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POLICY ESSAY

- RESTORATION OF CONGRESSIONAL AUTHORITY AND RESPONSIBILITY
OVER THE REGULATORY PROCESS
Congressman Nick Smith 323

ARTICLES

- BACK TO THE FUTURE: THE COLLAPSE OF NATIONAL DRUG
CONTROL POLICY AND A BLUEPRINT FOR REVITALIZING THE
NATION'S COUNTERNARCOTICS EFFORT
Robert B. Charles 339
- "BUDGETIZED" HEALTH ENTITLEMENTS AND THE FISCAL
CONSTITUTION IN CONGRESS'S 1995-1996 BUDGET BATTLE
Charles Tiefer 411
- PROTECTING SOCIAL SECURITY AND MEDICARE
William G. Dauster 461

ESSAYS

- THE FATE OF PUBLIC DEBATE IN THE UNITED STATES
Philip Heymann & Jody Heymann 511
- THE POLITICS OF CRIME
Harry A. Chernoff, Christopher M. Kelly,
& John R. Kroger 527
with a Response by Senator Herb Kohl 581
- HEALTH CARE REFORM IN THE 103D CONGRESS—A CONGRESSIONAL
ANALYSIS
Manish C. Shah & Judith M. Rosenberg 585
- BOOK REVIEWS 617

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INTRODUCTION

For the past six years, the *Harvard Journal on Legislation* has biennially dedicated its summer issue to an examination of Congress as a legislative institution. The Congress Issue format has consistently provided the *Journal* with timely pieces discussing many of the hot topics of the day. This issue is no exception, containing pieces discussing a full range of current policy issues, from budgeting and congressional supervision of regulation to drug, crime, and health care policy.

The Congress Issue has also allowed us to depart from our usual author assortment of law school professors and law students to include people more active in the legislative process. This Congress Issue contains two pieces written by sitting members of Congress, two by chief counsels on congressional committees, and one by the former Solicitor of the United States House of Representatives. There are also pieces written by professors and law students, although these authors too have extensive policymaking experience.

The first piece in the issue is a Policy Essay written by Congressman Nick Smith (R-Mich.), who discusses the appropriateness of Congress's current role in the development of regulation and urges that Congress increase its supervision of regulatory functions. The first Article, by staff director and chief counsel Robert Charles, forcefully discusses current United States drug control policy, advocating a renewed focus on drug interdiction and coordination. This is followed by two Articles on budget issues, one by former Solicitor of the House of Representatives Charles Tiefer that discusses the increasing attention to health entitlements in the budget process, and the other by chief of staff and chief counsel William Dauster discussing the necessity for protecting Social Security and Medicare from similar budget discussions. The three Essays that follow are intended as a set. The Essays on the successful 1993 Clinton crime legislation and the unsuccessful health care reform effort were both written in part from research conducted under the supervision of Professors Philip Heymann and Jody Heymann. Both pieces extensively and critically examine the political atmosphere that surrounded those pieces of legislation and examine what, if anything, went wrong. We are privileged to be able to include a response by Senator Herb Kohl (D-Wis.) to the crime Essay. The Essays

are preceded by an Essay by Professors Philip Heymann and Jody Heymann addressing the general state of debate in the United States.

The tone of this Congress Issue at times differs from the usual *Journal* tone; a number of the pieces have distinct political and ideological slants. The *Journal* is proud to present these views in a neutral forum and of course neither endorses nor disparages any of the views taken by the authors. This Congress Issue provides a provocative and exciting look at many of the most pressing issues facing Congress today written by important and influential policymakers. It has been a pleasure to produce.

POLICY ESSAY

RESTORATION OF CONGRESSIONAL AUTHORITY AND RESPONSIBILITY OVER THE REGULATORY PROCESS

CONGRESSMAN NICK SMITH*

We get to vote for senators, congressmen, and presidents. But we have less and less control over our lives because we have no control over the people who make the rules by which we live—about how we make and sell our products, which groups get what preferences, how we can use our land.¹

The majority in the 104th Congress believes that Congress must do more to monitor administrative rulemaking.² An enormous amount of lawmaking responsibility rests with agency staffers who write the regulations to implement statutes. These government employees are seldom personally affected by these rules or truly accountable to those affected. Consequently, they often produce onerous regulations that serve the agency's goals and philosophy—which are often influenced by a smaller constituency of activists—rather than the overall public good.³ The peo-

* Member, United States House of Representatives (R-Mich.). B.A., Michigan State University, 1957; M.S., University of Delaware, 1959. Representative Smith served in the United States Department of Agriculture, as a Commissioner of the Michigan Occupational Safety and Health Administration, and on the Michigan Joint Committee on Administrative Rules. The author would like to thank Alec D. Rogers, Esq., who assisted in the preparation of this Policy Essay.

¹ Malcolm Wallop, *Taking on Big Government: Agenda for the 1990's*, Address at Hillsdale College's Shavano Institute for National Leadership Seminar (Feb. 21, 1995), in *IMPRIMIS*, July 1995, at 2.

² ROGELIO GARCIA, CONG. RES. SERV., ISSUE BRIEF IB95035, *FEDERAL REGULATORY REFORM* Summary (1996) (“[Republicans] introduced bills designed to reduce what they saw as overly costly and onerous regulations.”). The Republican majority of the House was elected upon a platform entitled *Contract with America* [hereinafter the *Contract*]. Signed by 367 of the 421 Republican House candidates, the *Contract* contained 10 legislative initiatives upon which Republicans guaranteed the full House would vote during the first hundred days of the 104th Congress. See NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA* 6–12 (Ed Gillespie & Bob Schellhas eds., 1994). Parts of the *Contract* tackle some of the problems with our regulatory system that this Policy Essay discusses. For instance, the House has passed the Job Creation and Wage Enhancement Act, which embodies one of the elements of the *Contract*. Compare H.R. 9, 104th Cong., 1st Sess. (1995) (as passed by the House) with GINGRICH ET AL., *supra*, at 125–41.

³ DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 111–12 (1993). For instance, federal agricultural marketing orders for oranges persisted from 1933 through 1992 while increasing the price of oranges, preventing the sale of about one third of the harvest, but failing to

ple who supervise the writing of the rules are often of a different political party than the majority in Congress and may disagree with the policies underlying a statute. Regulatory lawmaking has also eroded the American people's confidence in the federal government.⁴ By increasingly abdicating the ultimate lawmaking function to agencies, Congress has left the American people with less and less control over their lives.⁵

This Policy Essay presents an initiative to alter the overall regulatory process, as opposed to more narrow proposals that would affect only certain agencies.⁶ It discusses why regulatory reform is vital, analyzes a few types of reform that are currently under consideration, and concludes with an explication of my proposal to require that Congress affirmatively enact significant rules.⁷

I. THE PROBLEM: DELEGATION OF CONGRESSIONAL AUTHORITY TO THE EXECUTIVE BRANCH LEADS TO ILLEGITIMATE AND EXCESSIVE REGULATION

A. *The Political Illegitimacy of the Current Regulatory Process*

A couple of recent developments have made regulatory reform a pressing issue. First, recent years have witnessed the promulgation of a significant number of new regulations.⁸ Second, the

increase the long-term profits of the orange growers. *See id.* at 4–5. One writer summarizes the process succinctly:

The pattern is familiar: a statute is passed, an agency is created, a regulation is promulgated. At the same time, a narrow constituency is created that benefits from the statute, works for the agency, or receives favorable treatment under the regulation. The remainder of the citizenry does not have enough time, energy, or interest to focus on this small corner of the political landscape.

Vern McKinley, *Sunrises Without Sunsets: Can Sunset Laws Reduce Regulation?*, REG., Fall 1995, at 57, 57.

⁴ SCHOENBROD, *supra* note 3, at 195–96.

⁵ *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 182–83 (1994). *See also* Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, in ROGER CLEGG ET AL., REGULATORY TAKINGS 87 (1994) (citing economist Paul Craig Roberts's estimate that the growth in law since the turn of the century has been 3000%).

⁶ *See, e.g.*, H.R. 1834, 104th Cong., 1st Sess. § 22 (1995) (as introduced in the House) (requiring the Occupational Safety and Health Administration (OSHA) to incorporate cost-benefit analysis into its rulemaking).

⁷ H.R. 2990, 104th Cong., 2d Sess. (1996) (as introduced in the House).

⁸ As an indication of this trend, the approximate number of pages in the Code of Federal Regulations has grown from 55,000 to 134,000 between 1970 and 1995 while

aggregate cost of regulation has ballooned; businesses and other economic actors spend billions of dollars on compliance and fines, sometimes with no corresponding social benefit.⁹ As more people recognize these problems, a consensus is building that we must address a significant underlying cause: Congress has given away too much of its constitutional power over both law-making and appropriations.¹⁰

Regulations are laws.¹¹ They govern the lives of people exactly as do the statutes enacted by Congress or state legislatures. In some cases, they do so even more directly because they control the implementation of general statutory commands. Many regulations are enforced under statutes that provide severe civil and even criminal penalties.¹² Yet, members of Congress rarely vote for these rules.

Unlike ordinary federal laws (i.e., statutes), which must pass both the House and the Senate and be presented to the President,¹³ such regulations require no legislative branch participation beyond the enactment of an enabling statute. The civil servants and political appointees in an agency draft the rules they

the approximate number in the United States Code has increased from 13,000 to 33,000 over the same period. *See infra* text accompanying notes 41–43.

⁹ *See infra* text accompanying notes 43–45.

¹⁰ A shockingly small amount of federal spending is truly discretionary. The Congressional Budget Office (“CBO”) defines discretionary spending as “[s]pending for programs whose funding levels are determined through the appropriation process.” CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1996–2000, at 110 (Jan. 1995) [hereinafter FISCAL YEARS 1996–2000]. In 1962 discretionary spending was 70% of the federal budget. *Id.* at 96. By 1995 it had declined to 36%. CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK 22 (Aug. 1995). The CBO has projected that by the year 2005 it will be at 28%. CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: DECEMBER 1995 UPDATE 22 (Dec. 1995).

¹¹ Regarding rulemaking, Abner Greene has written:

We have euphemisms—we call this power “regulatory” or “interpretive” or “gap filling.” But . . . the delegation from Congress is often vague or silent on a key issue, and the resulting rule—from either rulemaking or adjudication—is a public policy choice in much the same way that statutes are policy choices.

Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123 (1994) (footnote omitted), *citing* *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984).

¹² *See, e.g.*, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928(d)(2)(C) (1994) (providing criminal penalties consisting of fines of up to \$100,000 and up to 10 years of imprisonment for violating interim status regulations); the Clean Air Act 42 U.S.C. § 7413(c)(1) (1994) (10 years of imprisonment for violation of certain rules); and the Clean Water Act, 33 U.S.C. § 1319(c) (1994) (fines of up to \$100,000 per day and imprisonment for negligent violation of the conditions of permits issued under the Federal Water Pollution Control Act).

¹³ U.S. CONST., art. I, § 7, cls. 2–3.

think are necessary to implement the statute *as they have interpreted it*¹⁴—often after informal consultations with a variety of interested private parties, academics, and other officials in government.¹⁵

The agency must coordinate this drafting process with the White House Office of Management and Budget (OMB) and must receive clearance from other bureaucrats in OMB before publishing the draft rule in a Notice of Proposed Rulemaking in the *Federal Register*.¹⁶ After a comment period, the civil servants and political appointees in the agency will decide whether or not to issue a final regulation. Before promulgating a regulation, the agency must once again receive OMB clearance.¹⁷ Upon promulgation, we have a new law—a law that may not even be consistent with the intent of Congress in passing the organic statute.

Congress presently exerts control over agency lawmaking in a few different ways. Most directly, it enacts legislation rescinding or modifying promulgated regulations. In practice, this approach necessarily cedes much authority to the agency; the regulation is law unless new legislation overrides it. The current process is biased in favor of regulation, since the burden is on Congress to alter the status quo. Since the President's appointees have endorsed the regulation,¹⁸ presumably the President does as well. Therefore, to enact a legislative override would almost certainly require two-thirds majorities in both houses.¹⁹ Also, practically speaking, only regulations that are so flawed that they attract substantial attention or that offend senior members of Congress are likely to command the floor time and general legislative effort needed to enact a statute. The convoluted legislative process can result in even uncontroversially good bills getting lost.

Congress can also oversee regulation through the annual appropriations process. First, Congress can explicitly deny funding

¹⁴ See *Chevron*, 467 U.S. at 845.

¹⁵ PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 307-08 (9th ed. 1995).

¹⁶ Exec. Order No. 12,866, 3 C.F.R. 638, 644-49 (1993), reprinted in 5 U.S.C. § 601 (1994). Among other considerations, OMB is to "provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with . . . the President's priorities. . . ." 3 C.F.R. at 646. Independent agencies are not subject to Executive Order No. 12,866. *Id.* at 641.

¹⁷ See *id.* at 644-49. The prior discussion pertains to the more common process of informal rulemaking under § 553 of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1994).

¹⁸ See *supra* notes 14-17 and accompanying text.

¹⁹ See *supra* note 13.

for certain practices. For instance, the House attempted to prohibit OSHA from spending any funds to promulgate ergonomic regulations through the 1996 appropriations bill for the Departments of Labor, Health and Human Services, and Education.²⁰ In this bill the House also tried to transfer OSHA funds from enforcement to compliance assistance.²¹ Second, Congress can influence agency regulatory programs by including instructions in the committee and conference reports accompanying appropriations bills. These instructions put bureaucrats on notice to comply or face possible future retaliation (e.g., funding cuts or explicit denials of funds for certain purposes).

Nevertheless, the appropriations process does not provide Congress with adequate control over agency lawmaking. Congress often faces the objection of the President and, therefore, may need two-thirds majorities in both Houses.²² Also, the appropriations process annually surveys almost the entire federal government, so Congress can attempt to address only the most egregious regulatory practices (or those that particularly offend key members of Congress). Moreover, the process itself restricts legislative changes.²³

The flaws of this system are perhaps not immediately apparent. In practice, however, the regulatory process has proven patently inconsistent with the notion of republican government as understood by the Framers. The unchecked delegation of rule-making authority threatens civil liberties. Moreover, a system with greater congressional involvement would create better rules than does the current process.²⁴

Delegation subverts the basic logic of representation in our system of government. Ostensibly, “the people” are sovereign and, through elections, confer legitimacy upon lawmaking by Congress and the President.²⁵ However, it defies logic to argue

²⁰ H.R. 2127, 104th Cong., 1st Sess., tit. I (1995) (as passed by the House); H.R. REP. NO. 209, 104th Cong., 1st Sess. 27 (1995) (committee report accompanying H.R. 2127).

²¹ See H.R. 2127, 104th Cong., 1st Sess., tit. I (1995) (as passed by the House); H.R. REP. NO. 209, *supra* note 20, at 27.

²² See *supra* notes 14–17 and accompanying text. However, Presidents are typically reluctant to veto an appropriations bill over relatively minor issues; so, Congress has more clout here than in passing stand-alone bills.

²³ See House Rule 21(b) (prohibiting legislation—or non-fiscal provisions—in appropriations bills); of course, the House regularly waives this rule in considering appropriations measures. The Byrd Rule, 2 U.S.C. § 644 (1994), similarly restricts the budget reconciliation process in the Senate.

²⁴ See *infra* part II, which addresses this third point.

²⁵ See THE FEDERALIST No. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961)

that such legitimacy extends to bureaucrats' making of public policy without meaningful guidance and review by Congress.²⁶ To enhance the legitimacy of our laws and to allow citizens greater influence over lawmaking, Congress should retain as much lawmaking power as possible.²⁷

Agency rulemaking also undermines the constitutional separation of powers,²⁸ one of the principal devices upon which the Framers relied to preserve liberty.²⁹ Although the Framers recognized that these powers need not be *rigidly* separated,³⁰ they clearly intended Congress—not the Executive Branch—to legislate. The stark experiences of other nations where this separation has failed highlights the risks of unbalanced government.³¹

The administrative state in the United States clearly does not tyrannize citizens the way that, for example, the former Soviet Union did. Nevertheless, because of the Executive Branch's legislative and judicial activities, the present system concentrates too much power in any agency that (1) promulgates extensive and highly substantive regulations, (2) enforces those regulations, and (3) sometimes adjudicates these enforcement proceed-

("[W]e may define a republic . . . [as] a government which derives all its powers directly or indirectly from the great body of the people. . . . It is *essential* to such a government that it be derived from the great body of the society."); Letter from John Adams to John Taylor (Apr. 15, 1814), in 6 THE WORKS OF JOHN ADAMS 447, 474 (Charles C. Little & James Brown eds., 1851) ("There is but one element of government, and that is *The People*.")

²⁶Of course, senior presidential appointees make the decisions that are controversial within an agency, and OMB clearance ensures consistency (whatever this term means) with the President's program. However, these practices still effectively allow apolitical civil servants to make a wide variety of "legislative" choices.

²⁷See SCHOENBROD, *supra* note 3, at 112 (writing that agencies are even more likely than Congress to favor narrow, organized interest groups over diffusely affected, broader, unorganized ones).

²⁸Though such delegations are constitutionally permissible, the extent of delegation that has occurred is undesirable. The Supreme Court has only struck down three statutes on delegation grounds and none since 1936. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

²⁹See THE FEDERALIST, *supra* note 25, Nos. 47–51 (James Madison). In particular, see *id.* No. 47, at 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.")

³⁰*Id.* No. 48, at 308 ("Unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never in practice be duly maintained.")

³¹The former Soviet Union provided its people with a lengthy list of rights, see KONST. SSSR [Constitution], arts. 40 (right to employment), 42 (right to health care), 44 (right to housing), 50 (freedoms of speech, press, assembly, and association) (1977), translated in W.E. BUTLER, BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 3–33 (1983), but concentrated political power in a handful of people; as a result, these constitutional protections were hollow.

ings.³² The majority in Congress agrees that our current regulatory system is off-track. However, the Supreme Court has constrained Congress's prior efforts to rein in the agencies' powers.

B. *The Loss of the Legislative Veto*

At one time, Congress monitored the Executive Branch and independent agencies via the legislative veto. Congress would enact an enabling statute, and the relevant agency would promulgate regulations in accordance with this statute. However, some enabling statutes included a legislative veto, which provided that rules were subject to reversal if one or both Houses (or, in some cases, just a committee) passed a resolution repealing the Executive Branch's action. This procedure was increasingly used from the early 1970s through 1983.³³

In 1983, the Supreme Court struck down the legislative veto in *INS v. Chadha*.³⁴ The Court reasoned that when Congress acted "legislatively,"³⁵ it had to conform to the dictates of the bicameral requirement and Presentment Clause.³⁶ Because the legislative veto was a "legislative" act that did not adhere to these provisions,³⁷ it violated the constitutional design for the separation of powers.³⁸

The legislative veto was an efficient way for Congress to control the agencies, so the loss of this tool has hampered legislative supervision of the Executive Branch's rulemaking. Given

³² Agency adjudications are subject to judicial review, which arguably preserves an adequate check against agency power. Administrative Procedure Act, 5 U.S.C. § 702 (1994). Moreover, the Administrative Procedure Act, 5 U.S.C. § 554(d)(C), prohibits an agency adjudicator—other than the agency heads—from hearing a case with which the adjudicator has had prior involvement if she (1) has "been involved with ex parte information" or (2) has developed a "will to win." *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980).

³³ ROGELIO GARCIA, CONG. RES. SERV., ISSUE BRIEF IB95035, FEDERAL REGULATORY REFORM: AN OVERVIEW 6 (1996). For a list of statutes employing the legislative veto as of 1983, see *INS v. Chadha*, 462 U.S. 919, 1003–13 (1983) (White, J., dissenting).

