting effects. Community organizations and environmental groups, as well as the press and everyday citizens, were empowered to expose toxic dangers and demand action. Government decisionmakers were given more comprehensive and interactive data to evaluate toxic risks. And industrial facilities were able to track their own toxic releases, as well as their performance relative to other facilities. This heightened awareness—among the public, government, and industry itself—pushed facilities toward best practices that delivered dramatic results. Since facilities began reporting under the TRI in 1988, toxic releases have declined by nearly 50 percent.<sup>7</sup>

The political impetus for the TRI grew out of a “right-to-know” movement led by environmental organizations, labor unions, and citizen activists. During the 1960s and 1970s, a crescendo of environmental and workplace disasters brought home the problems of unhealthy air, contaminated water, and worker exposure to cancer-causing chemicals. In one of the most tragic cases, the residents of Love Canal, New York, suffered numerous birth defects and astronomical illness rates before they learned about the massive toxic waste dump on which their town was built. In 1978, the town was completely evacuated, drawing national attention and spurring passage of the Superfund legislation to identify and clean up toxic waste sites. Americans discovered they were living with risks they had no knowledge of and therefore no control over. The TRI was viewed as a continuation of this effort to inform the public of toxic risks in their communities.

Today, federal agencies collect vast amounts of data crucial to protecting public health, safety, and the environment—from information on foodborne illnesses to traffic fatalities to workplace injuries to air and water pollution. Nonetheless, persistent data gaps, poor information management, and the lack of systematic analysis hinder government’s ability to adopt more data-driven decisionmaking.

Among other things, we lack basic information to measure variations of smog and soot from community to community, assess worker exposure to hazardous chemicals, monitor toxic releases and the quality of drinking water in real-time, and track the health of our oceans. Meanwhile, the information we do collect is seldom linked together and made available through the Internet. For example, census data is not integrated with public health data and data on air and water pollution. This makes it more difficult for government decisionmakers, researchers, and the public to evaluate cumulative risks within communities, spot trends over time, establish correlations between corporate activity and health effects, and assess the performance of government programs and the private sector.

Due in large part to significant data gaps, policies and priorities are not developed in a systematic way so that the biggest problems and best solutions are readily apparent to government decision-makers and the public. For example, federal agencies generally do not perform comparative rankings, which can spotlight problems and suggest priorities, promote constructive competition among the states or entities being ranked to avoid or solve problems, and generate public pressure to implement solutions. This has made it easier for regulated entities to influence outcomes, and for the current administration to ignore health, safety, and environmental problems or even adopt policies that exacerbate them. More comprehensive data, put in a context that is easily understood, would help bring these problems to light and engage the public in counteracting the influence of special interests.

### The Promise

Today, the values and goals of the right-to-know movement are widely embraced. Federal agencies across the board have made it a central mission to gather and analyze information on health, safety, and environmental risks, and broadly disseminate that information to the public. At the same time, advances in technology—most notably the Internet—have made these goals readily achievable. Through government web sites, a wealth of data is now at a citizen's fingertips.

The challenge now is taking the next step, so that data is more comprehensive, more integrated, and more easily understood. This means taking greater advantage of technologies already in use, such as electronic reporting software and analytical tools to link multiple databases. But it also means developing and employing technologies of the future; indeed, the next information revolution lies right before us, promising to translate our physical world into a digital one. For example, small wireless sensors have been developed that can measure temperature, light, sound, pressure, chemical concentration, and more. Sensors can be deployed to provide current data on just about anything in the physical environment, from air and water quality to the health of ecosystems to traffic flow to the condition of critical infrastructure, such as roads and bridges and the electrical grid.

In a new book about the promise of new technology for environmental protection, Feng Zhao and John Seely Brown describe how biologists are relying on 190 sensors, linked together by satellite, to remotely monitor the nesting habitat of Leach's Storm-Petrels on an island off the coast of Maine.<sup>8</sup> Information collected by these sensors is immediately posted to the Internet, and made available to biologists on the other side of the country.

Soon, sensor networks like this could be ubiquitous. Sensors the size of a wristwatch can now be purchased for \$100 to \$200 each. With advances in nanotechnology, which involves the manipulation of matter at the atomic and molecular level, these sensors are expected to become much smaller and cheaper—as small as a gnat and costing no more than a few cents.<sup>9</sup> This

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“smart dust”<sup>10</sup> could be spread through the natural environment, workplaces, and highways, as well as homes, consumer products, and automobiles, to collect vast amounts of data on health, safety, and environmental threats wherever they may lie. Thoughtful upfront planning could ensure that we employ this technology without jeopardizing privacy.

New powerful analytical tools, also propelled by nanotechnology, could be employed to comb this data to instantly identify problem areas, while government decisionmakers, researchers, and the public could use intelligent browsers to ask almost any question imaginable. Zhao and Brown call this “Google on steroids.” In contemplating such a future, they speculate further about the possibilities:

Equipped with a new generation of sensors, automobiles and trucks could monitor their own emissions and download them at a service station or to a home computer, or transmit the data in batches over cellular networks. When cars can talk to each other we can begin to create dynamic networks that can be optimized to reduce congestion, cut air pollution, speed up just-in-time deliveries, or help people find the closest available parking space in an unfamiliar city. This is more than just about convenience. We waste enough energy sitting in traffic jams each year to run our entire domestic airline fleet.<sup>11</sup>

How far are we from entering this digital world? The answer depends on our commitment to developing a comprehensive, coordinated strategy for getting there.

## PROGRESSIVE PRINCIPLES

*The American people have a fundamental right to know about the health, safety, and environmental dangers with which they live.* A functioning democracy depends on the free flow of information, allowing the public to participate in government decisions and hold officials accountable for results. Grounding our decisionmaking in good data can help enhance transparency and public confidence. For example, if an agency were to rank its top 10 regulatory priorities and then identify the best performing individual companies or state and local governments, both the regulator and the regulated—and the public—would have a basis upon which they could measure performance and identify best practices for future performance.

*Likewise, greater knowledge about health, safety, and environmental dangers should lead to greater corporate accountability.* Our religious and ethical traditions instruct that those who do harm should take responsibility for their actions. This principle extends to businesses that inflict health, safety, and environmental damage on the public. The recommendations below are based on the assumption that where problems are identified, we should expect those responsible to mitigate damage and demonstrate improvement.

*Regulatory safeguards should be no more restrictive or costly than necessary to ensure the protection of public health, safety, and the environment.* Too often, narrow special interests have argued that health, safety, and environmental safeguards impose unnecessary and burdensome costs on private sector activity. While the costs to regulated entities are often vastly overstated,<sup>12</sup> we agree that society should do everything possible to control them without sacrificing necessary safeguards. Indeed, industry stands to gain from new technology as much as the public does.

Innovative technology promises fewer reporting burdens and more targeted policy solutions that eliminate unnecessary costs.

*Protective action should not be postponed until all data gaps are filled and all uncertainty is eliminated.* By properly employing technology, policymakers will undoubtedly improve data collection and analysis. Despite such improvements, some degree of uncertainty will inevitably remain. Even where information is imperfect or incomplete, those charged with the responsibility for protecting the public and the environment must take timely action using the best information available.

*Improved data and enhanced understanding should facilitate special attention on subpopulations particularly at risk.* Obtaining more data and enhancing our understanding of it allows policymakers to prioritize both the problems that require attention and the solutions that should be pursued. Furthermore, this enables policymakers to pay special attention to groups of people at disproportionate risk from health, safety, or environmental dangers. Such groups include children, the elderly, and those who live in areas with high concentrations of environmental contaminants—frequently poor, minority communities. The risk of a particular contaminant might look small when spread over the entire population, yet still carry significant risks for certain subgroups. It is therefore essential that policymakers analyze data to account for social justice and equity concerns.

*We must be willing to “follow the data.”* The pursuit of better data and better analysis of data allows us to address problems where they are discovered, expand programs that are shown to be working, and improve or eliminate those that are not. Ultimately, we expect such data-driven decisionmaking to produce stronger, more effective health, safety, and environmental protection. Indeed, if the Bush administration had acted on the data, rather than seeking to distort or conceal it, we would have tougher standards on mercury emissions, the dumping of mine waste, the prevention of repetitive-motion injuries on the job, tire-pressure monitoring, and Listeria-contaminated meat, just to name a few examples.<sup>13</sup> Information should drive the agenda, not the other way around.