³⁴ 462 U.S. 919.

³⁵ *Id.* at 952 (defining legislative action as "alter[ing] the legal duties, rights and relations of persons . . . outside the legislative branch.")

³⁶ *Id.* at 957. For the constitutional provisions, see *supra* note 13 and accompanying text.

³⁷ The INS had granted Chadha a suspension of deportation subject to a veto by either House under § 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254 (1982). The Court held that the House of Representatives' veto "altered Chadha's status." 462 U.S. at 952.

³⁸ 462 U.S. at 946.

demands on congressional time, other oversight methods such as the budget process and enacting new statutes to repeal bad rules are too involved to alter any but a small number of flagrantly objectionable regulations.³⁹ Further, civil service laws protect bureaucrats who produce rules that are excessive or in violation of the intent of the statute from being punished through job termination.⁴⁰

C. *The Problem of Regulatory Excess*

Since 1990 the number of final major regulations has dramatically increased.⁴¹ From 1987 to 1990, agencies promulgated 160 final major regulations; from 1991 to 1994 there were 241, an increase of roughly fifty percent.⁴²

Unfortunately, regulations do not come cheap. For instance, the yearly cost to the nation's economy to comply with Occupational Safety and Health Administration (OSHA) rules alone has been estimated at \$8.5 billion in 1988 dollars.⁴³ A small price to pay for the safety of millions of American workers? Of course. The only problem is that some studies have concluded that these regulations have produced *no tangible benefits either in worker safety or health*.⁴⁴ Moreover, the compliance costs of regulations

³⁹ See *supra* text accompanying notes 14–17, 22–23.

⁴⁰ See, e.g., 5 U.S.C. § 4303 (Supp. II 1995) (reductions in grade or removal based on unacceptable performance); *Id.* § 7501 (adverse actions—suspensions for 14 days or less); *Id.* § 7511 (adverse actions—removal, suspension for more than 14 days, reduction in grade or pay, furlough for 30 days or less); *Id.* § 7541 (actions against members of the Senior Executive Service); *Id.* § 7701 (appellate process).

⁴¹ A major rule, as defined by Exec. Order No. 12,291, 3 C.F.R. 127–28 (1981), reprinted in 5 U.S.C.S. § 601 (1989), revoked by Exec. Order No. 12,866, 3 C.F.R. at 649 (1993), is one likely to result in

(1) [a]n annual effect on the economy of \$100 million or more; (2) [a] major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) [s]ignificant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

3 C.F.R. at 127–28 (1981). This definition was replaced by Executive Order No. 12,866, 3 C.F.R. at 641–42. Executive Order 12,866 also includes in its definition of “significant regulatory actions” those that considerably affect the environment, public health, or safety; produce serious inconsistencies with other agencies’ regulations; or raise novel legal or policy issues. *Id.*

⁴² OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, REGULATORY PROGRAM OF THE U.S. GOVERNMENT, APRIL 1, 1992–MARCH 30, 1994 608 (1993) [hereinafter OMB].

⁴³ Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation*, 8 YALE J. ON REG. 233, 275–76 (1991).

⁴⁴ *Id.* (noting “the absence of credible studies showing positive benefits of OSHA regulations”).

sometimes exceed the amounts otherwise spent on the regulated subject. For instance, the Defense Department spent \$2 billion on travel in 1994. Yet it spent \$2.2 billion complying with travel reimbursement procedures.⁴⁵

Furthermore, regulations have impeded progress. In the wake of the last Los Angeles earthquake, it was necessary to rebuild the Santa Monica freeway. In order to do so in the shortest possible amount of time, California Governor Pete Wilson decided not to enforce applicable regulations and utilized incentives for prompt work. The result was that “[i]nstead of a four-year trudge through government process, the Santa Monica freeway was rebuilt in sixty-six days, to a higher standard than the old one.”⁴⁶ The only problem with the work done on the new highway, as one construction worker observed, was that “they’re going to want them all completed this fast.”⁴⁷

Regulations also have a ripple effect on government agencies, complicating subsequent regulatory efforts. For example, an agency drafting a new rule may be subject to regulations (such as a requirement to file an environmental impact statement) written by one or more different agencies. The new regulations consequently become more complicated and less comprehensible to the people who must enforce, comply with, and adjudicate them.

An anecdote from early in my government career suggests the magnitude of this problem. From 1970 to 1975, I was a deputy administrator for farm programs in the U.S. Department of Agriculture. My first assignment from Secretary Earl Butz was to reduce the voluminous regulations that had been piling up for the last twenty years. It took two years to reduce the mountain of often conflicting regulations by fifty percent. This experience also showed me how agencies are not always faithful to congressional intent when they write regulations; in fact, I learned first-hand how easy it was to tailor Democrat-passed agricultural legislation to be consistent with a Republican philosophy through the development and administration of rules.

In sum, the regulatory state has had an enormous impact on the United States economy. In testimony before the Senate Com-

⁴⁵ HOWARD, *supra* note 5, at 175.

⁴⁶ *Id.* at 172. See also Barry Wise, *Rising from the Rubble: Los Angeles Repairs Its Roads*, AM. CITY & COUNTY, Dec. 1994, at 36 (describing Governor Wilson’s relaxation of government contracting procedures).

⁴⁷ HOWARD, *supra* note 5, at 172.

mittee on Governmental Affairs, Professor Robert Hahn estimated that in 1995 alone the direct costs of all regulations on the economy totalled approximately \$400 billion (in 1992 dollars).⁴⁸ This sum works out to \$3500 per family—about the same amount as the average family spends on groceries annually.⁴⁹ The direct costs of regulation are up sharply from 1986 when they were approximately \$300 billion (in 1992 dollars), the level at which they had been for the previous decade.⁵⁰

While, of course, not all regulations are harmful, an OMB report suggests that the most cost-effective regulations have already been promulgated and that the marginal benefits of more recent regulations may not justify the costs of compliance. The analysis concluded that twelve of the more effective safety and health regulations (those that extended a life for less than \$1 million) were issued prior to 1986, and only five were issued thereafter.⁵¹ Conversely, of those safety and health regulations that cost greater than \$25 million per life extended, six were adopted prior to 1986 and twelve thereafter.⁵²

II. PROPOSALS FOR REFORM AND A STRUCTURAL ALTERNATIVE

The 104th Congress has sought to curb regulatory excess through a variety of suggested reforms. These concepts include barring unfunded mandates,⁵³ requiring cost-benefit⁵⁴ or risk analy-

⁴⁸ *Regulatory Reform: Hearings Before the Senate Comm. on Governmental Affairs*, 104th Cong., 1st Sess. (1995) (statement of Robert W. Hahn).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ ROBERT J. SAMUELSON, *THE GOOD LIFE AND ITS DISCONTENTS* 170 (1995) (citing OMB, *supra* note 42, at 28).

⁵² SAMUELSON, *supra* note 51, at 170.

⁵³ *See, e.g.*, The Unfunded Mandates Reform Act, 2 U.S.C.A. § 1501 (West Supp. 1995), was a key part of the *Contract*. Cf. GINGRICH ET AL., *supra* note 2, at 133. The Act pertains when a federal statutory, regulatory, or judicial action mandates spending in excess of \$100 million by state, local, and tribal governments or by the private sector. 2 U.S.C.A. § 1532. In such cases, Congress would either have to provide the funding for these costs or vote affirmatively not to do so. 2 U.S.C.A. § 1514 (Supp. II 1995).

⁵⁴ *See, e.g.*, S. 343, 104th Cong., 1st Sess. § 4 (1995) (as reported by the Senate Committee on Governmental Affairs). In addition, this Congress has enacted a requirement that agencies prepare cost-benefit analyses for any regulations imposing annual burdens of \$100 million or more on state, local, or tribal governments or the private sector. Unfunded Mandates Reform Act of 1995, 2 U.S.C.A. § 1532. Further, the Unfunded Mandate Reform Act of 1995 also provides that the least costly regulatory alternatives be used or that an explanation be given if it is not. § 1535.

sis,⁵⁵ using regulatory budgets,⁵⁶ enhancing judicial review,⁵⁷ enacting takings legislation,⁵⁸ and imposing regulatory sunsets.⁵⁹

Each of these proposals would provide a brake on regulatory excess by requiring a more careful consideration of the costs of regulation. However, they fall short of what I have argued is the paramount goal of regulatory reform: restoration of Congress's accountability for rules and regulations. Two of the proposals—unfunded mandates reform and regulatory budgets—would force the federal government to itemize or even to pay for the full cost of big government regulations but fail to address the problem of delegation directly. The rest of the proposals rely on either the judiciary or a more cost-aware executive branch for control of the regulatory process.

Therefore, while each of the foregoing proposals has merit, I favor a more profound structural change in the way that regulations are made in this country. I start with two premises: first, under our Constitution, Congress is the supreme maker of laws;

⁵⁵See, e.g., S. 291, 104th Cong., 1st Sess. § 205 (1995) (as reported by the Senate Committee on Governmental Affairs). On the methodologies of "risk analysis" and "risk assessment," see generally LINDA-JO SCHIEROW, CONG. RES. SERV., ISSUE BRIEF IB94036, THE ROLE OF RISK ANALYSIS AND RISK MANAGEMENT IN ENVIRONMENTAL PROTECTION 1-2 (1996).

⁵⁶See, e.g., S. 291, 104th Cong., 1st Sess. tit. III, § 7 (1995) (as reported by the Senate Committee on Governmental Affairs). A regulatory budget, in its milder version, would simply serve as a way to allow lawmakers to understand the true costs of regulations when making laws and overseeing agencies. Thus, the current process would continue unaltered, but more enlightened decisionmaking would result.

⁵⁷S. 343, 104th Cong., 1st Sess. § 5 (1995) (as reported by the Senate Committee on Governmental Affairs) (amending 5 U.S.C. § 706(2) to provide for "hold[ing] unlawful and set[ting] aside agency action, findings and conclusions . . . without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553").

⁵⁸See, e.g., H.R. 925, 104th Cong., 1st Sess. (1995) (as passed by the House). The Takings Clause of the Constitution protects individuals' property rights from government intrusion with the guarantee of "just compensation." U.S. CONST. amends. V, XIV. However, the courts have construed this requirement narrowly in the context of regulatory takings. As one observer has put it, "[t]o date . . . the Court has never found a regulatory taking in the absence of a governmental physical invasion of land or a virtually total elimination of a tract's economic use." ROBERT MELTZ, CONG. RES. SERV., REPORT 95-200A, THE PROPERTY RIGHTS ISSUE 1 (1995). Some lawmakers seek to remedy this problem by providing statutory relief that would compensate property owners whenever certain regulations substantially diminish a property's value. See, e.g., H.R. 925, 104th Cong., 1st Sess. § 3 (1995) (as passed by the House).

⁵⁹Sunset provisions would require agencies to reconsider—and sometimes to repromulgate—regulations for them to have continuous effect. For instance, some bills include a sunset provision that would require that rules expire after a fixed number of years. See, e.g., H.R. 994, 104th Cong., 1st Sess. (1995) (as reported by the House Committees on the Judiciary and Government Reform and Oversight). The underlying premise is that it is easier to stop a bad regulation from being reenacted than to kill it outright.

second, regulations are merely laws enacted by someone other than Congress. I believe that in order to restore the type of oversight that it once exercised over regulations, Congress must positively enact significant rules, even though the Court's decision in *Chadha* has made this more difficult. At the same time, it would be highly undesirable, and probably impossible, for Congress itself to undertake the task of promulgating regulations. The remedy, then, is to enact a law requiring that Congress approve rules before they could go into effect.⁶⁰ Congressional approval would provide a political check on the process, thus enhancing its democratic legitimacy while maintaining the advantages of agency technical expertise. The issue is how to provide for this approval. I propose to import a solution, which is tailored to constitutional requirements, from the states—the Joint Committee on Administrative Rules.

Before coming to Congress, I served on the Michigan Joint Committee on Administrative Rules (JCAR) in the state legislature. This body, established in the Michigan Constitution⁶¹ and Michigan's Administrative Procedures Act,⁶² was comprised of a few Senators and Representatives from each party, including myself. JCAR would review rules to be promulgated by departments and agencies. If the members did not feel that the rules appropriately reflected the legislature's intent when drafting the underlying legislation, JCAR could vote the rules down and effectively veto them. Almost all other states have similar bodies.⁶³ While there have been some problems with these state JCARS (mostly in keeping up with the agencies), these have mostly stemmed from a lack of staff and the part-time nature of

⁶⁰ See, e.g., Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–94 (1984) (arguing that Senate rules should provide a special fast-track for laws that confirm regulations as a substitute for the legislative veto); Elliott H. Levitas & Stanley M. Brand, *Congressional Review of Executive and Agency Actions After Chadha: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801, 804–07 (1984) (arguing for a wait-and-see procedure combined with an expedited disapproval resolution as a substitute for the legislative veto); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 18–20 (1984) (arguing that "a law declaring that no administrative agency rule would take effect until affirmatively approved by a joint resolution of Congress and presented to the President" would be constitutionally valid).

⁶¹ MICH. CONST. art. IV, §§ 17, 37.

⁶² MICH. COMP. LAWS § 24.235–.235a (1994).

⁶³ As of 1990, 41 states had similar bodies. NATIONAL CONFERENCE OF STATE LEGISLATURES, REDRESSING THE BALANCE App. A (1991).

many legislatures. Neither of these problems are pertinent to Congress.⁶⁴

Because of *Chadha*, such a system cannot be enacted at the federal level. To allow a committee the power to veto administrative rules prior to their enactment would run afoul of the Constitution's Presentment Clause. Therefore, we must adopt an alternative system to allow similar legislative oversight.

My bill, H.R. 2990, would substantially accomplish this oversight goal by altering the rules that govern the House and the Senate, as well the congressional practice of delegating rulemaking authority to agencies and departments. Under my proposal, significant new regulations would require approval by a joint resolution of Congress before they would become effective.⁶⁵ Thus, Congress would affirmatively enact such rules by adopting a resolution that would have to be presented to and signed by the President to become effective.⁶⁶

Only significant regulations would be enacted into law by Congress. Minor regulations, which would not give rise to major concerns, would continue to be promulgated by the departments and agencies as they currently are under the APA. The decision whether regulations could be promulgated directly by the agency or whether they would have to be enacted by Congress would be decided by the initial enabling statute, which would delineate which regulations would go through which process—agency or congressional enactment.⁶⁷ This would enable Congress to give the most important regulations the highest priority and to keep

⁶⁴Letter from Roger Garcia, Cong. Res. Serv., to author (Apr., 27, 1996) (on file with the author), *citing* Telephone Interview with Tom Sherman, Executive Director of the Ohio Joint Committee on Agency Review, Ohio State Legislature (Spring 1995).

⁶⁵H.R. 2990, 104th Cong., 2d Sess. § 4 (1996).

⁶⁶A similar concept is embodied in a recently enacted law, P.L. 104-121, 104th Cong., 2d Sess. §§ 251-253 (1995). The new law delays the implementation of a major rule, giving Congress time to pass a resolution rejecting the rule. The resolution would have to pass both houses and be signed by the President. Realistically, however, the President is unlikely to veto a rule that was promulgated by his administration. *See supra* notes 14-17, 22 and accompanying text. Without the President's approval, Congress would need a two-thirds supermajority to block proposed rules. Furthermore, since the bill does not require an affirmative vote by Congress to allow major rules to take effect, it does not solve the other major problems discussed above that arise when civil servants pass laws instead of Congress. *See supra* notes 14-27, 28-32 and accompanying text. Representative J.D. Hayworth (R.-Ariz.) has also introduced similar legislation. H.R. 2727, 104th Cong. 1st Sess. §§ 3-4 (1995) (as introduced in the House).

⁶⁷H.R. 2990, *supra* note 65, § 6.

the direct responsibility for their enactment, and also would not violate the constitutional requirements of *Chadha*.

To ensure speedy consideration of the proposed regulations, the House and Senate procedural rules would be modified so that regulations would be subject to fast-track treatment in each house. Where an agency had been given the power to suggest major regulations, the agency would draft the regulation and send it to the Congress.⁶⁸ This would automatically create a resolution introduced by the Majority Leader that would go to the jurisdictionally appropriate committee.⁶⁹ The committee would have a limited time either to report it as forwarded by the agency or department, or to vote affirmatively not to report it.⁷⁰ If the committee did neither within a certain amount of time, the resolution would proceed automatically to the floor.⁷¹ Once on the floor, an up or down vote (i.e., no amendments would be permitted) would have to be taken within a certain amount of time.⁷²

Where agencies and departments could promulgate minor regulations as they do now, a petition could be introduced in either the House or Senate that would subject them to the same-day fast-track process.⁷³ In order to get a resolution on the fast track in either chamber, a fixed number of members would have to sign a petition.⁷⁴ Previously enacted regulations would also be subjected to this provision.⁷⁵ That way, burdensome regulations could be repealed in a reasonably efficient manner.

The effect of such a system would be substantial. Fewer onerous regulations would surely result because of the congressional approval requirement. Congress would be loath to pass regulations that are too burdensome for fear of electoral reprisal—a fear not shared by agencies. This hesitancy would force agencies to consult closely with the lawmakers who wrote the enabling statute to ensure that the proposed regulations were of the nature envisioned by Congress if they hoped to get them enacted. Additionally, this would serve the very useful purpose of bringing the agencies and Congress in closer cooperation. Finally, by making Congress enact regulations, we would restore

⁶⁸ *Id.* § 3(b).

⁶⁹ *Id.* § 4(a)–(b).

⁷⁰ *Id.* § 4(b)(1).

⁷¹ *Id.*

⁷² *Id.* § 4(b)(2)–(3).

⁷³ *See id.* § 5.

⁷⁴ *See id.* § 5(d)(2).

⁷⁵ *Id.* § 5(a).

not only lost congressional authority, but the responsibility that accompanied it. By placing regulatory power once more into the hands of officials that ordinary citizens could speak with, influence, and vote for, those citizens would retain more control over their lives. This is the real change that is needed in the Washington regulatory arena.

CONCLUSION

As attorney Philip Howard has written:

Regulatory reform will be comprehensive only when responsibility itself becomes the touchstone. Nothing fancy is required to make it a success. When Americans can identify who is responsible for what, sensible decisions will begin popping out of our schools and other institutions like spring flowers after a long winter. And when things don't work, everyone will know the right question: Who has the responsibility?⁷⁶

By positively enacting regulations rather than giving the agencies the responsibility, we can make the Federal government more accountable to the people it serves. People will regain control over their lives, since their elected representatives will exercise more effective oversight of those who create most of the laws under which we live. H.R. 2990 is a good first step towards restoring the people's faith in the federal government.

⁷⁶ Philip K. Howard, *The Resurrection of Common Sense*, WALL ST. J., Jan. 17, 1996, at A14.

ARTICLE

BACK TO THE FUTURE: THE COLLAPSE OF NATIONAL DRUG CONTROL POLICY AND A BLUEPRINT FOR REVITALIZING THE NATION'S COUNTERNARCOTICS EFFORT

ROBERT B. CHARLES*

The Nation is confronting a new drug epidemic marked by increased juvenile drug use and violent juvenile crime. In this Article, Robert B. Charles, Staff Director and Chief Counsel to the Subcommittee on National Security, International Affairs and Criminal Justice, of the House Committee on Government Reform and Oversight, examines the causes of this crisis and offers recommendations for ending it. He believes that the current epidemic is tied to the weak national drug strategy, which places too much emphasis on federally funded drug treatment and too little emphasis on drug interdiction, effective source country programs, demand reduction through prevention, and overall better coordination of the Drug War. In 1995 and 1996, Mr. Charles visited Mexico, Panama, Colombia, Bolivia, Peru, and the Caribbean Transit Zone for a hands-on evaluation of U.S. counternarcotics efforts. Insights from those visits are included in this Article.