By investing in technological breakthroughs and implementing existing cutting-edge technology as recommended below, we can increase public knowledge about existing public health, safety, and environmental dangers; enhance corporate accountability and encourage preventive or corrective action; reduce the costs of unnecessary or ineffective regulation; and focus our resources on those interventions that are most effective.

## PROGRESSIVE POLICY RECOMMENDATIONS AND ACTION ITEMS

Our recommendations are divided into three parts: (1) using new technology to address information gaps and enhance data collection; (2) managing and disseminating data to improve analysis and empower the public; and (3) using data to enhance government decisionmaking

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and accountability. While the executive branch could implement some or all of these recommendations without legislation, we believe it is important for Congress to act to enhance effectiveness and accountability. Implementation will require a level of government coordination and commitment that is unlikely to happen without the force of law. Ultimately, congressional oversight will be critical to ensuring that federal agencies follow through.

Congress must also be willing to make the necessary investments in new technology. Over the long run, these investments promise to produce significant savings—by lowering government overhead, minimizing reporting costs associated with regulation, and saving money currently spent addressing preventable health, safety, and environmental harms. The policymaking benefits of a comprehensive information infrastructure for government decisionmaking are even more appealing. These include: greater precision in identifying problem areas; more responsive and transparent government; more effective safeguards; and an informed public, empowered to fight for a cleaner environment and safer, healthier communities.

#### Information Gaps and Data Collection

A comprehensive effort to address information gaps and enhance data collection through new technologies promises more responsive and smarter government. The invisible would become visible, allowing for clearer identification of problems. Data could be analyzed immediately, facilitating swift action to head off and reverse health, safety, and environmental damage. And information would be more accurate, giving us greater confidence in our conclusions.

Starting with data gaps, consider a few examples. We do not adequately monitor for regional variations of smog and soot, frequently missing dangerous levels of air pollution.<sup>14</sup> Each “urban area” of more than 200,000 people is required to have only one monitoring station to detect exposure,<sup>15</sup> while air quality in counties without an “urban area” is not monitored at all—even if those counties are downwind from polluting sources or between counties that do not meet air quality standards. Nor do we track the health of our oceans, despite their alarming deterioration. According to the U.S. Commission on Ocean Policy, “there is no national monitoring network in place to assess their status, track changes over time, help identify causes and impacts, or determine the success of management efforts.”<sup>16</sup>

The lack of information regarding worker health and safety is even more serious. There has not been a national study to broadly assess worker exposure to hazardous chemicals in 20 years, while the Occupational Safety and Health Administration inspects less than 1 percent of all workplaces each year.<sup>17</sup> Thus, we lack essential information to address occupational disease, which kills an estimated 50,000 to 60,000 American workers annually.

Even where information is collected, by the time it reaches the government and the public, it is frequently too late to act. We do not collect real-time data on drinking-water quality, leaving us vulnerable to contamination, including by a terrorist act. The Government Accountability Office (GAO) recently consulted 43 nationally recognized experts on this possibility, and issued a report noting that “experts most strongly supported developing near real-time monitoring technologies to quickly detect contaminants in treated drinking water on its way to consumers.”<sup>18</sup>

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Real-time monitoring is also unavailable for toxic releases into the air, land and water. Instead, many industrial facilities report only *estimates*<sup>19</sup> of their pollution—found to understate actual pollution<sup>20</sup>—and this data is not disseminated until years after the fact. The EPA did not publicly release the 2002 toxic-release data until June 2004, and data from 2003 did not become available until May 2005. Imagine what would happen if the public could obtain accurate, timely news of a water or air pollution emergency. There can be little doubt that a public so informed would take decisive action to ensure that such problems were quickly addressed.

To address problems of timeliness, we should move to adopt sensor technology that can provide precise, real-time air and water quality data, which computers can comb to instantly identify problem areas. Such sensor networks have the added advantage of allowing the problems that exist to be identified with specificity, as opposed to relying on averages for metropolitan areas.