America is in the midst of a resurgent and dangerous drug crisis. After reviewing the relevant legal, legislative and operational histories, this Article concludes that the crisis stems from an ineffective National Drug Control Strategy and weaknesses in existing policy. This Article first examines the crisis itself, then reviews weaknesses in the Nation's interdiction, prevention, law enforcement, source country and drug treatment strategies and programs. Lastly, a number of concrete ideas are advanced for creating an effective National Drug Control Strategy—one that would directly confront and eventually face down the growing crisis. In a word, this Article offers a "blueprint" for revitalizing the Nation's counternarcotics effort.

Without an effective National Drug Control Policy,¹ embodied in a well-designed and properly implemented National Drug

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¹"National Drug Control Policy" is a term of art that first appeared in the national lexicon in the wake of the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4189 (codified as amended at 21 U.S.C. §§ 1501-1508 (1994)). This Act created

Control Strategy,² America's multi-tiered federal counter-narcotics initiative will almost certainly collapse. In truth, it appears that the collapse has already begun. Most experts agree that the Nation is confronting a renewed drug epidemic. This current epidemic is even more frightening than encounters with drug use in the 1970s because it appears to be closely linked to rising violent crime and it centers on children ages eight to seventeen.

If national attention does not soon return to the task of defining and vigorously implementing an effective National Drug Control Strategy, the Nation can expect to confront a wave of drug addiction and violent crime unparalleled in our Nation's history, and, some might argue, sufficiently damaging as to become culturally irreversible.

On the other hand, if the core components of an effective strategy can be rapidly identified, garner bipartisan support, and be conscientiously implemented, the prognosis for reversing the explosion in juvenile drug use and juvenile crime will be good.

II. A BRIEF HISTORY OF AMERICA'S ANTI-DRUG EFFORT

A. *From the Early 1970s Through 1988*

In the early 1970s, America experienced the enormous impact of illegal drugs. In June 1971, President Nixon told Congress that a national response to drug addiction would be required, since "the problem [had] assumed the dimensions of a national emergency."³

Nixon's admonition was not ill-placed. By 1980, the use of illegal drugs was so widespread that anti-drug parent groups, including PRIDE and the National Family Partnership, were spring-

the Office of National Drug Control Policy ("ONDCP") and provided it with a director, popularly known as the "White House Drug Czar." *Id.*

²Consistent with the Anti-Drug Abuse Act of 1988 and contributing to the increased currency of the term "National Drug Control Policy" was the statutory requirement that the Drug Czar annually present to Congress and to the President a federal Drug Control Budget and a "National Drug Control Strategy." *Id.* Between 1988 and 1996, with the exception of 1993, there has been compliance with the statute. In 1993, President Clinton argued that he did not have time to comply. It was not until more than six months after his election that he nominated an ONDCP Director, Dr. Lee P. Brown, and finally presented a full National Drug Control Strategy in February 1994.

³DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 256 (1987).

ing up. The previous year, more than half of all minors surveyed acknowledged drug use.⁴

The parent groups, however, were not alone. During the early 1980s, then-First Lady Nancy Reagan became a leading spokesperson in the anti-drug or drug abuse prevention movement. Reagan soon became the movement's chief spokesperson.⁵

During the mid-1980s, President Reagan also showed unprecedented leadership in what soon became known as the "war" against illegal drug use and those who trafficked in illegal drugs.⁶

B. *The 1988 Anti-Drug Abuse Act and the Creation of the Office of National Drug Control Policy (ONDCP)*

In 1988, Congress passed the Anti-Drug Abuse Act of 1988, which established the Office of National Drug Control Policy ("ONDCP") and created the new position of "White House Drug Czar" or ONDCP Director. The Act also required the White House ONDCP Director to present an annual strategy with measurable goals and a Federal drug control budget to the President and Congress.⁷

⁴In 1979, 54% of youth respondents to the Monitoring the Future Survey indicated drug use. See PRIDE, 1995 REPORT 1 (1995).

⁵In hearings in early 1995, the Chairman of the Subcommittee on National Security, International Affairs and Criminal Justice, Representative William H. Zeff, Jr. (R-N.H.), noted that Reagan "woke the nation up to this [juvenile drug abuse] problem and its pervasiveness in the early 1980's." Zeff also observed that the former First Lady's "Just Say No" campaign effectively launched a "national crusade" for drug abuse prevention. He reminded America that, in April 1985, Reagan held the first International Drug Conference for the world's First Ladies; in 1988, she held the second such conference and became the first American First Lady to speak before the United Nations; and after leaving the White House, she founded the Nancy Reagan Foundation, which has since "awarded grants in excess of \$5 million to drug prevention and education programs . . ." *Effectiveness of the National Drug Control Strategy and the Status of the Drug War: Hearings Before the National Security, International Affairs and Criminal Justice Subcomm. of the Comm. on Gov't Reform and Oversight*, 104th Cong., 1st Sess. 11-12 (1995) [hereinafter *Effectiveness Hearings*] (statement of Rep. Zeff).

⁶The term "Drug War" is employed throughout this Article to denote the entire gamut of federal counter-narcotics efforts, including transit-zone interdiction, international source country programs, domestic prevention and treatment programs, law enforcement, and other federal support efforts. The specific budget request and appropriation numbers for these programs, and the cuts that have been permitted in them, are discussed in detail below.

⁷See 21 U.S.C. § 1504 (1988).

C. The 1994 Violent Crime Control and Law Enforcement Act and Modifications to ONDCP

In 1994, pursuant to the Violent Crime Control and Law Enforcement Act of 1994,⁸ the Drug Czar was authorized to make recommendations to agencies during budget formulation. The goal of this provision was to improve resource targeting and policy consistency at Federal agencies that were charged with implementing the National Drug Control Strategy, as well as to heighten overall counter-narcotics coordination throughout the Federal Government. In addition, the 1994 Act authorized the Drug Czar to exercise discretion over two percent of the overall drug budget, subject to the approval of the appropriations committees.⁹ Implicit in this award of new authority was the necessary presidential support for ONDCP to ward off predictable opposition from the agencies themselves, if not also from the Office of Management and Budget ("OMB").

D. Other Recent Legislation

A combination of frustration and creative thinking has resulted in several novel 1995 legislative measures. An amendment to a bill sponsored by Representative William Zeliff (R-N.H.) and Representative Mark Souder (R-Ind.), for instance, attempted to condition the release of foreign aid to Mexico on "the Mexican Government taking actions to reduce the amount of illegal drugs entering the United States from Mexico, as determined by the Director of the Office of National Drug Control Policy."¹⁰ While this measure passed the U.S. House of Representatives overwhelmingly, it was not included in a companion Senate bill and was struck in conference.

The effort by Representatives Zeliff and Souder was followed in early 1996 by a similar development in a Senate bill introduced on January 30, 1996 by Senators Alfonse D'Amato (R-N.Y.) and Dianne Feinstein (D-Cal.). This bill, S. 1548, would also sanction Mexico through restriction of applications by Mexican motor carriers to transport goods across the U.S. border, if

⁸ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁹ In fact, this two percent measure has proved more theoretical than actual, as particular agency heads have resisted the transfers and prevailed in those efforts.

¹⁰ H.R. 1868, 104th Cong., 1st Sess. (1995).

the President and Secretary of Transportation were unable to certify to Congress that substantial progress had been made in counter-narcotics efforts.¹¹

Similarly, Representative E. Clay Shaw (R-Fla.) offered H.R. 2248, a bill “[t]o authorize the imposition of trade sanctions on countries which threaten the health and safety of United States citizens by failing to cooperate fully with the United States policy regarding the reduction and interdiction of illicit drugs.” Under this bill, which was not approved in the first session of the 104th Congress, the U.S. Trade Representative would be empowered to rescind or withhold certain trade benefits.¹²

A variety of other legislation affects the development and implementation of National Drug Control Policy, including recent demand- and supply-reduction measures.¹³

¹¹S. 1548, 104th Cong., 1st Sess. (1995).

¹²H.R. 2248, 104th Cong., 1st Sess. (1995).

¹³For descriptions of other recent legislation affecting the Nation’s Drug Control Policy, see OFFICE OF NATIONAL DRUG CONTROL POLICY, THE WHITE HOUSE, THE NATIONAL DRUG POLICY 56 (1995) (describing the Safe and Drug Free Schools and Communities Act of 1994 (“SDFSCA”), the National Commission on Drug-Free Schools, drug treatment programs, and the Drug Court Initiative) [hereinafter THE NATIONAL DRUG POLICY, 1995].

Demand-reduction programs are also administered by various federal agencies, including the Departments of Health and Human Services (“HHS”), Education (“DoEd”), and Defense (“DoD”). Other legislation obviously affecting demand-side programs are the appropriation measures required to support authorized demand-reduction. *Id.*

On the supply-reduction side, recent legislation affecting the Nation’s Drug Control Policy includes, the International Narcotics Control Corrections Act of 1994, which exempted Fiscal Year (“FY”) 1995 narcotics-related military assistance from general prohibitions on aiding law enforcement, waived restrictions on narcotics-related economic assistance, and gave the President authority to aid international counternarcotics efforts on such terms as he may determine fit. *See* International Narcotics Control Corrections Act of 1994, Pub. L. No. 103-447, 108 Stat. 4691–98 (codified as amended in scattered sections of 7, 8, 12, 18, 19, 21, 22 U.S.C.). In addition, a variety of appropriation bills supported or affected the supply-reduction programs, including the Foreign Operations Appropriations for FY1995, approving \$105 million for the State Department’s international narcotics programs, and creating a major new weapon in National Drug Control Policy by authorizing the President to deny foreign military financing to Colombia and Bolivia unless he certifies that it will be used primarily for narcotics-related activities (following the model of other historic de-certification legislation), and further barring debt relief by the United States for any nation that does not cooperate in international narcotics control efforts. *See* Foreign Operating Appropriations for FY1995, Pub. L. No. 103-306, 108 Stat. 1608–58 (codified as amended in scattered sections of 2, 7, 10, 22, 36, 50 U.S.C.).

Somewhat perilously, the Department of Defense Appropriations Act of 1995 and the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1994, respectively, reduced drug interdiction and counterdrug funding at DoD by approximately \$150 million, from \$868.2 million in FY1994 to \$721.266 million in FY1995, and reduced funding to the State Department’s international narcotics control programs by nearly \$50 million, from \$147.8 million in FY1993 to \$100 million in FY1994. *See* Department of Defense Appropriations Act of 1995, Pub. L. No. 103-335, 108 Stat. 2599–2660 (codified as amended in scattered sections of 10, 22, 41, 50

Other key pieces of 1995 legislation not yet signed by the President as of early 1996 include H.R. 728, which proposes to replace specific provisions in the 1994 Violent Crime Control Act concerning police, prevention and drug courts (Title 1; Title 3, Subtitles A through S, and X; and Title 5, respectively) with a flexible \$10 billion block grant program, allocated at \$2 billion per fiscal year between 1996 and 2000.

The flexibility in this law enforcement block grant is novel and intended to allow states to spend Federal monies on their choice of police officer training, hiring, and overtime pay, as well as new law enforcement technology, crime prevention programs, school security, drug courts, multi-jurisdictional task forces, and more anti-drug activities under the Byrne Grant program. This bill passed the House of Representatives on February 14, 1995. Special credit also goes to Representative William McCollum (R-Fla.), Chairman of the Crime Subcommittee of the House Judiciary Committee, for launching a hard-hitting anti-juvenile crime initiative in 1996.

On the edges of the process, but nevertheless important, are measures that would further enhance law enforcement and other aspects of the Drug War. For example, H.R. 1488 would heighten certain mandatory minimum sentences that involve a firearm; H.R. 2076 would enhance the provisions of H.R. 728 by adding

U.S.C.); Foreign Operations, Export, Financing, and Related Programs Appropriations Act of 1994, Pub. L. No. 103-87, 107 Stat. 931-76 (codified as amended in scattered sections of 2, 5, 12, 22, 50 U.S.C.).

Finally, additional significant legislation, which affected both demand- and supply-reduction, includes the Emergency Supplemental Appropriations and Rescissions Bill for FY1995 that cut previously unspent funding for portions of selected drug-related programs in the 1994 Crime Control Act, including the so-called drug courts (\$17.1 million), the Family and Community Endeavor Schools grants at DoEd (\$11.1 million), and the Community Schools Youth Services at HHS (\$15.9 million). It also transferred \$13.2 million from the ONDCP Special Forfeiture Fund to the U.S. Customs Service for implementation of a new border enforcement initiative called Operation Hardline. *See* Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995, Pub. L. No. 104-19, 109 Stat. 194-254 (codified as amended in scattered sections of 5, 20, 23, 26, 40, 42 U.S.C.). The Federal Sentencing Guidelines, Amendment, Disapproval was also key 1995 legislation. It disapproved the amendments proposed by the U.S. Sentencing Commission that would have reduced mandatory minimum sentences for crack cocaine and money laundering transactions, and simultaneously raised the penalties for distributors of powder cocaine by widening the dealer population to which current mandatory minimums apply; this provision was strongly advocated by Representative Zeliff and Representative William McCollum (R-Fla.). In the absence of this legislation, the Sentencing Commission amendments would have gone into effect on November 1, 1995. *See* The Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. No. 104-38, 109 Stat. 334-35 (1995) (codified as amended in 28 U.S.C. § 994).

nearly \$2 billion in a Local Law Enforcement Block Grant Program, specifically targeted to drug-related activities.¹⁴

In the Senate, S. 3, introduced by Senate Majority Leader Bob Dole (R-Kan.), would create a law enforcement block grant that also expands mandatory minimum sentences for those who use minors in commission of narcotics offenses or discharge of a firearm; and S. 1398, which amends the Controlled Substances Act to increase the penalty for trafficking in powder cocaine to the same level, attempting to damp out the argument about different mandatory minimum sentences for the two drugs by raising the lesser penalty. Together, these efforts reflect differing approaches to halting the onslaught of the drug abuse and drug-related crime. They also reflect a common growing concern for the Nation's basic security.¹⁵

E. *Congressional Drug Policy Hearings from 1988 Through 1994*

More recently, legislative and investigative oversight hearings have been held on a variety of topics relating to national drug policy. Many of these hearings, for example the 1989 and 1990 Hearings of the Legislation and National Security Subcommittee of the House Committee on Government Operations, targeted "The National Drug Control Strategy." However, they also tended to drift toward problems afflicting a few specific programs (at more than fifty federal agencies and departments), highlight individual geographic concerns, and follow idiosyncracies of the Committee or Subcommittee Chairmen.¹⁶

¹⁴ See H.R. 1488, 104th Cong., 2d Sess. (1995); H.R. 2076, 104th Cong., 2d Sess. (1995); H.R. 728, 104th Cong., 2d Sess. (1995).

¹⁵ See S. 3, 104th Cong., 2d Sess. (1995); S. 1398, 104th Cong., 2d Sess. (1995).

¹⁶ See, e.g., *The National Drug Control Strategy: Hearing Before the Legis. and National Security Subcomm. and Joint Hearings Before the Legis. and National Security Subcomm. and Gov't Information, Justice and Agric. Subcomm. of the Committee on Gov't Operations*, 101st Cong., 1st Sess., vol. 1 (1989) [hereinafter *1989 Hearings on The National Drug Control Strategy, vol. 1*]; *The National Drug Control Strategy: Hearing Before the Legis. and National Security Subcomm. and Joint Hearings Before the Legis. and National Security Subcomm. and Gov't Information, Justice and Agric. Subcomm. of the Committee on Gov't Operations*, 101st Cong., 1st, 2d Sess., vol. 2 (1990) [hereinafter *1990 Hearings on The National Drug Control Strategy, vol. 2*]; *The National Drug Control Strategy: Hearing Before the Legis. and National Security Subcomm. and Joint Hearings Before the Legis. and National Security Subcomm. and Gov't Information, Justice and Agric. Subcomm. of the Committee on Gov't Operations*, 101st Cong., 2d Sess., vol. 3 (1990) [hereinafter *1990 Hearings on The National Drug Control Strategy, vol. 3*]. Volume One of these oversight hearings

On balance, these hearings advanced the issue of drug abuse and drug trafficking in public dialogue, but did not arrive at any guiding or governing principles that might legitimately form the basis for an effective National Drug Control Strategy. Where firm positions were taken by the Chairman, they tended to reflect the view that demand- and supply-reduction are in competition and that demand-reduction efforts, particularly drug treatment, should prevail. Thus, then-Chairman John Conyers, Jr., (D-Mich.), of the Legislation and National Security Subcommittee opened one hearing with the proclamation that, "it has become apparent that the focus of the drug strategy must be on reducing demand."¹⁷

allowed for Administration presentations and a brief discussion of interdiction and the Andean Initiative, while Volume Two focused on "The Impact on the State of Michigan," "The Impact on the State of California," and "The Impact on the State of Illinois." Volume Three addressed prevention, treatment and law enforcement programs, but seemed to favor treatment-oriented demand-reduction and promoted the view that demand-reduction and supply-reduction efforts must be viewed in competition, rather than recognizing that interdiction and source country programs, if effective, reduce street availability and purity, raise price, and make prevention more likely to succeed. On the other hand, effective prevention reduces overall casual use, shrinks the number of users likely to become addicted, and reduces the burden on the criminal justice system, law enforcement, and treatment programs. Finally, reducing the demand for illegal drugs and reducing the growth of demand reduces the incentive for increased production, thus aiding supply-side efforts, including coca crop eradication and alternative crop production in the source countries. Interestingly, the expert testimony at these hearings does not support the view that interdiction and prevention should take a back seat to drug treatment; in fact, some advocates of greater federal attention to drug treatment conceded that effectiveness measures are lagging in the area of drug treatment. For example, Karst J. Besteman testified that, among the faults of the 1990 Strategy, was "[t]he emphasis of [sic] expansion of treatment capacity by the federal government with little or no assistance to improve its quality and effectiveness." While Besteman offers one argument for more federal funding to aid research into the efficacy of drug treatment, his testimony is also a persuasive argument against open-ended funding of drug treatment programs not proven to be effective. *1990 Hearings on "The National Drug Control Policy," vol. 3, id.* at 188 (testimony of Karst J. Besteman, Executive Director of the Alcohol and Drug Abuse Problems Association).

¹⁷ *1990 Hearings on The National Drug Control Strategy, vol. 3, supra* note 16, at 151 (statement of Rep. Conyers). In addition, contrary to expert testimony indicating the absence of effective drug treatment programs and confirming that few if any publicly funded drug treatment programs offered encouraging rates of success with crack or cocaine addicts, Conyers nevertheless maintained that "[p]reliminary research indicates that drug treatment reduces drug abuse, increases employment and decreases crime." *Id.* at 152. Indeed, these hearings appear to have been intended to buttress unrelated priorities. For example, expressing "serious reservations about the general orientation" of the 1990 Strategy, which funded interdiction, source country programs, and prevention programs ahead of drug treatment programs, Chairman Conyers took the discussion far afield of counternarcotics policy, asking then-Drug Czar William Bennett, "Isn't it impossible to fight a war on drugs without fighting a war on poverty, homelessness, unemployment, teenage pregnancy, and the overall despair about the future?" *1989 Hearings on "The National Drug Control Strategy," vol. 1, supra* note 16, at 19.

Some national hearings have even been wasteful and counter-productive. Ironically, and contrary to the body of scientific evidence describing what narcotics are, how narcotics severely and subtly impair the human mind and body, and how devastating effects of drug use can be in the nearterm (e.g., cardiac arrest, mental impairment, addiction, death) and long-term (e.g., reduced motivation, addiction, mental and physical process deterioration, death), one 1994 hearing even gave witnesses an opportunity to blithely opine in favor of legalizing dangerous narcotics.¹⁸

At that hearing, witnesses were encouraged to explore the legalization of marijuana, PCP (phencyclidine), and cocaine. Putting aside the body of narcotics science demonstrating psychological and bodily harm,¹⁹ the inchoate criminality of non-medi-

¹⁸*Drugs in the 1990s: Emerging Trends; The Challenges Facing the Drug Enforcement Administrations, the Justice Department, and the Coast Guard: Hearing Before the Information, Justice, Transp., and Agric. Subcomm. of the Committee on Gov't Operations*, 103d Cong., 2d Sess. (1994) [hereinafter *1994 Hearings on Drugs in the 1990s*]. See also *infra* notes 19 and 21 and accompanying text.

¹⁹The damaging effects of drugs on the body have been widely reported. The most authoritative data is collected from emergency rooms around the country and presented by HHS in the annual Preliminary Estimates From The Drug Abuse and Warning Network, or "DAWN," data. DAWN data released in September 1995 demonstrates the harms associated with drugs, as well as the recent increases in juvenile drug use.

Specifically, the 1995 DAWN data shows that "cocaine-related episodes reached their highest level in history," heroin-related episodes have been increasing since the early 1980s, "marijuana/hashish-related episodes rose from 28,900 in 1993 to 40,100 in 1994, a 39 percent increase," and "[t]he 1994 estimates of total drug-related hospital emergency department episodes continued an upward trend begun in 1991." SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., DEP'T OF HEALTH AND HUM. SERVICES, 1994 PRELIMINARY ESTIMATES OF DRUG-RELATED EMERGENCY DEPARTMENT EPISODES 11 (1995) [hereinafter *1994 PRELIMINARY ESTIMATES*].

The 1995 emergency room data also indicates that "[d]rug related episodes rose by 58 percent (from 323,100 to 508,900) from 1978 to 1994, while emergency department visits increased by 21 percent (from 71.3 million to 86.1 million)," *id.* at 6, and "[t]he rate of drug-related episodes per 100,000 population increased 32 percent" from 1990 to 1994. *Id.* at 6.

Of the remaining 1995 DAWN facts, four stand out: "Between 1993 and 1994, the number of drug-related episodes rose by 17 percent for persons aged 12 to 17 years," *id.* at 6; "[d]ependence" and "recreational use" were both listed as "motives" for drug use producing these emergencies, *id.* at 7; "[t]he most frequently recorded reason for a drug-related emergency department visit was 'overdose' . . . which composed 51 percent of all episodes and increased by 16 percent since 1991," *id.* at 7, and the "proportion of drug-related episodes that are heroin-related has increased steadily from 4 percent in 1978 . . . to 13 percent in 1994 . . ." *Id.* at 8. Accordingly, it can hardly be said that there are not significant and damaging health effects associated with each drug named in the 1995 DAWN data, including heroin, cocaine, and marijuana/hashish.

Independently, Dr. Mark Gold, professor of neuroanatomy at the University of Florida, is reported to have recently found that "all drugs change the brain chemistry," and "marijuana and cocaine alter both human genes and neuroreceptors." WILLIAM R. CALTRIDER, JR., CTR. FOR ALCOHOL AND DRUG RESEARCH AND EDUC., *THE FOLLY OF MARIJUANA LEGALIZATION* 5 (1995).

cal narcotics use, the heightened impact of narcotics on children, and the deep societal and moral implications of government encouragement of narcotics use, one witness opined that marijuana's only attraction is that it is "illicit" and that "no one knows" what would happen to the crime rate if cocaine were legalized. The same witness suggested that making cocaine available in large doses to addicts would assure "illicit cocaine dealers would be put out of business."²⁰ The naivete, as well as the uninformed and misleading nature of that testimony, did little to enhance the public dialogue.

While indulgent and defeatist arguments for drug legalization and decriminalization have been bandied about at different points during the course of the Nation's historic fight against drug abuse and international drug trafficking,²¹ most recently by President Clinton's then-Surgeon General, Jocelyn Elders—these ideas

Likewise, Caltrider reports that "the respiratory burden" and "physiological insult" created by "one joint of marijuana" is "400% greater than [by] a commercial tobacco cigarette," that "[u]se of marijuana as infrequently as once a month will insure consistent retention of a baseline level of THC and byproducts in lipid tissues, the brain, lungs, liver and reproductive organs of the user," and meaning that "[t]here is no safe daily dose of marijuana, a drug whose psychoactive agent is fat-soluble and tenaciously persistent within the human body." *Id.* at 5-6.

Importantly, the definition of marijuana has also been changing, and this bears on health effects. "The THC content of current street-grade marijuana is 2500% more potent than that of the late 1960's . . ." *Id.* at 6.

²⁰ See 1994 *Hearings on Drugs in the 1990's*, *supra* note 18, at 35-37.

²¹ There have been sporadic efforts to legalize narcotics, often under the rubric of "legalization," "decriminalization," "medicalization," or "harm reduction," by groups such as NORML, for years. Most recently, at a Harvard Law School Conference on May 21, 1994, nine legalization or harm reduction advocates were invited to share their views. Whether the intent of the conference was to openly air, promote, or discredit the pro-legalization advocates, their expressed views speak for themselves. These views were included in a recent paper by William R. Caltrider, Jr., president of the Center for Alcohol and Drug Research and Education, a nonprofit public policy information clearing house. According to Caltrider's report, Richard Cowan, the national director of NORML, indicated at the Harvard conference that drug prohibition "policies are no more effective than those of Stalin and Hitler," "millions of people are harmed by your [drug] policies, not the drug itself." Similarly, Caltrider reports that another legalization advocate presented the case that society suffers from "addictiphobia" and professed that "marijuana is a harmless drug." John Morgan of City University of New York apparently explained that "cocaine does not cause physical dependence," adding that "when we know drugs are dangerous, we should legalize them," since "prohibiting dangerous drugs is foolish." Representative Barney Frank (D-Mass.) is reported to have said that "drug laws are among the most stupid parts of our culture," and "people like Kurt Schmoke [mayor of Baltimore, who urges drug legalization] are enormously courageous." Finally, the reported comments of Orange County Circuit Court Judge James Gray, as recorded by Caltrider, include the view that "the very worst thing would be the [sic] close our borders and keep drugs out," and the dismaying assertion by a member of the judiciary that "we made a 17 percent gain (in a public poll) in favor of legalization in one year in Orange County." William R. Caltrider, *Rhetorical Disinformation in Drug Policy Debate*, Address at PRIDE International Conference (Mar. 24, 1995) (on file with the author).

have seldom been taken seriously. The empirical reasons for dismissing the legalization argument, beyond the body of science supporting direct and indirect health damage resulting from narcotics,²² the immorality of drug use, and broader social issues, are: (1) the close proven correlation between high street availability, high purity, low price and increased casual drug use, particularly use by children ages twelve to seventeen;²³ (2) the proven link between violent crime and drug use, in particular user-crime, rather than dealer- or internecine gang-crime;²⁴ and

²² See *supra* note 19 and accompanying text. In addition, however, note that the National Institute on Drug Abuse (NIDA) at the National Institutes of Health reported in 1995 that "research has shown marijuana use has many serious and harmful effects." Elaborating, NIDA reported that:

Short-term or acute effects of marijuana include impairments in learning and memory, perception, judgement, and complex motor skills Marijuana can cause difficulty speaking, listening effectively, thinking, retaining knowledge, problem solving and forming concepts. An "amotivational syndrome" can develop in heavy, chronic marijuana users. It is characterized by decreased drive and ambition, shortened attention span, poor judgement, high distractibility, impaired communications skills, and diminished effectiveness in interpersonal situations Judgement of speed and time are impaired by marijuana use, making driving particularly hazardous. In one study of more than 1,000 accident victims at a shock trauma unit, 35% were found to have detectable levels of marijuana in their blood Regular use of marijuana—with or without other illicit drugs—is correlated with higher levels of truancy, fighting, delinquency, arrests, and health problems in adolescents Physiological effects of marijuana include an alteration of heart rate. Use of marijuana may result in intense anxiety, panic attacks or paranoia Marijuana smoke contains some of the same carcinogens and toxic particulates as tobacco, sometimes in higher concentrations. Daily use of 1 to 3 joints appears to produce the same lung diseases (bronchitis, emphysema, and bronchial asthma) and potential cancer risk as smoking five times as many cigarettes.

NATIONAL INSTITUTE ON DRUG ABUSE AND NATIONAL INSTITUTES OF HEALTH, THE FACTS ABOUT MARIJUANA 1 (1995).

²³ See *supra* note 16 and *infra* note 24.

²⁴ See, e.g., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT (1995) [hereinafter 1995 OJJDP REPORT]. Among other findings, the 1995 OJJDP report found that "1 in 3 juvenile detainees were [sic] under the influence of drugs at the time of their offense," and according to the National Institutes of Justice Drug Use Forecasting ("DUF") data, "[o]verall, the 12 [DUF detention center] sites in 1993 reported that between 18% and 54% of juveniles tested positive for at least one illicit drug" at the time of arrest, and "[t]he average proportion of positive [juvenile] tests was 33% . . . substantially above the 1992 average of 25%." *Id.* at 64–65. In addition, "[t]he crime most commonly committed [by juveniles] under the influence of drugs was burglary," and "crimes committed most often to obtain drugs were drug selling (36%), serious assault (24%), burglary (24%), and robbery (19%)." *Id.* at 64. Finally, so there can be no minimization of the correlation between rising juvenile crime and rising juvenile use of marijuana, the 1995 OJJDP report notes that "[t]he level of marijuana use in 1993 [i.e., positive test at arrest] ranged from 14% to 51% [among the 12 test sites] of the juveniles tested, with an average value of 26% . . . substantially above the 1992 average of 16.5%." *Id.* at 65.

On rising violent juvenile crime, the Justice Department found that, "[a]fter years of

(3) the clear relationship between casual drug use and addiction, including the percentage of casual users who will, by virtue of regular or continuing use, become addicted (with the attendant harms of addiction).²⁵

In response to the suggestion at the 1994 hearing testimony that legalizing cocaine would somehow mean “illicit cocaine dealers would be put out of business,” the shortest answer is not the economic reality that as cocaine use increased, production in the source countries would also increase or that most drug-related crime is not dealer-related.²⁶ The shortest answer is that, more people would die (directly and indirectly) as use and addiction increased,²⁷ and they would die both at the hands of legal dealers and those continuing to promote a higher potency black market. Of course, crime associated with any act considered criminal (including murder) could be statistically reduced overnight by declaring the act no longer a crime; victory on those terms would be an obvious illusion. For better or worse, the national dialogue, including the rare congressional hearing, has periodically indulged in a counter-productive discussion of drug legalization. However, until we begin seriously considering the legalization of murder, child abuse, and similar crimes, there is no room in the public dialogue for discussing the legalization of narcotics.

relative stability, juvenile involvement in violent crime known to law enforcement has been increasing.” *Id.* at 1. Moreover, DoJ indicates that “if juvenile arrest rates for Violent Crime Index offenses (murder, rape, robbery, and aggravated assault) were to remain fixed at the 1992 level, juvenile population growth alone would produce a 22 percent rise in violent juvenile crime arrests.” More forebodingly, DoJ concludes, “Should the juvenile crime arrest rates increase in the future . . . juveniles arrested for these violent crimes would double by the year 2010 . . .” *Id.*

Finally, Caltrider observes that, “[d]rug use and criminal activity are inextricably linked” and “between 50–80% of felony arrestees nationwide test positive for some single or multiple illicit drug(s) at the time of the arrest for a non-drug crime.” CALTRIDER, *THE FOLLY OF MARIJUANA LEGALIZATION*, *supra* note 19, at 7.

²⁵The Columbia University Center on Addiction and Substance Abuse, led by former President Jimmy Carter’s Secretary of Health Education and Welfare (“HEW”), Joseph Califano, and former Demand Reduction Deputy ONDCP Director under President Bush, Herbert Kleber, in a joint press release with former Drug Czar William Bennett, recently warned that, “If historical trends continue, the jump in marijuana use among America’s children (ages 12–18) from 1992 to 1994 signals that 820,000 more of these children will try cocaine in their lifetime. Of that number, about 58,000 will become regular cocaine addicts and users.” *Untitled Press Release from Joseph Califano and William Bennett (Sept. 1995) [hereinafter Califano and Bennett Press Release]*.

²⁶*See infra* notes 51 and 54 and accompanying text.

²⁷*See supra* notes 19, 22 and 24 and *infra* notes 51 and 54.

F. *General Accounting Office Investigations*

It should be noted that, while hearings in 1995 established new ground in the process of reviewing the National Drug Control Strategy, and presented findings based partially on new General Accounting Office ("GAO") investigations, earlier GAO investigations were helpful in guiding national policy.²⁸

G. *Other Congressional Anti-Drug Efforts*

Creative thinking has also opened non-legislative channels. One of the most promising is the formation of the U.S. House Bipartisan Drug Policy Working Group, which in a closed session recently heard from FBI Director Louis Freeh, DEA Administrator Thomas Constantine, and ONDCP Director Lee Brown. That unprecedented November 1, 1995 meeting drew in excess of twenty-five members of the House and a nearly even split between Republicans and Democrats. On February 29, 1996, the Group met again for nearly two hours with newly confirmed White House Drug Czar, General Barry McCaffrey, again in closed session. The Group is co-chaired by Representative Zeliff and Representative Charles Rangel (D-N.Y.). Another promising group is the newly created Senate-House Drug Policy Task Force, jointly chaired by Senator Orrin Hatch (R-Utah), Senator Charles E. Grassley (R-Iowa), Representative Zeliff, and Representative Henry Hyde (R-Ill.). The Task Force was convened by Majority Leader Dole (R-Kan.) and House Speaker Newt Gingrich (R-Ga.). A third major initiative is the spear-heading of community anti-drug coalitions by Representative Rob Portman (R-Ohio). This highly successful initiative may soon be replicated throughout the country, and involves creating local synergies by bringing together often disparate groups behind one anti-drug mission.

²⁸ See, e.g., GENERAL ACCOUNTING OFFICE, COMMUNITY BASED DRUG PREVENTION: COMPREHENSIVE EVALUATIONS OF EFFORTS ARE NEEDED (1993); GENERAL ACCOUNTING OFFICE, WAR ON DRUGS: FEDERAL ASSISTANCE TO STATE AND LOCAL DRUG ENFORCEMENT (1993); GENERAL ACCOUNTING OFFICE, DRUG CONTROL: REVISED DRUG INTERDICTION APPROACH IS NEEDED IN MEXICO (1993); GENERAL ACCOUNTING OFFICE, DRUG CONTROL: REAUTHORIZATION OF THE OFFICE OF NATIONAL DRUG CONTROL POLICY (1993) [hereinafter REAUTHORIZATION]; GENERAL ACCOUNTING OFFICE, INS DRUG TASK FORCE ACTIVITIES: FEDERAL AGENCIES SUPPORTIVE OF INS EFFORTS (1994).

II. PREDICATE FOR ACTION: A NATION IN CRISIS

In 1995, congressional oversight hearings conducted by the Subcommittee on National Security, International Affairs and Criminal Justice (hereinafter "National Security Subcommittee"), of the Government Report and Oversight Committee, broke new ground in the exploration of National Drug Control Policy. Those hearings, chaired by Representative Zeff, in combination with recent nationwide studies and other reliable documentary evidence, provide the statistical and evidentiary underpinning for the analysis that follows.²⁹

The National Security Subcommittee initiated its investigation of the design, coordination, and implementation of the National Drug Control Policy in early 1995.³⁰

Even in early 1995, a number of factors suggested a major deficiency in how the nation was approaching the drug war. These factors included the steep rise in juvenile and overall drug use (including both rising casual drug use and increasing regularity of use), the growing awareness that increased juvenile drug

²⁹ See *Effectiveness Hearings*, *supra* note 5.

³⁰ During the 1995 investigation into the status of the National Drug Control Strategy and its implementation, the Subcommittee engaged in extensive correspondence with the Administration, including direct correspondence with the President; the Vice President; the President's National Security Advisor, Anthony Lake; the Director of ONDCP, Dr. Lee P. Brown; the United States Interdiction Coordinator and Coast Guard Commandant, Admiral Robert E. Kramek; the Administrator of the Drug Enforcement Administration, Thomas A. Constantine; the Commissioner of the U.S. Customs Service, George Weise; the Department of Defense Deputy Assistant for Drug Enforcement Policy, Brian Sheridan; the Department of State Deputy Assistant Secretary for International Narcotics and Law Enforcement, Ambassador Jane E. Becker; and others at the Departments of Justice, Defense, State, ONDCP, and elsewhere in the Administration.

The Subcommittee investigation also included a June 1995 fact-finding trip to the Seventh Coast Guard District in the Caribbean transit zone, which involved high-level briefings at Seventh District Headquarters in Miami on Coast Guard interdiction initiatives at sea, Drug Enforcement Administration (DEA) activities in the Greater Antilles, and interagency working group activities in Puerto Rico involving the FBI, DEA, Customs, Border Patrol, and local authorities. The Subcommittee also received in-depth briefings by Admiral Granuzo and others at the Joint Interagency Task Force-East in Key West, Florida, dedicated to Eastern Caribbean Drug Interdiction. In coordination with ONDCP, Subcommittee Chairman Zeff also traveled with the White House Director of ONDCP for prevention and treatment programs in New England.

In general, the Subcommittee met extensively with the Federal agencies involved in implementing the National Drug Control Strategy and relied upon statistical and anecdotal evidence pertaining to the effectiveness and accountability of the current National Drug Control Strategy and programs. Efforts under inquiry spanned interdiction, law enforcement, prevention, treatment, and source country initiatives. The Subcommittee was assisted by GAO investigators, field agents, and departmental inspectors general.

use is linked to rising juvenile crime,³¹ the absence of a long-promised White House Heroin Strategy,³² an objective reduction in interdiction efforts,³³ an apparent lack of progress in source countries toward goals set forth for so-called source country programs,³⁴ reports of lagging accountability in drug prevention programs,³⁵ de-emphasis by the media on drug abuse³⁶ and the overall rise in drug-related juvenile violence,³⁷ and problems with interagency coordination of counter-narcotics.³⁸

A. *Juvenile Drug Use Exploding*

What becomes apparent upon a review of all available factual material is that—as of early 1996—the nation is in the grips of an unprecedented juvenile drug use explosion, replete with the societal costs and the correlations any observer would expect from such a development.

Specifically, the evidence is now nearly incontrovertible that drug use among the nation's juvenile population has risen at an alarming rate across American society over the past three years. Reputable 1994 nationwide surveys measured disturbing increases

³¹ 1995 OJJDP REPORT, *supra* note 24, at 58–65.