Where sensor technology is not an option, electronic reporting offers the opportunity to improve data quality. Industrial facilities are now able to report their toxic releases electronically using new software that scans for errors, such as missing or inconsistent data.<sup>21</sup> We should move to expand electronic reporting and harmonize information collection across agencies and agency programs. This would not only speed information collection and improve data quality, but would eliminate duplication, slash administrative overhead, and significantly reduce industry reporting burdens.

#### ACTION ITEMS TO IDENTIFY INFORMATION GAPS

- The White House Office of Management and Budget (OMB), acting through its Office of E-Government and Office of Information and Regulatory Affairs, should coordinate agency efforts to improve health, safety, and environmental information.
- Each health, safety, and environmental agency<sup>22</sup> should identify the 10 most critical data gaps in its area that impede the fulfillment of its mission and hinder measurement of government performance.
- Federal agencies, led and coordinated by OMB, should identify information technology that can address priority data gaps.
- The Congress should provide the funds to invest in, and federal agencies should employ, information technologies, such as pollution sensors and electronic reporting software, to improve data quality and speed information collection and dissemination.

- Federal agencies should move to adopt integrated electronic reporting, so that regulated entities do not have to report the same information to multiple agencies and agency programs.

### Data Management and Dissemination

As we collect more data, information management becomes even more critical. If data is not managed effectively, analysis suffers and the data's power is diminished. Currently, health, safety, and environmental databases are seldom integrated across government agencies or even within agencies, making it more difficult to evaluate cumulative risks within communities, spot trends over time, establish correlations between industrial activity and health effects, and assess the overall performance of regulated entities.

Fortunately, such integration is eminently achievable. Cross-agency information collection naturally facilitates database integration, while distributed database technology can make multiple databases function as one—even if they were put together with different database software. Unfortunately, this technology is underutilized.

Besides impeding analysis, this lack of integration limits the quality of information delivered to the public. EPA is probably the most advanced agency with respect to disseminating data through the Internet, yet the public is still unable to retrieve, through a single search, all data reported to EPA by zip code or industrial facility. Likewise, pollution data (*i.e.*, toxic emissions) is not linked to information on health outcomes (*i.e.*, resulting illness or fatalities), providing little context for understanding its significance.

By moving toward greater data integration and more meaningful dissemination, we could unlock the power of this information. Data-mining systems could sift through data to more precisely identify health, safety, and environmental problems, while integrated databases, searchable through the Internet, would empower the public to hold government and corporations accountable for improvements. Consider the potential benefits of an integrated database that presents every company's record of compliance with laws and regulations, including health, safety, and environmental standards. Federal contracting officials, who are required to ensure that prospective federal contractors have demonstrated a "satisfactory record of integrity and business ethics,"<sup>23</sup> would have a basis on which to evaluate potential contractors and the public would have a basis for holding contracting officials accountable for their determinations.

In addition, by making such a database available through the Internet, members of the public could invest in socially responsible ventures.<sup>24</sup> For the investor, there are economic reasons for wanting this information beyond pure altruism: poor health, safety, or environmental performance may lead to fines, litigation, or loss of government contracts that reduce bottom-line profits. According to Innovest, a financial advisory firm, companies with strong environmental performance yield investment returns from 1.5 to 3 points higher than companies across the stock market.<sup>25</sup>

A bright spotlight on a company's health, safety, and environmental record is likely to produce improved performance. The same is undoubtedly true for government performance. With a firm commitment to data management and dissemination, we can turn the spotlight on.



## ACTION ITEMS FOR DATA MANAGEMENT AND DISSEMINATION

- Each federal agency should integrate its own health, safety, and environmental databases and make this data searchable through the Internet, so that the public can obtain all the agency's data by zip code or by specific facility, among other possible variables.
- Federal agencies should move to link data on industrial outputs (e.g., product defects, food contamination, air and water pollution, or chemicals used in the workplace) with data on health, safety, and environmental consequences.
- Federal agencies, led and coordinated by OMB, should create an integrated, centralized database that presents each company's history of compliance with laws and regulations, including health, safety, and environmental standards.
- Each federal agency should convene its partners in state government to develop a plan for better information sharing, including the integration of data collection, analysis, management, and dissemination.
- EPA, which has government-wide leadership for advancing e-rulemaking,<sup>26</sup> should work to establish an integrated system that would allow the public to track the development, implementation, and enforcement of each major rule.
- OMB and EPA should convene an interagency panel to devise a plan and identify resource needs to create a government-wide searchable database that includes: (1) all health, safety, and environmental data by zip code; (2) all data reported by a specific entity, such as an industrial facility; (3) census data; and (4) data on enforcement actions against specific entities.
- Federal agencies should identify (1) legal barriers that preclude data integration and dissemination<sup>27</sup> and (2) privacy issues that militate against data integration and dissemination.