³² In November 1993, the President promised a national heroin strategy within 120 days. As testimony indicated throughout hearings in 1995, no heroin strategy was ever produced. Without White House announcement, the President finally signed a national heroin strategy in late November 1995. Because the signed strategy offers little that is new, is weak on details, and was promulgated without implementing guidelines, it has been a nullity so far. However, there is hope that with the nomination of a new ONDCP director, namely General Barry McCaffrey, the implementing guidelines will appear, and the heroin strategy will be integrated into a more coherent overall strategy.

³³ See *infra* notes 84–122 and accompanying text.

³⁴ See *infra* notes 125–134 and accompanying text.

³⁵ In particular, reports of waste and misapplication of funds have been associated with certain states' administration of Safe and Drug Free Schools monies. These allegations are presently under investigation by the Department of Education and GAO.

³⁶ See *Effectiveness Hearings*, *supra* note 5, at 114 (statement of Thomas Hedrick, Vice Chairman of the Partnership for a Drug-Free America). Hedrick continues, “[since the Partnership’s inception,] [t]he nation’s media has donated over \$2 billion in time and space to get our anti-drug messages to the public. In 1990 and 1991, this translated to 1 anti-drug message per household per day. However, support of our messages has declined by 20 percent over the past three years because the media is not as convinced that the drug issue is as important as it was.” *Id.*

Hedrick also noted, “There has been an even more dramatic decrease in the news coverage of the drug issue . . . going from about 600 stories in the 3 major networks in 1989 to 65 which, quite frankly, from a communications point, ladies and gentlemen, is about zero.” *Id.* at 112.

³⁷ See *supra* note 24 and accompanying text.

³⁸ See *Effectiveness Hearings*, *supra* note 5, at 100–04 (statement of Admiral Paul A. Yost, USCG (retired), president, James Madison Memorial Fellowship Foundation).

in drug use and acceptability, especially among the nation's youth.

According to the 1994 *Monitoring the Future Study*, conducted by the University of Michigan, thirteen percent of eighth-graders experimented with marijuana in 1993, about twice the 1991 level. Experimentation among tenth-graders increased by about two-thirds the previous three years, and daily use among high school seniors was up by half over 1993 levels.³⁹

In addition, lifetime cocaine use increased among eighth and tenth graders, crack use increased among eighth graders, lifetime use of hallucinogens (including LSD) increased for tenth graders, and lifetime, annual and current use of heroin increased among eighth graders. Overall, drug use showed a marked upturn among the junior and senior high school students surveyed.⁴⁰

This same study, which annually surveys approximately 16,000 high school seniors, the same number of tenth graders, and approximately 17,000 eighth graders,⁴¹ came to other disturbing conclusions. The 1994 survey not only found that overall lifetime use of drugs was up; it found a declining number of students who viewed use of crack, cocaine, LSD or heroin as risky.⁴²

³⁹NATIONAL INSTITUTE OF DRUG ABUSE, DEP'T. OF HEALTH AND HUM. SERVICES, *MONITORING THE FUTURE STUDY, 1975-1994: NATIONAL HIGH SCHOOL SENIOR DRUG ABUSE SURVEY (1994)* [hereinafter *MONITORING THE FUTURE STUDY*].

⁴⁰*Id.* at 4.

⁴¹The *Monitoring the Future Study* is highly regarded within the drug-prevention community. Data are collected annually in the spring from public and private junior and senior high schools throughout the country, excepting Alaska and Hawaii. The survey covers both trends in use and prevalence of drug use and addresses 20 classes and subclasses of drugs, including marijuana/hashish (up 2.7% in 1993 and up 2.9% in 1994, after falling 4.1% in 1992), inhalants (up 0.8% in 1993 and up 0.3% in 1994, after falling 1.0% in 1992), LSD (up 1.7% in 1993 and up 0.2% in 1994, after falling 0.2% in 1992), PCP (up 0.5% in 1993 and down 0.1% in 1994, after falling 0.5% in 1992), cocaine (level in 1993, after falling 1.7% in 1992, falling 1.6% in 1991, falling 0.9% in 1990, falling 1.8% in 1989, falling 3.1% in 1988, falling 1.7% in 1987, and falling 0.4% in 1986), crack (level in 1993 and up 0.4% in 1994, after falling 0.5% in 1992, falling 0.4% in 1991, falling 1.2% in 1990, falling 0.1% in 1989 and falling 0.6% in 1988, before which crack was not measured), heroin (level in 1993 and 1994, after a 0.3% increase in 1992), stimulants (up 1.2% in 1993 and 0.6% in 1994, after falling steadily from a high of 32.2% in 1981 to a low of 13.9%), crystal methamphetamine (up 0.2% in 1993 and 0.3% in 1994, after falling 0.5% in 1992), sedatives (up 0.3% in 1993 and up 0.9% in 1994, after falling 0.6% in 1992), barbiturates (up 0.8% in 1993 and up 0.7% in 1994, after falling 0.7% in 1992), and tranquilizers (up 0.4% in 1993 and up 0.2% in 1994, after falling 1.2% in 1992). Also included in the study were anabolic steroids, non-LSD hallucinogens, other opiates, methaqualone, amyl and butyl nitrites, and alcohol. Questions include inquiries into age of first use, trends in use at earlier grade levels, intensity of drug use, attitudes and beliefs concerning various types of drug use, and perceptions of peer attitudes. *MONITORING THE FUTURE STUDY*, *supra* note 39, at 2.

⁴²*Id.* at 4.

Increasing use of illegal drugs was also reported by the Drug Abuse Warning Network (DAWN) using data on drug-related emergencies during 1993, collected from emergency rooms around the country. Overall, that data showed an eight percent increase in drug-related emergency room cases between 1992 and 1993, with heroin overdoses accounting for forty-five percent of the increase. Cocaine use also reached an all-time high, having more than doubled since 1988, and marijuana emergencies increased twenty-two percent between 1992 and 1993.⁴³

The latest surveys indicate that illegal drug use has continued to rise since 1994. The National Household Survey released in late 1995 shows that overall drug use among children ages twelve to seventeen jumped nearly fifty percent in 1994, from 6.6% to 9.5%.⁴⁴ The National Pride Survey of 200,000 students shows that one in three American high school seniors now smokes marijuana, that there has been a thirty-six percent increase in cocaine use among students in grades nine through twelve since 1991-92, and that hallucinogen use by high schoolers has risen seventy-five percent since 1988-89.⁴⁵ Additionally, the October 1995 DAWN data shows that, in 1994, "[c]ocaine-related episodes reached their highest level in history," registering a "15 percent increase from 1993 . . . and 40 percent increase from 1988 . . ." Marijuana or hashish-related emergencies rose thirty-nine percent from 1993 to 1994, while total drug-related emergency cases rose ten percent between 1993 and 1994.⁴⁶

B. *Historical Context: Prior Decade of Falling Use*

The increase in juvenile drug use over the past three years is especially disheartening in light of the reductions witnessed under the Reagan and Bush Administrations. Between 1981 and 1992, overall drug use fell precipitously, as coordinated federal, state, community, and parental counter-narcotics activity inten-

⁴³SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., DEP'T. OF HEALTH AND HUM. SERVICES, 1993 PRELIMINARY ESTIMATES OF DRUG-RELATED EMERGENCY DEPARTMENT EPISODES 2-8 (1994).

⁴⁴SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., DEP'T. OF HEALTH AND HUM. SERVICES, PRELIMINARY ESTIMATES FROM THE 1994 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (1995).

⁴⁵PRIDE, TEEN DRUG USE RISES FOR FOURTH STRAIGHT YEAR, 1-4 (1995). *See also* THOMAS J. GLEATON, ET AL., PRIDE COMMUNITIES: A GRASSROOTS DRUG PREVENTION EFFORT FOR HEALTHY TEENS (1995).

⁴⁶1994 PRELIMINARY ESTIMATES, *supra* note 19, at 11.

sified, and Presidents Reagan and Bush, as well as First Lady Nancy Reagan, provided outspoken leadership on the issue.⁴⁷

In combination with nationwide grassroots parent groups, such as Pride and the National Family Partnership, Nancy Reagan's "Just Say No" prevention message began the push to reduce drug use in the early 1980s. Reagan's effort was supplemented by federal drug prevention funding in 1987, and was coordinated with the first concerted drug interdiction program in the late 1980s.⁴⁸

Aided by new counter-narcotics programs at the Departments of Defense and Justice, the Drug Enforcement Administration, U.S. Customs Service, Border Patrol, and State and Local law enforcement agencies, then-Coast Guard Commandant Admiral Paul Yost coordinated and implemented a drug interdiction effort based on the increased flow, or "pulsing," of federal interdiction resources into the Transit Zone at high drug trafficking times (for example, in high harvest seasons).⁴⁹

Together, these prevention, law enforcement, and interdiction efforts yielded results. "Monthly cocaine use dropped from nearly 3 million users in 1988 to 1.3 million in 1990 Between 1991 and 1992 overall drug abuse dropped from 14.5 million users to 11.4 million."⁵⁰ The perceived risk of drug use rose, as did prices, while availability and purity fell.⁵¹

⁴⁷ *Effectiveness Hearings*, *supra* note 5, at 13–16 (statement of Former First Lady Nancy Reagan); *id.* at 11–13 (remarks of Rep. Zeff).

⁴⁸ *Id.*

⁴⁹ See *Effectiveness Hearings*, *supra* note 5, at 103–04 (statement of Paul A. Yost).

⁵⁰ *Effectiveness Hearings*, *supra* note 5, at 14 (testimony of Nancy Reagan). See also *id.* at 18 (statement of John P. Walters, President, New Citizenship Project); at 47 (statement of William J. Bennett, Former Drug Czar); at 42–43 (statement of Judge Robert C. Bonner, Former Director, Drug Enforcement Agency). In the foregoing hearings, Walters testified that "[o]verall, casual drug use by Americans dropped by more than half [between 1977 and 1992] . . . [and] [b]etween 1985 and 1992 alone, monthly cocaine use declined by 78 percent," noting that "[a] 50–80 percent reduction in a similar social problem (the dropout rate, illegitimacy, the spread of HIV, or the rate of violent crime) would be considered a major domestic policy success—that is what happened with illegal drug use in the U.S." *Id.* at 18. Bonner added that, "crack cocaine use sharply declined from nearly half a million in 1990 to just over 300,000 two years later in 1992," and observed that, "in virtually every category of illegal drug, we saw sharp declines from the mid-1980s through 1992," including "an astonishing 61 percent decline" of regular marijuana users between 1985 and 1992. *Id.* at 43.

⁵¹ See *Effectiveness Hearings*, *supra* note 5, at 31–37 (testimony of John P. Walters).

C. Drug-Related Violent Juvenile Crime Rising

The increase in juvenile drug use is all the more alarming because juvenile drug use and juvenile violent crime are closely correlated and, predictably, feed upon each other. In September 1995, the Justice Department's Office of Juvenile Justice and Delinquency Prevention ("OJJDP") reported that "1 in 3 juvenile detainees were under the influence of drugs at the time of their offense."⁵² Moreover, there should be no understating the relationship between rising juvenile crime and rising juvenile use of marijuana. The 1995 OJJDP report notes that, "[t]he level of marijuana use in 1993 [i.e., positive test at arrest] ranged from 14% to 51% [among the twelve test sites] of the juveniles tested, with an average value of 26% . . . substantially above the 1992 average of 16.5%."⁵³

Moreover, according to OJJDP, "[a]fter years of relative stability, juvenile involvement in violent crime known to law enforcement has been increasing," and "juveniles were responsible for about 1 in 5 violent crimes."⁵⁴ Other factors suggest that drug use itself, independent of the population under study, is closely correlated with non-drug offense crime.⁵⁵

D. Media and Presidential Attention Missing

The difficulties of reducing drug use have been exacerbated by the fact that the drug issue has fallen into relative obscurity since the late 1980s. Objective indicators of the amount of attention that the media, national leaders, and the President, in particular, are devoting to the anti-drug effort reveal lower inter-

⁵² 1995 OJJDP REPORT, *supra* note 24, at 64.

⁵³ *Id.* at 64-65.

⁵⁴ The 1995 OJJDP Report also notes that, "[t]he crime most commonly committed [by juveniles] under the influence of drugs was burglary," and "crimes committed most often to obtain drugs were drug selling (36%), serious assault (24%), burglary (24%), and robbery (19%)." *Id.* at 64-65.

The OJJDP Report also indicates that "if juvenile arrest rates for Violent Crime Index offenses (murder, rape, robbery, and aggravated assault) were to remain fixed at the 1992 level, juvenile population growth alone would produce a 22 percent rise in violent juvenile crime arrests by the year 2000." More forebodingly, DoJ warns: "Should the juvenile crime arrest rates increase [at current rates] in the future . . . juveniles arrested for these violent crimes would double by the year 2010 . . ." *Id.*

⁵⁵ See CALTRIDER, *supra* note 19, at 7 (observing that "[d]rug use and criminal activity are inextricably linked . . ." and "between 50-80% of felony arrestees nationwide test positive for some single or multiple illicit drug(s) at the time of the arrest for a non-drug crime.")

est than at any other time in recent history. Experts say that media coverage of the Drug War, which peaked in 1989, has been barely evident since.⁵⁶

Presidential leadership has been equally anemic. In 1993, President Clinton made seven addresses to the nation; none mentioned illegal drugs. The President's 1993 presidential papers reveal thirteen references to illegal drugs out of a total 1,628 presidential statements, addresses, and interviews. Of 1,742 presidential statements and other utterances in 1994, illegal drugs were mentioned only eleven times.⁵⁷

E. 1993–1996 Budget Cuts in Counter-Narcotics Programs

Despite the successes in the 1980s and early 1990s, support for counter-narcotics efforts, especially for interdiction, has been declining, as evidenced by the Administration's 1993, 1994, 1995, and 1996 budget priorities and the relative indifference of the 103d Congress on this issue. In fact, the Clinton Administration has presided over a substantial reduction in resources committed to important supply-reduction programs, and has underemphasized crucial demand-side prevention efforts. In early 1995, key budget numbers were already well below prior levels, despite the perception that these marks defined the minimum resource requirements for effective conduct of the Drug War.⁵⁸ Sadly, even the election-year 1996 numbers are much the same.⁵⁹

While the total anti-drug budget rose from \$1.5 billion in fiscal 1981 to \$13.2 billion in fiscal 1995,⁶⁰ ONDCP reports a drop in both drug interdiction and international program funding,⁶¹ and concedes a significant shift among demand reduction programs toward an emphasis on drug treatment. Under the Clinton Administration's re-prioritization, the drug interdiction budget

⁵⁶ See *supra* note 36 and accompanying text.

⁵⁷ See William H. Zeff, Jr., *Missing Leader in the Drug World*, WASH. POST, Dec. 15, 1995, at A25.

⁵⁸ See *supra* note 6.

⁵⁹ See OFFICE OF NATIONAL DRUG CONTROL POLICY, 1996 NATIONAL DRUG CONTROL STRATEGY (1996). In this strategy, proposed April 25, 1996, treatment program spending rises to a record \$2.9 billion dollars, while interdiction spending remains almost \$100 million dollars below 1992 levels, and source country spending is \$123 million dollars below 1992 levels. *Id.*

⁶⁰ DAVID TEASLEY, CONGRESSIONAL RESEARCH SERVICE REPORT NO. 95-943, at 1 (1995).

⁶¹ THE NATIONAL DRUG POLICY, 1995, *supra* note 13, at 113.

fell from \$1.511 billion in FY 1993 to \$1.312 billion in FY 1994. President Clinton's FY 1994 budget request rolled back interdiction spending by \$200 million. In FY 1995, the President rolled back interdiction spending another \$18 million, to \$1.293 billion, and in FY 1995, he proposed an additional cut of \$15 million to \$1.278 billion.⁶²

At the same time, international or source country counter-narcotics funding fell from a high of \$523 million in FY 1993, to \$329 million in FY 1994, and to a low of \$309 million in FY 1995, rebounding only slightly to \$399 million in the presidential request for FY 1996.⁶³ These and other budget numbers, as well as specific asset and personnel cuts, are discussed further below.

F. Shifting National Drug Control Policy Priorities

Another sign of, and cause for, the juvenile drug use and juvenile crime crisis is the Clinton administration's embrace of two new drug policy priorities. Drug treatment for a limited number of older, chronic addicts has been favored over accountable, juvenile drug prevention; and the Administration has made a public shift away from transit zone interdiction, favoring source country programs, but has not shifted the resources necessary to sustain their stated priority on source country programs. These conscious shifts in the Administration's 1994 and 1995 National Drug Control Strategies have been a material cause of recent declines in policy effectiveness.

First, on the consumption, or demand-reduction side, the new policies comprise a shift of available resources toward treatment programs for hardcore drug users, and away from prevention programs for casual and non-users. Specifically, the 1995 White House National Drug Control Strategy identifies first on its list of "National Funding Priorities for FYs 1997-99" the "[s]upport programs that expand drug treatment capacity and services so that those who need treatment can receive it."⁶⁴ To this end, the President has markedly increased treatment resources. In FY

⁶²*Id.* at 113. An April 1996 report suggests an even steeper decline in drug interdiction than reported by the White House. See GENERAL ACCOUNTING OFFICE, DRUG CONTROL: U.S. INTERDICTION EFFORTS IN THE CARIBBEAN DECLINE (1996).

⁶³*Id.*

⁶⁴*Id.* at 119.

1993, treatment funding stood at \$2.339 billion. The figure increased to \$2.399 billion in FY 1994, to \$2.647 billion for FY 1995, and the President's request for FY 1996 was at the all-time high of \$2.827 billion.⁶⁵ In the April 1996 proposal for FY 1997, the President topped even the prior record, seeking \$2.908 billion dollars for treatment.⁶⁶

Experience now indicates that these demand-reduction resources were poorly targeted. The President's 1995 Drug Control Strategy acknowledged the increase in casual drug use among the Nation's youth but concluded: "Anti-drug messages are losing their potency among the Nation's youth."⁶⁷ This conclusion, coupled with increased spending on drug treatment, represents a fundamental misunderstanding of the importance of prevention programs targeted at the population most at risk.

The stated goal of shifting these resources to effective source country programs appears never to have occurred. The 1994 and 1995 White House Strategies represent a reduction in interdiction or transit zone counter-narcotics programs, as discussed in greater detail below.

G. Movement Away from Short-Term Measurable Objectives

The Clinton White House Drug Strategies for 1993, 1994, 1995, and 1996, depart from the statutory requirement of "short-term measurable objectives,"⁶⁸ offering instead broad, prescriptive goals and precatory language, such as: "Reduce the number of drug users in America."⁶⁹

The Anti-Drug Abuse Act of 1988 clearly sets forth four statutory requirements. ONDCP is required to:

- (A) include comprehensive, research-based long-range goals for reducing drug abuse in the United States;
- (B) include short-term measurable objectives which the Director determines may be realistically achieved in the 2-year period beginning on the date of the submission of the strategy;
- (C) describe the balance between resources devoted to supply reduction and demand reduction; and
- (D) review State and local drug control activities to ensure that the United States

⁶⁵ *Id.* at 113.

⁶⁶ See *supra* note 59.

⁶⁷ *The National Drug Policy*, *supra* note 13, at 9, 20.

⁶⁸ 21 U.S.C. § 1504(a)(2)(B) (1988).

⁶⁹ THE NATIONAL DRUG POLICY, 1995, *supra* note 13, at 53.

pursues well-coordinated and effective drug control at all levels of government.⁷⁰

While there are serious questions as to whether sections A and D are being performed (see below), section B clearly seems to have warranted no attention from ONDCP. This is true in President Clinton's 1996 strategy, as it was in 1993, 1994, and 1995.

Together, the indicia of mounting drug use and juvenile crime, in combination with the policy shifts, suggest that a crisis is indeed upon us.

III. IDENTIFYING CAUSES AND EXAMINING FEDERAL PROGRAMS

A. *Supply-Reduction Policy and Programs*

Supply-reduction consists essentially of drug interdiction efforts, coordinated among the Defense Department ("DoD"),⁷¹ U.S. Coast Guard,⁷² Drug Enforcement Administration ("DEA"),⁷³ Federal Bureau of Investigation ("FBI"),⁷⁴ U.S. Cus-

⁷⁰21 U.S.C. § 1504(a)(2)(B) (1988). The National Drug Control Strategies prior to 1993 conformed with these requirements. Thus, the 1992 Strategy laid out "10 detailed goals with specific numerical and proportional targets," such as to "reduce current overall drug use by 15%."

⁷¹The Department of Defense ("DoD") has been designated the lead agency for air and maritime detection and monitoring. 10 U.S.C. § 124 (1988). Until late 1995, the Joint Interagency Task Force-East ("JIATF-East") was coordinated by DoD; it appears that chief responsibilities at JIATF-East have now passed to the U.S. Coast Guard with the retirement of Admiral Granuzo. For further discussion, see, e.g., NATIONAL INTERAGENCY COUNTERDRUG INSTITUTE, THE COUNTERDRUG MANAGERS COURSE, RESOURCE GUIDE, §§ 1-1 to 2-26 (1994).

⁷²The United States Coast Guard, which is anachronistically part of the Department of Transportation, is the only federal agency with jurisdiction on the high seas and in U.S. territorial waters. 14 U.S.C. § 1 (1988). While it conducts other missions, such as search and rescue, it has a primary responsibility for interdiction of illegal drugs en route to the U.S. *Id.*

⁷³The Drug Enforcement Administration ("DEA"), created in 1973, 5 U.S.C. Reorg. Plan 2 § 4 (1973), is the lead federal agency for the enforcement of counternarcotics, or drug and controlled substances laws. DEA is primarily responsible for investigating drug traffickers, enforcing laws and regulations barring the manufacture, distribution, dispensation or importation of controlled substances, and managing the drug intelligence system. Although not often viewed as operating outside the country, DEA maintains 19 field divisions with 100 field offices, a research laboratory, and a DEA Air Wing that offers air support domestically and abroad. DEA operates in 45 countries. DEA operates the El Paso Intelligence Center ("EPIC").

⁷⁴The Federal Bureau of Investigation ("FBI") is our Nation's principal agency for the conduct of federal investigations, and is part of the Department of Justice. 28 U.S.C. § 531 (1988). In 1982, following the Attorney General's determination that drug trafficking was the top criminal problem facing the nation, the FBI was designated by the lead agency in seeking violations of the 1970 Comprehensive Drug Abuse and Control Act, and became the designated supervisor of DEA. The FBI's counterdrug organization features the Mexican Drug Traffickers Unit ("DTU"), and investigates

toms,⁷⁵ State Department,⁷⁶ U.S. Border Patrol,⁷⁷ and other supporting law enforcement agencies,⁷⁸ as well as the so-called source country programs, which are coordinated in-country and intended to stem the flow of illegal drugs at the source.

A review of testimony and documents surrounding the Nation's supply-reduction policy suggests bipartisan support for interdiction. Just as interdiction and law enforcement experts recognize the central role played by parental, community, state, and federal drug prevention efforts, prevention experts acknowledge the importance of law enforcement and interdiction efforts in creating and maintaining an effective use-reduction strategy.

Drug interdiction assets, funding, and emphasis have fallen substantially over the past three years, with foreseeable results. This development is in sharp contrast to the concerted interdic-

major Mexican drug trafficking organizations. It also maintains a DTU in Colombia and elsewhere in South America. On the heels of the FBI's successful engagement of the La Cosa Nostra and Sicilian Mafia, the European and Asian DTU are now focused on organized crime groups such as La Camorra and N'Drangheta, as well as Asian drug trafficking organizations.

⁷⁵The U.S. Customs Service is the Nation's chief border enforcement agency, 19 U.S.C. § 2071 (1988), and, as such, is responsible for facilitating and regulating the movement of traffic across the borders. Customs is central to the drug war, since it is charged with detecting and seizing large quantities of illegal narcotics destined for the U.S. at the border. Customs operates air, land, and marine operations.

⁷⁶The State Department's Bureau of International Narcotics Matters coordinates U.S. international supply reduction and demand reduction strategies. Programs the State Department oversees include crop eradication, income replacement, investigations, intelligence and interdiction support. The Department has four basic missions, including maintenance of an air wing, crop eradication and in-country enforcement, in-country development and demand reduction assistance, and support for regional counternarcotics efforts, such as those developed by the Organization of American States ("OAS"), the U.S. Fund for Drug Abuse Control, and the Pan American Health Organization.

⁷⁷The U.S. Border Patrol is the enforcement arm of the Immigration and Naturalization Service, and is responsible for border drug interdiction. 8 U.S.C. § 1357(a) (1988). More broadly, the INS seeks and apprehends illegal aliens and drug traffickers inside the United States. 8 U.S.C. § 1103(a) (1988).

⁷⁸Also pivotal in the drug war are the activities of the National Drug Intelligence Center ("NDIC"), which reports to the Attorney General. 21 U.S.C. § 873 (1988). NDIC is located in Johnstown, Pennsylvania (with a Washington, D.C. satellite office) and amasses and assesses drug trafficking patterns and other critical drug intelligence. Other agencies involved in counternarcotics activities, while perhaps seeming far afield, include the U.S. Marshals Service, Federal Bureau of Prisons, International Criminal Police Organization ("INTERPOL," which reports to the Attorney General), Bureau of Alcohol Tobacco and Firearms ("BATF," which exercises jurisdiction over firearms offenses, but reports that 50% of law enforcement work is now drug-related), the Internal Revenue Service ("IRS," which handles trafficker tax compliance issues), the U.S. Secret Service (which handles counterfeiting and currency violations), Federal Aviation Administration ("FAA," which assists in identifying airborne traffickers), and—central to all foreign counternarcotics operations—the intelligence community, including the Central Intelligence Agency ("CIA"), Defense Intelligence Agency ("DIA"), and National Security Agency ("NSA").

tion efforts launched by the Reagan and Bush Administrations between 1984 and 1990.

1. Successful 1980s and early 1990s Interdiction Efforts

Testimony offered in early 1995 by Admiral Paul Yost, former United States Coast Guard Commandant and the man who headed the nation's interdiction effort between 1984 and 1990, is revealing. It suggests reasons for optimism in the area of interdiction, because his coordinated effort had a positive effect on domestic drug use, drug availability, drug purity, and the rise in street drug prices during the late 1980s.⁷⁹

In hearings before the National Security Subcommittee in early 1995, Yost testified that the Nation experienced a "major build-up in drug interdiction . . . from 1984 through 1990, and this interdiction effort successfully interrupted the flow of bulk marijuana by sea and cocaine by air over the water routes [of the Caribbean]."⁸⁰

Yost testified that "strong interdiction and law enforcement [during the period 1984 to 1990] were providing a climate that made it clear to the [drug] trafficker: '[T]his is wrong, and your chances of being intercepted are very high.'"⁸¹ He also explained the need for a "theater commander," and how he had aggregated Coast Guard and interagency assets to implement a sub-strategy called "pulses." The "pulses" strategy involved concentrating all interdiction resources in a particular region at pre-planned times, for example along Caribbean trafficking routes at the height of the marijuana harvest season.⁸²

2. 1993–1995 Interdiction Cuts and Asset Removal

While some transit zone interdiction assets were redeployed to the Persian Gulf in 1991, the overwhelming reduction in the interdiction force structure has occurred between 1993 and 1995. Objective indicators of federal support for the counter-narcotics

⁷⁹ See *Effectiveness Hearings*, *supra* note 5, at 100–09. See generally *Illicit Drug Availability: Are Interdiction Efforts Hampered by a Lack of Agency Resources?: Hearings Before the National Security, International Affairs, and Criminal Justice Subcomm. of the Comm. on Government Reform and Oversight*, 104th Cong., 1st Sess. (1995) [hereinafter *Drug Availability Hearings*].

⁸⁰ *Effectiveness Hearings*, *supra* note 5, at 100–04 (testimony of Paul A. Yost).

⁸¹ *Id.*

⁸² *Id.*

effort show a substantial reduction in resources committed to key areas. Although the policy shift has been defended by the Administration, key budget numbers are below prior highwater marks. This conclusion is supported by evidence from the President's 1995 and 1996 drug interdiction budgets, the Office of the United States Interdiction Coordinator, and 1995 reports from the General Accounting Office, as well as from 1995 congressional testimony.

There have also been reductions at ONDCP that appear to have affected implementation and coordination of supply- and demand-reduction programs. While the total anti-drug budget rose from \$1.5 billion in FY 1981 to \$13.2 billion in FY 1995,⁸³ ONDCP itself lost substantial resources in 1993 and reported a substantial drop in funding for both drug interdiction and international programs.⁸⁴

The raw budget numbers clearly display a decrease in funding. Drug interdiction's budget authority fell from \$1.511 billion in FY 1993 to \$1.312 billion in FY 1994, a \$200 million reduction by President Clinton in the FY 1994 budget. In FY 1995, the interdiction budget was cut by another \$18 million to \$1.293 billion. In FY 1996, the President's request for drug interdiction funding fell another \$15 million to \$1.278 billion.⁸⁵ While the 104th Congress appears to have been unresponsive, these figures also demonstrate a reduced White House commitment to drug interdiction.

Despite a rhetorical shift to source country programs, even international counter-narcotics funding fell during this period, from a highwater mark of \$523 million in 1992 to \$329 million in FY 1994, and then to \$310 million in FY 1995, recovering only slightly to about \$400 million in President Clinton's requests for FY 1996 and FY 1997.⁸⁶

⁸³ TEASLEY, *supra* note 60, at 1.

⁸⁴ THE NATIONAL DRUG POLICY, 1995, *supra* note 13, at 113.

⁸⁵ *Id.*

⁸⁶ *Id.* One example of damaging inconsistency in source country program funding was the decision to freeze program monies to Peru, in response to President Fujimori's suspension of the Peruvian constitution. In a recent trip to Peru, the author learned that President Fujimori's effort reduced the number of terrorist deaths caused by the terrorist group The Shining Path dramatically, from approximately 30,000 to 500. President Fujimori has also introduced a highly effective "force-down/shoot-down" policy that has had three clear effects: (1) the price of flying coca from Peru to Colombia has increased eightfold; (2) the price of coca in Peru has fallen tenfold; and (3) between 20% and 40% of Peru's coca farmers have abandoned their fields; this is significant because two-thirds of the world's coca is grown in Peru. U.S. aid should have been released earlier; to be effective, source country programs must be coordinated and

Interdiction cuts have also been reflected in the loss of concrete and identifiable assets. According to 1995 testimony from Admiral Yost, the United States has recently experienced a “tragic dismantling” of its interdiction efforts, such that today “there are several orders of magnitude less effort spent on drug interdiction.”⁸⁷ In particular, “[s]hip days and aircraft hours are drastically reduced,” and “[a]ll of the Coast Guard jet aircraft, the Falcons with the F-16 intercept radars, were taken away from interdiction”⁸⁸

Admiral Yost testified to the fact that “three Coast Guard E-2C airborne early warning aircraft have been turned back to the Navy and used for other purposes,” and that “[t]he Coast Guard Air Station at St. Augustine, Florida, which was established to support these three multimillion dollar aircraft, is now closed.” Yost indicated that he believed some of the E-2Cs were even being “decommissioned.”⁸⁹

On top of this, “[t]he Coast Guard C-130 airborne early warning aircraft has been turned over to the Air Force, stripped of its equipment, including a dome-mounted radar, and is now used for transportation of cargo,” Yost reported. Finally, “the new Command, Control, Communications and Intelligence Center has been closed, and its duties are performed elsewhere.”⁹⁰

The impact of the loss of interdiction assets has been described in different ways. For example, the Nassau DEA Office of Operation BAT (Bahamas, Turks and Caicos, abbreviated as

funded consistently. In addition, recent assessments of the overall spending on the “Andean Strategy” and other source country programs in Colombia, Bolivia, and Peru show that the “controlled shift” of resources to these countries never occurred. This reality was best described by Senator Hatch in a December 1995 study. This report noted that the Administration’s cut in interdiction funding was supposed to have been balanced by enhanced concentration on institution-building and interdiction in the source countries of Latin America—an idea recognized by some for its similarity to the Bush Administration’s Andean Strategy. Yet more than 18 months after unveiling the new strategy, however, ONDCP Director Brown acknowledged to a congressional committee that the shift had not taken place:

Foreign assistance funding to the Andean region has, in fact, been steadily declining [I]nternational counternarcotics funding to the Andean region fell abruptly under the Clinton Administration, from \$334.9 million in fiscal year 1993 to \$131.8 million in fiscal year 1995—a 60 percent drop, and significantly less than the \$470.3 million appropriated in fiscal 1992 under President Bush.

SENATOR ORRIN HATCH, LOSING GROUND AGAINST DRUGS: A REPORT ON INCREASING ILLICIT DRUG USE AND NATIONAL DRUG POLICY (1995) [hereinafter LOSING GROUND].

⁸⁷ *Effectiveness Hearings*, *supra* note 5, at 101 (testimony of Paul A. Yost).

⁸⁸ *Id.*

⁸⁹ *Id.* at 105.

⁹⁰ *Id.* at 101.

“OPBAT”) reported in 1995 that, “while no specific intel[ligence] source indicates that traffickers perceive the removal of the aerostats [radars] from the Bahamas as a weakness in law enforcement detection capability, it stands to reason that a reduction in visible detection resources would equate to ‘safe’ illicit activity,” and the Nassau DEA OPBAT Office partially attributed the recent shift in trafficking patterns and the increase in “trafficking events per month,” to removal of the aerostats.⁹¹

A further indication of disarray in interdiction asset policy appears in an unclassified December 18, 1995 Department of Treasury memorandum to the Director of the Domestic Air Interdiction Coordination Center (“DAICC”) from a U.S. Customs Service official. This memorandum concerns the status of over-the-horizon radars, or R.O.T.H.R. radars. After the Administration removed key aerostats from service, it proposed deploying ground-based over-the-horizon radars as the primary, intelligence-gathering substitute technology. Primary reliance on R.O.T.H.R. radars, without other intelligence assets, such as aircraft equipped with look-down radars or redeployment of the aerostats, raises serious questions. According to the memorandum, R.O.T.H.R. radars are “a good *support* system . . . [and] can be an invaluable tool in assisting the detection and tracking of targets, but due to . . . operational limitations (even if all the enhancements are successful and funded for O&M), [R.O.T.H.R.] cannot replace a fixed or airborne radar system.”⁹²

Compounding the problem created by the Nation’s reduced radar coverage in the transit zone and source countries, it now appears clear that one R.O.T.H.R. must now be deployed in Puerto Rico to provide effective radar coverage of narco-trafficking in and from northern South America, for example, to track flights originating in Colombia and destined for Mexico or drop points in the Caribbean. Also clearly needed now are three or four ground-based radars in Southern Peru, to halt flights leaving southern Peru, transiting Brazil, and landing in Colombia, from which cocaine is shipped to Mexico and the United States.⁹³

⁹¹NASSAU COUNTRY OFFICE, DRUG ENFORCEMENT ADMINISTRATION, OPERATION BAHAMAS AND TURKS AND CAICOS 7-8 (1995).

⁹²Unclassified memorandum from United States Customs, Department of Treasury, to Director of DAICC (Dec. 18, 1995) (pertaining to R.O.T.H.R. User Enhancement Meeting) (on file with the author).

⁹³This information stems from 1996 visits by the author to Puerto Rico, Mexico, Panama, Colombia, Bolivia, and Peru.

If testimony from the Drug War's former operational commander and other informed observers were not persuasive enough, ONDCP's own reports and statements confirm the profound nature of the shift away from drug interdiction and toward other priorities.

The 1995 National Drug Control Strategy Budget Summary confirms a drop in Department of Defense flight hours from 50,624 in 1994 to 50,000 in 1995, with the same number projected for 1996. It also shows ship days down from 2,268 in 1994 to 1,545 in 1995, with the same number projected for 1996.⁹⁴ Furthermore, the Budget Summary shows that National Guard container search workdays dropped from 227,827 in 1994 to 209,000 projected for 1996, while other drug interdiction-related National Guard workdays fell from 597,385 in 1994 to a projection of 530,000 in 1996.⁹⁵

3. Corroborating a Reduced Emphasis on Interdiction: The 1995 USIC Memo and Testimonial Evidence

Strong support exists for the conclusion that interdiction efforts have been consciously de-emphasized by the current Administration. For example, an unclassified memorandum originating in the Office of the United States Interdiction Coordinator ("USIC") dated June 1995 offers a detailed assessment of the Clinton reductions. The USIC memorandum lists two sets of assets removed from the interdiction effort by the Clinton Administration: "counterdrug assets removed from USCG [United States Coast Guard] inventory to comply with FY94 budget reductions," and "other assets removed prior to 1994."⁹⁶

Initially, the USIC memorandum lists: five "HU-25 Falcon jet interceptors," one "Medium Endurance Cutter," three "Surface Effect Ship (SES) patrol boats," forty-nine personnel due to an "end of participation" in a Miami-based C3I [Command, Control, Communications and Intelligence] station, and twenty-four more personnel due to the "[d]isestablished . . . Caribbean Squad-

⁹⁴THE WHITE HOUSE, OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL BUDGET SUMMARY 41 (February 1995).

⁹⁵*Id.*

⁹⁶Unclassified Memorandum from the Office of the United States Interdiction Coordinator, Summary of USCG FY1994 Budget Reduction of \$9M, Directed at Drug Interdiction Funding, (June 9, 1995) (on file with the author) [hereinafter USIC Memorandum].

ron Staff.” Overall, the USCG interdiction assets removed amounted to a reduction of \$9,337,915 and 306 total personnel as well as \$21,151,338 in “recurring costs.”⁹⁷ On top of this, the USIC memorandum notes that, although the Customs Service “has now consolidated the former functions of C3I East and C3I West into the Domestic Air Interdiction Coordination Center (DAICC) located at March AFB [Air Force Base] in California,” the “DAICC facility faces serious manning shortages.”⁹⁸

As a secondary matter, the USIC memorandum lists assets removed “prior to 1994,” including: four “E2-C Hawkeye AEW aircraft (1 lost to a crash; 3 returned to the Navy),” and one “EC130-V AEW aircraft (delivered to USCG in FY92. Transferred to DoD in 1993 for lack of operations & maintenance funding).” Additionally, the memorandum observes, in discussing the EC130-V AEW (intelligence gathering) aircraft transferred from USCG interdiction to DoD, “The rotodome was removed from the airframe. Last we heard, the airframe was in storage,” adding “DoD retired all of the . . . sea-based aerostats.”⁹⁹

In addition to the evidence offered by the USIC memorandum, an array of drug policy experts came to the fore in 1995 to offer what is becoming a consensus, namely that the interdiction cuts were too deep and have led to serious detrimental effects.

Testimony offered by former Acting ONDCP Director John Walters, former ONDCP Director Bill Bennett, and former Bush and Clinton DEA Administrator Judge Robert Bonner confirmed the loss or decommissioning of interdiction assets during the Clinton Administration.