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*Once gathered, data must be analyzed and put in a context that is easily understood, so that it drives health, safety, and environmental decisionmaking. Filling data gaps is of little use if the data is not provided to decisionmakers in a way that makes the biggest problems and most effective solutions readily apparent.*

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### Data-Driven Decisionmaking

Once gathered, data must be analyzed and put in a context that is easily understood, so that it drives health, safety, and environmental decisionmaking. Filling data gaps is of little use if the data is not provided to decisionmakers in a way that makes the biggest problems and most effective solutions readily apparent.

Comparative rankings—currently seldom used in this country—are a crucial part of this effort. Government decisionmakers can use rankings to set priorities, target resources, and guide effective policy responses. Such rankings can also promote constructive competition, which in

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turn can spur innovation and create public pressure to address problem areas. For example, Belgium's poor 2001 ranking<sup>28</sup> in the Environmental Sustainability Index—a project of the World Economic Forum that measures 21 core indicators of environmental performance in 146 countries<sup>29</sup>—caused a public uproar and a new focus on the country's pollution problems. Pollution was just as bad before the index's release, but the rankings (in which Belgium finished 79<sup>th</sup>, behind Albania) gave Belgians a context for understanding environmental health risks and their government's relative performance.<sup>30</sup>

To develop rankings like these, we first must measure performance using key indicators. Due in part to data gaps, agencies often have been unable to measure performance in terms of *outcomes* (e.g., demonstrable improvements in air and water quality), making it more difficult to judge whether programs are working.

Enhanced data collection and management is essential to the generation of outcome data, which in turn enables agencies to develop rankings to spotlight good and bad performance, promote best practices, and inform decisionmaking. In particular, agencies should identify top performing programs and policy solutions, and rank the performance of states and metropolitan areas. Based on the results of these rankings, we could expand successful strategies to programs and areas that are underperforming. At the same time, consensus would be easier to achieve and public trust would be enhanced as the benefits of government action became more apparent.

Agencies should also rank the performance of regulated entities or facilities. As a model, Great Britain's Environment Agency publishes an annual report that grades the performance of individual companies.<sup>31</sup> This report has allowed members of the public to better understand risks in their communities, while encouraging industry to adopt best practices.

Rankings should also be used to set priorities. In setting priorities, federal agencies should rank the greatest threats to health, safety, and the environment, giving special attention to at-risk populations, such as children, the elderly, and those who live in areas with high concentrations of environmental contaminants. For example, this could mean identifying the greatest threats to children's health and safety, and ranking the communities whose children are in the most peril. Few communities would tolerate being in the "top" 10.

Indeed, the public is unlikely to tolerate poor health, safety, and environmental performance all the way around. Performance measurement, coupled with comparative rankings, provides a context for understanding, so that problems and solutions are crystallized, thereby engaging the public in government decisionmaking to produce better policy results.

#### ACTION ITEMS FOR DATA-DRIVEN DECISIONMAKING

- Federal agencies should measure the performance of their programs in terms of outcomes where feasible, and present the results in their annual performance reports to Congress (required under the Government Performance and Results Act).