In March 1995, Walters testified that “[t]he drug problem is simply not a part of the foreign policy agenda of the United States under President Clinton—there is no carrot and no stick facing the countries from which the poison destroying American lives every day comes.” He noted that the Administration’s de-emphasis of international counternarcotics “fuels calls in other countries for abandoning anti-drug cooperation.”¹⁰⁰

Sadly, it is clear that a precious window of opportunity in the source and drug transit countries is currently being lost. In Peru, Bolivia, and Colombia, source country programs—including coca

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Effectiveness Hearings, supra* note 5, at 22–23 (statement of John P. Walters).

crop eradication, alternative crop production, creation of high-integrity "vetted" law enforcement units composed of indigenous citizens, and crucial DEA, State Department, DOD, and intelligence-led efforts—are badly underfunded. This is occurring just as Peru's shoot-down policy has effectively shut off the "air bridge" between Peru (where two-thirds of the world's coca is grown) and Colombia (where coca is processed). Thus, just as Peru's policy has driven the price of a narco-trafficking flight from \$25,000 up to \$200,000 and caused the price of coca leaves in Peru to fall (resulting in Peruvian coca farmers abandoning twenty to forty percent of their fields), the Clinton Administration's lack of commitment to combatting drugs in the source countries may prove disastrous.

Other South American countries' counter-narcotics activities also reveal the need for Washington to restore its once-vigorous war on drugs abroad. In Mexico, despite lagging efforts in prior years, the Mexican Congress and President are poised to enact stiff, new money-laundering, organized crime, conspiracy, wiretap, and asset forfeiture laws. This broad Mexican effort should compel a heightened U.S. commitment to counter-narcotics training for Mexican law enforcement personnel, targeted intelligence sharing, and increased counter-narcotics support.

A similar U.S. commitment is essential and timely for Colombia. The 1995 efforts of General Serrano, head of the Colombian National Police, and Prosecutor General Valdivieso have finally broken the Cali Cartel and have begun to root out official corruption. While a constitutional crisis still surrounds President Semper, the dedication of these two men is striking. Finally, Fujimori's success in Peru during 1995, and the advances made by Bolivia's elite counter-narcotics military force, "UMOPAR," call for a return to greater efforts against the drug trade by the United States.

Moving to intelligence, Walters testified that President Clinton's interdiction policy is "destroying the intelligence support to the drug war," noting that the President last year cut \$600,000 in intelligence funding and took other measures to redirect resources away from intelligence for the drug war.¹⁰¹ TheUSIC memorandum referred to previously buttresses Walter's assessment.¹⁰²

¹⁰¹ *Id.* at 22.

¹⁰²USIC Memorandum, *supra* note 96.

In addition, the potential for increasingly effective planning and coordination of counter-narcotics operations by U.S. Southern Command was demonstrated in the late-1995 effort, called "Operation Green Clover," which coordinated militaries from several South American nations (as well as a variety of U.S. agencies). The success of Green Clover argues strongly for increased U.S. intelligence gathering and regional coordination, if not a full-fledged international counter-narcotics center in Panama. Unclassified intelligence assets still needed include at least two P-3 AEW aircraft, multiple ground-based radars in Southern Peru and Mexico, and the R.O.T.H.R. in Puerto Rico. Also badly needed is State Department support for the "vetted units" and for more DEA agents in the region.

Regarding overall force reduction, Walters testified that "the military and other interdiction agencies have received a 50 percent force reduction in 1994 that has caused over a 50 percent reduction in their ability to interdict drugs . . . [in] the transit zone."¹⁰³ He sent a strong signal for reform by stating that, "if these trends continue, by 1996, the Clinton Administration will have presided over the greatest increase in drug use in modern American history."¹⁰⁴ As the end of 1996 approaches, there is no reason to revise Walter's assessment.

Bennett and Bonner offered similar assessments in recent testimony. Bennett outlined how the Administration's 1995 strategy would "cut . . . more than 600 positions" from the DEA and other agencies, cut "more than 100 drug prosecution positions in the U.S. Attorney's offices," and "cut . . . drug interdiction and drug intelligence programs from FY 1994 levels."¹⁰⁵ Bennett also testified that, "last year [1994], the Clinton Administration directed the U.S. Military to stop providing radar tracking of cocaine-trafficker aircraft to Columbia and Peru," a policy Congress "had to reverse," and stressed that "massive policy failures" have plagued the Clinton Administration.¹⁰⁶

Judge Bonner argued that drugs pose "a serious threat to the well-being of our nation,"¹⁰⁷ noting that "our national drug strategy [in the 1980s and early 1990s] was working . . ."¹⁰⁸ Bonner

¹⁰³ *Effectiveness Hearings*, *supra* note 5, at 51 (testimony of John P. Walters).

¹⁰⁴ *Id.* at 22.

¹⁰⁵ *Effectiveness Hearings*, *supra* note 5, at 48 (statement of William J. Bennett).

¹⁰⁶ *Id.*

¹⁰⁷ *Effectiveness Hearings*, *supra* note 5, at 41 (statement of Robert C. Bonner).

¹⁰⁸ *Id.* at 43.

further observed that, “as the resources for enforcement and interdiction have been cut, the price of cocaine has gone down and the estimated number of heavy users has gone up.”¹⁰⁹ The linkage between reduced resources for interdiction, lower drug prices and increased usage should give pause to those who have favored only increased demand-reduction. Judge Bonner also testified that, while the Cali Cartel is “supplying between 80 and 90 percent of all of the cocaine that reaches the United States[,]”¹¹⁰ the Clinton Administration “has utterly failed to appreciate the value of strong international drug law enforcement as a major component in an effective drug control strategy” Judge Bonner called on the President to “reverse this trend and start leading our nation’s anti-drug efforts.”¹¹¹

4. Further Corroboration: Admiral Kramek’s Voice in the Wilderness

Confirming the depth of concern about the Administration’s new direction is a piece of unclassified correspondence between the Interdiction Coordinator, Admiral Robert Kramek, and ONDCP Director Lee Brown from December 1994. It reveals Admiral Kramek’s view that a “consensus” of agency heads at that time believed, “we need to restore assets to the interdiction force structure” and “must return to the 1992-1993 levels of effort” to keep the Drug War on track. This recommendation flew in the face of Presidential efforts to reprogram or shift funding to drug treatment.¹¹²

Pointedly, Admiral Kramek addresses the drug problem as a threat to “national security.” Specifically, the Interdiction Coordinator wrote,

I believe it appropriate that we meet with the President and National Security Advisor as soon as possible to brief them on the results of our conference and discuss the current state of implementation and national strategy Of key importance to this meeting is the determination of priority of *counting narcotics trafficking as a threat to national security of the United States* as evaluated against other threats to our security that compete for resources.¹¹³

¹⁰⁹ *Id.* at 44.

¹¹⁰ *Id.* at 51.

¹¹¹ *Id.* at 44.

¹¹² Unclassified Letter from Admiral Robert Kramek to Lee Brown, White House ONDCP Director (Dec. 1994) (on file with the author).

¹¹³ *Id.* (emphasis added).

In subsequent Congressional testimony on June 27, 1995, Admiral Kramek offered implicit criticism of President Clinton's reduced interdiction efforts by stating, "When the [smugglers] see our foreign policy priorities changing and making drug interdiction much lower on the list than other things, they're quick to take advantage of that."¹¹⁴ He explained that "[w]hen they see funds being cut back for things like AWACS and radars and ships in the transit zone, they're quick to take advantage of that."¹¹⁵ Defending a return to interdiction, Kramek noted that interdiction returns twenty-five to one in net benefits to the public for every dollar spent, a compelling, new statistic in the national dialogue.¹¹⁶ Kramek commented further on the shift from a transit zone strategy to a source country strategy, saying that "the source country strategy . . . is starting to take hold, [but it] is not robust enough, in my view, for us to reduce assets in the transit zone yet."¹¹⁷ Since key interdiction assets were already gone in June 1995, Admiral Kramek's critique calls the current strategy into serious question, especially given the high regard in which the Admiral is held by Democrats and Republicans in Congress.

Adding weight to Admiral Kramek's 1994 letter and 1995 testimony, and underscoring the need to revitalize our interdiction efforts, is a letter sent to Admiral Kramek by Commissioner of U.S. Customs George J. Weise on December 19, 1995. In this letter, the Commissioner of Customs informed Admiral Kramek that "the demand for the Customs P-3 Early Warning (AEW) aircraft in the detection mission is increasing dramatically."¹¹⁸ Accordingly, Weise enlisted Kramek's support for increased funding of intelligence-gathering P-3s. Weise also cited a letter from Admiral Kramek to a Special Assistant to the President in which the U.S. Interdiction Coordinator noted that Customs had "only four such aircraft in our fleet," essentially confirming the President's low priority on intelligence-gathering assets.¹¹⁹

Perplexingly, testimony in April 1995 by then-White House Drug Czar Lee Brown revealed that Brown held a strikingly

¹¹⁴*Drug Availability Hearings*, *supra* note 79, at 15-16 (statement of Admiral Robert Kramek) (emphasis added).

¹¹⁵*Id.* at 16.

¹¹⁶*Drug Availability Hearings*, *supra* note 79, at 69 (testimony of Robert Kramek).

¹¹⁷*Id.* at 18.

¹¹⁸Letter from Commissioner of U.S. Customs George J. Weise to Admiral Robert Kramek (Dec. 19, 1995) (on file with the author).

¹¹⁹*Id.*

different view of the need for interdiction. Moreover, despite the Interdiction Coordinator's explicit 1994 request, Brown did not present to the President the consensus view of agency heads that increased interdiction efforts were needed.¹²⁰ In fact, Brown apparently never conveyed to the President Admiral Kramek's considered view. Brown conceded the Administration's intention to execute a "controlled shift . . . in interdiction from the transit zone to the source countries," but was unable to offer evidence of new resources appearing in the source countries, or any results of the alleged shift.¹²¹ Brown sought to justify the reduced interdiction effort by suggesting, without elaboration, that "random patrols produce random results."¹²²

5. Other Supply-Reduction Policy Deficiencies

a. *No heroin strategy.* Regarding heroin, President Clinton promised in November 1993 that he would enact a National Heroin Strategy within 120 days. Two years later, he signed an uninspired heroin strategy in an unannounced ceremony.¹²³ While Brown testified in early 1995 that the "growing availability of cheap high purity heroin raises concerns about the possibility of another heroin epidemic . . .,"¹²⁴ President Clinton did not sign a heroin strategy until November 1995, and has subsequently let the strategy languish without implementing guidelines.

Not surprisingly, a recent study by the General Accounting Office found that the approach to heroin pursued by the Clinton Administration has been deficient. Combatting the Burma-based heroin trade has been impaired by the United States' reluctance to engage in constructive dialogue with the repressive Burmese government. Consequently, the United States has been forced to rely on United Nations drug control efforts in the region. However, the U.N. policy has been flawed. In particular, GAO found that, "the [U.N.] projects have not significantly reduced opium production because (1) the scope of the projects has been too small to have a substantive impact on opium production, (2) the

¹²⁰ *Effectiveness Hearings*, *supra* note 5, at 142 (testimony of Lee Brown).

¹²¹ *Id.* at 143-44; *see generally id.* at 140-81.

¹²² *Id.* at 151.

¹²³ GENERAL ACCOUNTING OFFICE, *DRUG WAR: OBSERVATIONS ON THE U.S. INTERNATIONAL DRUG CONTROL STRATEGY 5* (1995) [hereinafter *U.S. INTERNATIONAL DRUG CONTROL STRATEGY*].

¹²⁴ *Effectiveness Hearings*, *supra* note 5, at 60 (statement of Lee Brown).

Burmese government has not provided sufficient support to ensure project success, and (3) inadequate planning has reduced project effectiveness.”¹²⁵

b. *Source country programs underfunded and mismanaged until June 1995.* A second major reason for worry about the prevailing source country-oriented National Drug Control Strategy stems from two basic findings. First, while there are some highly effective programs being implemented in Colombia, Bolivia, Peru, and most recently, Mexico, by the DEA, the A.I.D., the State Department and DoD, with vital assistance from the U.S. intelligence community, these programs have often been under-manned, under-equipped, and under-funded. A recent first-hand examination of some of these programs found each in need of better operational support and more consistent, long-term funding. These responsibilities lie equally on the President and Congress. Second, during the first two-and-a-half years of the Clinton White House, there have been sporadic reports of mismanagement, confusion and poor coordination in the source country programs. Those findings emerged again in June 1995 Congressional hearings, when a GAO official exposed pockets of mismanagement and continuing resource gaps in the source country programs.¹²⁶

As background, the President's 1995 National Drug Control Strategy not only refocused demand-reduction resources on drug treatment, but—in theory at least—refocused supply-reduction resources on source country programs. This is what Administration representatives term the “controlled shift.”¹²⁷

Deflecting a certain degree of responsibility away from ONDCP, the 1995 ONDCP Strategy stated that the National Security Council (“NSC”) conducted a “lengthy review” of drug trafficking in 1993 and concluded that “a stronger focus on source countries was necessary.” Accordingly, the NSC “determined that a controlled shift in emphasis was required—a shift away from past efforts that focused primarily on interdiction in the transit zones to new efforts that focus on interdiction in and around source countries.”¹²⁸

¹²⁵ GENERAL ACCOUNTING OFFICE, DRUG CONTROL: U.S. HEROIN PROGRAM ENCOUNTERS MANY OBSTACLES IN SOUTHEAST ASIA 23 (1996).

¹²⁶ See U.S. INTERNATIONAL DRUG CONTROL STRATEGY, *supra* note 123, at 10–11.

¹²⁷ See, e.g., *Effectiveness Hearings*, *supra* note 5, at 142 (statement of Lee Brown).

¹²⁸ NATIONAL DRUG CONTROL POLICY, 1995, *supra* note 13, at 44.

Following this 1993 NSC recommendation on national drug policy, President Clinton issued Presidential Decision Directive 14 (PDD-14),¹²⁹ which called for (1) "providing assistance to those nations that show the political will to combat narco-trafficking through institution building," (2) "conducting efforts to destroy narco-trafficking organizations," and (3) "interdicting narcotics trafficking in both source countries and transit zones," through a controlled shift of resources from the transit zones, like the Caribbean and Mexico, to the source countries, like Colombia, Bolivia, and Peru.¹³⁰

Ironically, in view of the deep transit zone interdiction cuts proposed and effectuated by President Clinton in 1993, 1994 and 1995, the 1995 Strategy boldly states, "Without effective transit zone programs in place, the smooth implementation of the new source country program will be severely inhibited"¹³¹

Putting aside their strategic advisability and impact on interdiction zone programs, the programs have been both poorly funded and intermittently mismanaged. Testimony by a GAO official in June 1995 raises serious concerns about the adequacy of both funding and consistent management of these vital programs. The GAO official reported, for example, that problems have periodically arisen as to who was "in charge of anti-drug activities in the cocaine source countries."¹³² GAO was also concerned after receiving the impression that "the Drug Enforcement Administration is reducing its presence in Colombia, [and] the U.S. Southern Command is now flying fewer sorties per month in support of source-country interdiction than it did in 1993."¹³³ Additionally, an absence of consistent funding contributed to an impression that funds in source countries "are not always well managed,"¹³⁴ and, most disturbingly, that "\$45 million originally intended for counter narcotics assistance to the cocaine source countries was reprogrammed to assist Haiti's democratic transition."¹³⁵ In short, more consistent funding and

¹²⁹ A Presidential Decision Directive is a written policy declaration, signed by the President, which directs Executive Branch departments and agencies to follow a particular policy course. It is usually issued in concert with implementing instructions.

¹³⁰ NATIONAL DRUG CONTROL POLICY, 1995, *supra* note 13, at 44.

¹³¹ *Id.*

¹³² U.S. INTERNATIONAL DRUG CONTROL STRATEGY, *supra* note 123, at 8.

¹³³ *Id.* at 4.

¹³⁴ *Id.* at 2.

¹³⁵ *Id.* at 7.

better regional coordination are advised, although not at the expense of transit-zone interdiction.

c. Inter-agency coordination for supply-reduction needed. Supply-reduction efforts appear to have been hampered by occasional lack of inter-agency coordination. Based on in-country interviews done in early 1995, the GAO concluded that: (1) “better leadership was needed to integrate all U.S. programs in the region to develop a coherent plan[;]” (2) the “lack of coordination and clear statements of responsibilities [among various agencies] has led to confusion over the role of the offices responsible for intelligence analysis and related operational plans for interdiction[;]” (3) the “specific roles and authorities” of the Interdiction Coordinator “were not established” despite the USIC’s responsibility for coordinating interdiction;¹³⁶ (4) the Interdiction Coordinator’s “ability to coordinate [inter-agency] activities was limited because of the lack of funds, expertise, and authority over agencies” responsible for interdiction;¹³⁷ and (5) the so-called “interagency working group on international counternarcotics policy,” which is “responsible for developing and ensuring implementation of an international counternarcotics policy” and chaired by the Department of State, needs further evaluation.¹³⁸

In general, GAO confirmed the need for tighter control of inter-agency activities, better regional coordination, stronger presidential leadership supporting an individual placed “in charge” of coordinating supply-reduction, and clearer lines of authority.

Another GAO study found that, back in Washington, better coordination between agencies is imperative. This lack of coordination has, for example, required the ONDCP to use its budget certification authority to force changes in agencies’ budgets. As a last resort, “ONDCP has used its budget certification authority to increase several agencies’ drug budgets [within the constraints of that agency’s overall budget] by threatening decertification and has decertified two agencies’ drug budgets that, according to ONDCP, were not adequate to implement the objectives”¹³⁹ This type of budget leverage requires strong presidential backing of ONDCP vis-a-vis the errant agency and the Office of Man-

¹³⁶*Id.* at 8.

¹³⁷*Id.* at 8–9.

¹³⁸*Id.* at 9.

¹³⁹REAUTHORIZATION, *supra* note 28, at 68.

agement and Budget; absent such strong backing, ONDCP's position is marginalized.

The Department of Defense's submission of its annual drug budget is illustrative of the overall problem. As the GAO reported in 1993, while DoD submits its budget for drug interdiction to the ONDCP in accordance with the 1988 Anti-Drug Abuse Act, DoD's drug-interdiction budget is not typically broken down by specific agencies and components, unlike other federal departments with drug control responsibilities.¹⁴⁰ Generally, DoD agencies do not submit agency-specific drug budgets to ONDCP until August, much later than the May submissions of other agencies, "leaving ONDCP little opportunity to recommend changes affecting [DoD] budget priorities and resources" and forcing ONDCP "to make rushed reviews of DoD's drug budgets."¹⁴¹

The theme that runs through every serious inquiry or investigation into supply-side coordination is that leadership must be from the top-down, strong, consistent and accompanied by a clear chain of command that begins with the President.

This need for Presidential leadership was the essential finding of the unclassified portion of the "After Action Report" on the October 1994 ONDCP/SOUTHCOM Counterdrug Conference.

That report noted, among other observations, that "[t]he counterdrug strategy must be led from the top down" and that leaders must "establish an interagency process to review and terminate ineffective programs early," "[r]eview the lead agency concept and determine which organization is best suited to plan, resource and execute national drug control policy," "[a]cquire support from the senior levels of leadership in the Administration, starting with the President," "[d]evelop broad policy guidance for interagency regional implementation plans," "[i]dentify a regional planning coordinator and mandate the terms of reference for source country strategy implementation," and "[c]reate a streamlined regional mechanism for planning and executing the strategy."¹⁴²

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 68-69.