- Each federal agency should annually rank the top 10 health, safety, or environmental problems under its jurisdiction, quantifying the problem to the extent possible (*e.g.*, the estimated number of premature deaths from air pollution). In subsequent performance reports, each agency should evaluate its progress in addressing these problems.
- Each agency should spotlight and expand top-performing policy solutions for addressing its top 10 priorities.
- Each agency should identify the most effective technologies for controlling hazards to promote best practices among industry.
- Agencies should annually rank the health, safety, and environmental performance of states, major metropolitan areas, and individual companies.
- Agencies should identify vulnerable subpopulations—including children, the elderly, and at-risk communities—and rank the greatest risks to those subpopulations.
- Each agency should prepare an annual report, for release to the public, that highlights the information discussed above, including: (1) top 10 priority concerns; (2) top-performing policy solutions and progress achieved in dealing with priority concerns; (3) the most effective technology for controlling hazards; (4) performance rankings for states and metropolitan areas, as well as individual companies; (5) the top 10 health and safety threats under the agency’s jurisdiction to children and the elderly, along with the top 100 locations where risk is highest; and (6) the 100 communities at the greatest overall risk.

## ENDNOTES

<sup>1</sup> National Highway Transportation Administration, Traffic Safety Facts 2003, available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2003/809767.pdf> (last viewed Jan. 27, 2004).

<sup>2</sup> Abt Associates, Power Plant Emissions: Particulate Matter-Related Health Damages and the Benefits of Alternative Emission Reduction Scenarios, June 2004, available at [http://www.cleartheair.org/dirtypower/docs/abt\\_powerplant\\_whitepaper.pdf](http://www.cleartheair.org/dirtypower/docs/abt_powerplant_whitepaper.pdf) (last viewed Jan. 27, 2004).

<sup>3</sup> Paul S. Mead, et. al., Food-Related Illness and Death in the United States, Emerging Infectious Diseases, September-October 1999, available at <http://www.cdc.gov/ncidod/eid/vol5no5/mead.htm> (last viewed Jan. 27, 2004).

<sup>4</sup> AFL-CIO, Death on the Job: The Toll of Neglect (April 2004).

<sup>5</sup> For example, more than 20,000 sensitive ocean habitats disappear every year. U.S. Commission on Ocean Policy, An Ocean Blueprint for the 21st Century Final Report of the U.S. Commission on Ocean Policy, September 2004, available at [http://oceancommission.gov/documents/prepub\\_report/welcome.html](http://oceancommission.gov/documents/prepub_report/welcome.html) (last viewed Jan. 27, 2004).

<sup>6</sup> Christine Todd Whitman, It’s My Party, Too: The Battle for the Heart of the GOP and the Future of America (Penguin Press 2005).

<sup>7</sup> See EPA, The Toxics Release Inventory (TRI) and Factors to Consider When Using TRI Data, at 2 (2002) available at [http://www.epa.gov/tri/2002\\_tri\\_brochure.pdf](http://www.epa.gov/tri/2002_tri_brochure.pdf) (last viewed Feb. 2, 2005).

- <sup>8</sup> Robert Olson & David Rejeski, eds., Environmentalism and the Technologies of Tomorrow, Feng Zhao & John Seely Brown, *Ecological Computing* (2004).
- <sup>9</sup> Robert Olson & David Rejeski, eds., Environmentalism and the Technologies of Tomorrow, Feng Zhao & John Seely Brown, *Ecological Computing* (2004).
- <sup>10</sup> The phrase “smart dust” was coined by Kris Pister, a professor of electrical engineering and computer science at University of California-Berkeley, to describe his vision for sensor technology. In 2002, Pister founded Dust Networks Inc., which sells sensor technology.
- <sup>11</sup> Feng Zhao & John Seely Brown, *Ecological Computing*, available at [http://www.johnseelybrown.com/eco\\_computing.html](http://www.johnseelybrown.com/eco_computing.html) (last viewed Jan. 31, 2005).
- <sup>12</sup> For a debunking of prominent anti-regulatory claims, see e.g., Richard W. Parker, *Grading the Government*, 70 *U. Chicago Law Review* 1345 (2003); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 *Yale Law Journal* 1981 (1999).
- <sup>13</sup> Center for American Progress & OMB Watch, Citizens for Sensible Safeguards Coalition, Special Interest Takeover (May 2004).
- <sup>14</sup> Halley Rosen, Environmental Defense, Gaps in Government Air Pollution Monitoring Leave Some Neighborhoods in Smog (2003).
- <sup>15</sup> EPA Guideline on Ozone Monitoring Site Selection, EPA-454-R-98-002, at 4-1 (August 1998).
- <sup>16</sup> U.S. Commission on Ocean Policy, An Ocean Blueprint for the 21st Century Final Report of the U.S. Commission on Ocean Policy (September 2004), available at [http://oceancommission.gov/documents/prepub\\_report/welcome.html](http://oceancommission.gov/documents/prepub_report/welcome.html) (last viewed Aug. 15, 2005).
- <sup>17</sup> AFL-CIO, Death on the Job: The Toll of Neglect (April 2004).
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- <sup>19</sup> See EPA, The Toxics Release Inventory (TRI) and Factors to Consider When Using TRI Data, at 13 (2002) available at [http://www.epa.gov/tri/2002\\_tri\\_brochure.pdf](http://www.epa.gov/tri/2002_tri_brochure.pdf) (last viewed Feb. 2, 2005).
- <sup>20</sup> See the Environmental Integrity Project and the Galveston-Houston Association for Smog Prevention, Whose Counting? The Systematic Underreporting of Toxic Air Emissions (June 2004), available at [http://www.environmentalintegrity.org/pubs/TRIFINALJune\\_22.pdf](http://www.environmentalintegrity.org/pubs/TRIFINALJune_22.pdf) (last viewed Feb. 2, 2005).
- <sup>21</sup> This software is called TRI-ME, which stands for Toxics Release Inventory Made Easy. EPA describes TRI-ME on its web site at <http://www.epa.gov/tri/report/trime/> (last viewed Jan. 31, 2005).
- <sup>22</sup> This includes, but should not necessarily be limited to, the Centers for Disease Control and Prevention, the Department of Energy, the Department of Interior, the Department of Transportation, the Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Department of Agriculture, the Food and Drug Administration, and the Mine Safety and Health Administration. Hereafter references to federal agencies should be read to include only health, safety and environmental agencies.
- <sup>23</sup> Federal Acquisition Regulation, Section 9.104(d), available at <http://www.acqnet.gov/far/> (last viewed Jan. 27, 2004).
- <sup>24</sup> Socially responsible investment now accounts for about 11 percent of professionally managed assets (amounting to \$2.16 trillion) in the United States. See Social Investment Forum, 2003 Report on Socially Responsible Investing Trends in the United States, available at [http://www.socialinvest.org/areas/research/trends/sri\\_trends\\_report\\_2003.pdf](http://www.socialinvest.org/areas/research/trends/sri_trends_report_2003.pdf) (last viewed Jan. 27, 2004).
- <sup>25</sup> Innovest, Corporate Environmental Governance: A Study into the Influence of Environmental Governance and Financial Performance, November 2004, available at [http://www.innovestgroup.com/pdfs/2004-11-09-Environmental\\_Governance.pdf](http://www.innovestgroup.com/pdfs/2004-11-09-Environmental_Governance.pdf) (last viewed Jan. 27, 2004).
- <sup>26</sup> Under President Bush’s E-Government Initiative, EPA assumed government-wide leadership for advancing e-rulemaking, which seeks to facilitate participation in regulatory decision-making by, among other things, accepting public input electronically and providing rulemaking material in one place through the Internet.
- <sup>27</sup> See e.g., the Confidential Information Protection and Statistical Efficiency Act (Title V of the E-Government Act).
- <sup>28</sup> See 2001 Environmental Sustainability Index at <http://www.ciesin.columbia.edu/indicators/ESI/archive.html> (last viewed Jan. 27, 2004).
- <sup>29</sup> See the project’s web site at <http://www.ciesin.columbia.edu/indicators/ESI/> (last viewed Jan. 27, 2004).

<sup>30</sup> For discussion, see Daniel C. Esty, Environmental Performance Measurement: The Global 2001-2002 Report, Chapter 1 (Oxford University Press 2002), *available at* <http://www.law.yale.edu/outside/html/faculty/danesty/why.measurmt.matters.pdf> (last viewed Jan. 27, 2004).

<sup>31</sup> The Environment Agency, Spotlight 2003, *available at* [http://www.environment-agency.gov.uk/commondata/acrobat/spotlight\\_eng\\_no\\_cvr\\_834878.pdf](http://www.environment-agency.gov.uk/commondata/acrobat/spotlight_eng_no_cvr_834878.pdf) (last viewed Jan. 27, 2004).



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