¹⁴² Unclassified After Action Report of ONDCP/USSOUTHCOM Counterdrug Conference §§ 3-2, 3-3 (1994) (on file with the author). Among the other constructive, forward-looking recommendations in this largely overlooked *After Action Report* are the following: "ONDCP should develop a coherent and consistent message to Congress and the American people regarding the relationship of drugs to violent crime . . ."; "[p]rovide senior Administration leadership . . . sufficient authority to identify and

The report offered a host of suggestions for improved supply-reduction coordination. However, while awareness of the need for increased coordination is promising, there is reason to believe that follow-through has been—if 1995 testimony by Dr. Lee Brown is any indication—weak. One reason for this distance between recommendation and action, ironically, may be the difficulties inherent in inter-agency coordination.

On the positive side, a model for more effective coordination may lie in the recently conceived joint interagency task force concept, a limited but important creation of PDD-14. Under the JIATF concept, agencies pool resources and personnel in one location for a defined purpose (e.g., intelligence collection and sorting) and coordinate with outlying agency arms for more effective follow-through (e.g., detection, monitoring and trafficker apprehension). Joint InterAgency Task Force-East (JIATF-East) is one example of this concept in practice.¹⁴³ While JIATF-East

delegate responsibility to a regional planning coordinator in the field”; “consider options for a Drug Summit this fiscal year”; “create a better relationship with Congress through a more consistent budget package [and] speak with a single voice to Congress and be prepared to present a clear set of effectiveness measurements;” “develop an implementation plan that realistically can persuade our allies that the drug fight is in their interest”; consider “focus[ing] on critical nodes like the center of gravity, Peru”; “emphasize training [and] use Special Forces as a multiplier to train host country forces;” “establish a lead person in each Country Team with the authority to coordinate all resources [and] seek support from other countries [and,] for example[,] request the European militaries to contribute material and personnel support to the counter-drug effort;” “develop a budget that is threat-driven as opposed to program-driven”; “more consistent budget review”; “reinforce effective programs;” “negotiate an investment treaty with countries in return for stopping drugs;” “assist in strengthening judicial institutions in Latin America;” and devise a “regional action plan that governs the actions and resources of all agencies in a coordinated and coherent fashion” *Id.* Notably, the author of this 1994 report was the U.S. Southern Command leader, General Barry McCaffrey, now the U.S. “Drug Czar.” In this single fact, there is a measure of renewed hope that the United States will again play a prominent role in counter-narcotics efforts in both source and drug transit countries.

¹⁴³ JIATF East was created by Presidential Decision Directive 14 (PDD 14), which ordered a review of the nation’s counternarcotics command and control intelligence centers. Creation of three joint interagency task forces and a domestic air interdiction center was authorized by the White House Drug Czar in April 1994. Accordingly, JIATF East is joined in its interdiction mission by JIATF West in Alameda, California; JIATF South in Panama; the DAICC at March Air Force Base, California; and JTF-6 in El Paso, Texas. *Id.*

JIATF East is dedicated to “deconfliction of all non-detection and monitoring counter drug activities in the transit zone.” The command integrates intelligence with operations, and “coordinates the employment of the U.S. Navy and U.S. Coast Guard ships and aircraft, U.S. Air Force aircraft, and aircraft and ships from allied nations, such as Great Britain and the Netherlands.” The command’s mission boils down to “maximiz[ing] the disruption of drug transshipment,” collecting, integrating and disseminating intelligence, and guiding detection and monitoring forces for tactical action. *Id.*

Just as importantly, JIATF East integrates law enforcement personnel, primarily from

represents a meaningful step in the right direction—and is presently headed by a two-star U.S. Coast Guard admiral—inter-agency coordination remains a major barrier to more effective implementation of the National Drug Control Strategy.

d. *Low national security priority given to counternarcotics effort.* Another overarching concern is the National Security Council's seeming disinterest in drug policy, PDD-14 notwithstanding. Interdiction efforts may have been hampered, both directly and indirectly, by the reported low national security priority placed on the Drug War by the Clinton Administration.

Public reports suggest that the counternarcotics effort has been placed at priority "Number 29" on a White House list of national security priorities. According to one account, "[t]he White House National Security Council has dropped the drug war from one of three top priorities to No. 29 on a list of 29, according to several sources."¹⁴⁴ There is no indication that the priority has ever been elevated, even informally, since February 1993. In fact, ONDCP's seemingly dismissive response to Admiral Kramek's letter of December 1994 urging reassessment of the "national security" threat corroborates the low priority ranking.¹⁴⁵

e. *Low priority on USIC and ONDCP staff.* Additionally, the man in charge of the nation's interdiction effort has been given only six persons to administer all United States interdiction policy. Admiral Kramek also testified that he briefs ONDCP Director Brown only monthly.¹⁴⁶

Notably, the President has also allowed ONDCP to remain without a Deputy for Supply Reduction, an unprecedented act, which appears to buttress claims of White House indifference.

The low priority of the drug war with the current administration also appears to be confirmed by the President's sudden 1993 cut in ONDCP staff by more than eighty percent; overnight, the ONDCP staff dropped from 146 staff to 25, with a simultaneous reduction in the FY 1994 ONDCP appropriations from \$101.2 mil-

Customs, into the international interdiction effort. For that reason, the command includes FBI, DEA, DIA and State Department, in addition to the Department of Defense.

¹⁴⁴ *Clinton's Drug Policy Perceived as Retreat*, STAR TRIB., Feb. 14, 1993, at 1.

¹⁴⁵ See *Effectiveness Hearings*, *supra* note 5, at 140-44 (testimony of Lee Brown).

¹⁴⁶ *Drug Availability Hearings*, *supra* note 79, at 69 (testimony of Robert Kramek).

lion to \$5.8 million. Expert witnesses hold that these actions contributed to the perception that the Administration placed a low priority on anti-drug efforts, and to the reality that ONDCP has been unable to perform previous functions, especially on interdiction policy.¹⁴⁷

f. *Legal constraints on policy.* Beyond the loss of assets, the Nation's transit-zone interdiction effort operates under other constraints. Cuban territorial waters, for example, present an obstacle to effective Caribbean interdiction since they offer legal shelter to traffickers; run-and-duck tactics were, for example, used extensively by traffickers in early February 1995.

The inability of U.S. aircraft to overfly Cuba is a continuing barrier to effective air interdiction. Traffickers can overfly the island at altitudes that radar is unable to track, and can easily blend with ground cover. This tactic has been used recently by aircraft originating in Jamaica and the West Caribbean.

Finally, the large number of sovereign nations in the region, and the importance of being able to pursue traffickers into these waters for purposes of apprehension, indicates a strong need for more bilateral agreements to facilitate drug trafficker apprehension and joint operations in foreign waters.¹⁴⁸

g. *Reduced emphasis on drug-related law enforcement.* From both a budgetary and prosecutorial perspective, drug-related law enforcement has suffered a setback since 1993. The Administration's FY 1995 budget advanced cuts of 621 drug enforcement personnel from DEA, FBI, INS, U.S. Customs and the U.S. Coast Guard; although Congress restored these proposed White House cuts, DEA has lost approximately 227 special agent positions between 1992 and 1995.¹⁴⁹ These losses are corroborated by field agents who describe their jobs as increasingly difficult in the absence of trained personnel.¹⁵⁰

¹⁴⁷ See *Effectiveness Hearings*, *supra* note 5, at 19, 22 (testimony of John P. Walters). See also DRUG POLICY FOUNDATION, *THE DRUG WAR AND CLINTON'S POLICY SHIFT* (1994).

¹⁴⁸ For example, the Greater Antilles Section Coast Guard Base ("GANTSAC") in Puerto Rico must cover 1.3 million square miles, and would benefit enormously from the creation of a seamless web of bilateral agreements with nations in the region, as well as some working arrangement with Cuba. According to field agents who participate in the areas' interagency working group, approximately 84 metric tons of cocaine arrives in Puerto Rico annually, of which "we interdict 10 to 15 percent."

¹⁴⁹ LOSING GROUND, *supra* note 86, at 9.

¹⁵⁰ Agents participating in Operation Bahamas, Turks and Caicos ("OPBAT"), a

Moreover, there is a close correlation between the Administration's cuts in drug-related law enforcement and declining drug-related prosecutions between 1992 and 1994. Specifically, the reported number of drug violations dropped from 25,033 in 1992 to 23,114 in 1994, or twelve percent in only two years.¹⁵¹

h. *Implications of degraded interdiction policy.* Based on the relationship between the rollback of interdiction and the rise of juvenile drug use and crime, the main implications of reduced interdiction over the past three years, combined with other factors, have been: (1) lower street prices for cocaine, heroin, and marijuana, (2) higher availability of these drugs, (3) higher purity levels for these drugs, (4) higher casual drug use by juveniles, (5) greater juvenile addiction, (6) rising drug-related juvenile crime, (7) increasing drug-related medical emergencies, and (8) a growing international perception of reduced U.S. commitment to the Drug War.¹⁵²

B. *Demand-Reduction Policy and Programs*

The 1995 National Drug Control Strategy counseled, and became the touchstone for, a shift away from transit-zone interdiction

multi-agency, international operation based in Nassua, Bahamas, stated on a recent trip to the region that they have lost major assets and personnel over the past two years with an obvious detrimental effect on operations.

OPBAT's mission is to halt the flow of cocaine and marijuana through the 700-island Bahamian region to the United States. At present, in an effort to achieve this aim, OPBAT operates three widely dispersed helicopter bases, from which U.S. Coast Guard and DEA helicopters are dispatched on cue from tracking by the JIATF-East or DAICC. Since the helicopters must operate in foreign waters, they are piloted by personnel from either the Government of the Bahamas or Turks and Caicos Island police, who are in turn responsible for making arrests and seizures. A United States DEA agent is, however, expected to be on every flight to coordinate intelligence and provide additional advice.

The Clinton Administration's decision to remove and destroy the aerostats based in the Bahamas, which was perceived as allowing a transfer of personnel, has instead had a negative effect on interdiction capability. See NASSAU COUNTRY OFFICE, *supra* note 91, at 7-8.

¹⁵¹*Id.* at 10.

¹⁵²This last implication, while not discussed above, is evidenced by clear congressional concern. Representative Ben Gilman (R-N.Y.), for example, recently noted that the President's de-emphasis on ONDCP has had negative implications. "[R]egrettably . . . [the White House is] sending the wrong signals to our Latin and Caribbean allies." ROBERT B. CHARLES, DRUG POLICY FOUNDATION, *THE DRUG WAR AND CLINTON'S POLICY SHIFT 6* (1993). Similarly, Judge Bonner has publicly noted that: "[The] deep cut in ONDCP has symbolic significance not only in Washington . . . but around the world. Our foreign allies read it as a signal that the Clinton Administration is backing away from a strong commitment to drug control policy." *Id.* at 8.

tion programs. While many of these resources failed to appear in the source countries, they plainly disappeared from the transit zone. However, another measure of the Clinton strategy is the demand-side shift toward emphasis on drug treatment for chronic drug addicts, at the expense of attention to preventing casual use by juveniles, the obvious foundation upon which hardcore use rests.

1. Drug Prevention Programs Praised

Just as prevention experts acknowledge the importance of law enforcement and interdiction, interdiction and law enforcement experts increasingly recognize the central role that must be played by parental, community, state and federal drug prevention efforts if the resurgence of drug use among the nation's youth is to be reversed.¹⁵³

Accountability, in the context of federal drug prevention programs, has two components. First, although programs built around a strong "no-use" message delivered through schools and community programs are to be applauded, reported allegations of missing financial audits and the non-"no use" content of some federally funded curricula gives rise to questions about what SDFS funds, for example, are actually expended on, by whom, and under whose supervision within the Federal Government.

Apparently, most interdiction and law enforcement experts, including Walters, Yost, Bennett, and Bonner, seem to agree that prevention was central to the success of counternarcotics programs in the 1980s. They also readily concede the need for including parental, local, state and federal prevention efforts in the total mix.

After testifying on interdiction and law enforcement, former Drug Czar Bennett noted, for example, that "success in the drug war depends above all on the efforts of parents and schools and churches and police chiefs and judges and community leaders," citing examples from his visits to more than 100 cities as Drug Czar during the Bush administration.¹⁵⁴

Admiral Yost emphasized that interdiction alone will not win the drug war, and that interdiction is just the foundation for

¹⁵³ See generally *Effectiveness Hearings*, *supra* note 5, at 18-39.

¹⁵⁴ *Effectiveness Hearings*, *supra* note 5, at 49 (testimony of William J. Bennett).

effective prevention, education and treatment—and “that’s what will win the war.”¹⁵⁵

Other experts confirm this view. Thomas Hedrick, Jr., Vice Chairman of the Partnership for a Drug-Free America, testified that prevention and interdiction advocates must begin to work together, and that “preventing drug use by young people” is essential “if we are to have a prayer of building safe and healthy families and communities.” At the federal level, Hedrick expressed the view that “Federal support and Federal leadership in making drugs a critical national priority is essential, if we are to help convince the media that this is an important issue.” National leaders, Hedrick stated, must also tell those community leaders involved in this fight that what they are doing is important.¹⁵⁶

In 1995 congressional hearings, Hedrick’s view was shared by Bridget Ryan, Executive Director of the BEST Foundation for a Drug-Free Tomorrow. Ryan testified that a recent RAND study advocated drug prevention as the “first priority” in curbing drug abuse, noting the distinction between “validated” and “unvalidated” drug prevention programs. Ryan also urged that the former be adequately funded.¹⁵⁷

According to Ryan, who described herself as “on the front lines of the implementation process,” “prevention can and does work, but our educators and policy makers must be selective in funding and implementing validated programs.” Ryan noted that an estimated 2000 non-validated programs are in use.¹⁵⁸ Another expert voice from within the prevention community, James Copple, National Director of the Community Anti-Drug Coalitions of America (“CADCA”)—a privately funded organization representing approximately 2500 community coalitions nationwide—testified that “CADCA members have been more than a little frustrated with the failure of the nation’s leadership to keep the pervasiveness of drug abuse before the American people,” since this is part of the prevention effort. Referring to the 1995 White House ONDCP Strategy, Copple testified that “a strategy . . . is only as good as the resources that follow it and the visible leadership that advances it.” More directly, he held that “there

¹⁵⁵*Id.* at 109 (testimony of Paul A. Yost).

¹⁵⁶*Id.* at 109–15 (testimony of Thomas Hedrick).

¹⁵⁷*Id.* at 122–24 (testimony of G. Bridget Ryan).

¹⁵⁸*Id.*

must be a national voice advocating for substance abuse prevention, and that voice should be loudest from the White House and the Congress.”¹⁵⁹

Perhaps the most moving and persuasive testimony of the 1995 hearings was delivered by former First Lady Nancy Reagan. Reagan, long a leader in this prevention effort, warned the Nation not to abandon the children affected by indifference to the Drug War.

She opened her testimony with echoes from a different policy period, noting that she had “decided to speak [before Congress on the drug issue] only after a lot of soul searching . . . because my husband and everything he stands for calls for me to be here.”¹⁶⁰

She then explained her worry that the nation “is forgetting how endangered our children are by drugs,” that societal “tolerance for drugs” is up, and that “the psychological momentum we had against drug use [in previous years] has been lost.” In short, she asked, “How could we have forgotten so quickly?”¹⁶¹

She warned that constant vigilance and attention to drug prevention is the only way to avert the “tragic human consequences” of surrendering our children to these narcotics, illustrating her point with a letter from a 16-year-old girl, which described the misery left in the wake of drug use and gradual dependence.¹⁶²

Directing herself to national policy, Reagan quoted from President Clinton’s 1995 National Drug Control Strategy, which states that “[a]nti-drug messages have lost their potency.” Mrs. Reagan countered: “[T]hat’s not my experience. If there’s a clear and forceful no use message coming from strong, outspoken

¹⁵⁹ *Effectiveness Hearings*, *supra* note 5, at 124–28 (testimony of James Copple).

¹⁶⁰ *Id.* at 13–16 (testimony of Nancy Reagan).

¹⁶¹ *Id.*

¹⁶² *Id.* The letter poignantly described how this girl of low self-esteem got caught in the “vicious cycle” of drug use, prostitution to get more drugs, and the death of her deformed and premature baby. The letter ended with a plea, which Nancy Reagan reiterated: “Please reach kids my age and younger. Don’t let what has happened to me and what destroyed my life happen to them.” *Id.* at 14.

Reagan also testified that, “[b]efore the drug use increases of 1993 and 1994, we really had seen marked progress,” and that “[juvenile] attitudes were being changed.” She credited many elements of society, including “athletes and entertainers” and “many CEOs of large companies” for this decrease. *Id.*

She also explained the origins of her “Just Say No” message; it came in answer to a child’s question about what to do if pressured to buy or use drugs. As she explained, it was an intentionally simple answer, and was never designed to be the “total answer.” In short, Mrs. Reagan said, it is “important for children to appreciate that ‘no’ is in the vocabulary” *Id.*

leadership, it is potent Half-hearted commitment doesn't work. This drift, this complacency, is what led me to accept your invitation to be in Washington today [W]e have lost a sense of priority on this problem, we have lost all sense of national urgency and leadership."¹⁶³

She stated that while treatment is important in the overall mix of anti-drug measures, it cannot supplant prevention as the nation's priority. Reagan noted that, "treatment can't begin to replace the overwhelming importance of education and prevention," since "tomorrow's hardcore users are today's children."¹⁶⁴

2. A Closer Look at Prevention Accountability

Despite strong bipartisan support for "validated" and accountable prevention programs, there appears to be cause for concern, namely that certain drug prevention programs are neither validated nor accountable. Indeed, allegations have recently arisen indicating a potentially systemic accountability problem in at least one major federal prevention program.

Returning to expert testimony from prevention program administrator Bridget Ryan, of the BEST Foundation for a Drug-Free Tomorrow, added that "prevention can and does work," but "our educators and policy makers must be selective in funding and implementing validated programs." From within the field, Ryan testified that, "it is estimated that more than 2,000 non-validated programs are in use," and surprisingly urged Congress to insist that federal funding flow only to validated programs.¹⁶⁵

In addition to this general recommendation, the hearings brought to light another disturbing and largely unnoticed policy flaw. Expert testimony and documentary evidence was offered suggesting that the Safe and Drug Free Schools ("SDFS") program,

¹⁶³*Id.* at 15.

¹⁶⁴*Id.* Overall, Reagan argued for greater attention to demand reduction. However, she also testified that "many outstanding prevention programs across the country" were "started and funded privately," including her own foundation, which recently "merged with the BEST Foundation for a Drug-Free Tomorrow" and "has trained over 13,000 teachers and others." *Id.*

Beyond the private sector, she said, the anti-drug effort "requires leadership here in Washington." Rhetorically, she asked, "[w]here has [the leadership] gone?," and in closing, she called for renewed leadership on this issue. "Today, the anti-drug message just seems to be fading away. Children need to hear it and hear it often, just like they need to hear that they're loved." *Id.* Missing is "a sense of common national purpose" in combating drugs and teaching young Americans to "live in the world that God made, not the nightmare world of drugs." *Id.* at 16.

¹⁶⁵*See supra* notes 122-123.

which provides seed money for some of the most effective drug prevention programs, has also reportedly been subject to serious misuse, waste and abuse of funding. At present, in the absence of more probing investigations, no conclusion can be reached as to the veracity of these allegations. On the other hand, they remain serious, and appear to be corroborated by documentation from various states.

The accountability issue was effectively raised by Representative Ileana Ros-Lehtinen (R-Fla.) in the early 1995 hearings. She articulated her reservations carefully, in questioning of then-White House Drug Czar Lee Brown: “[T]here is a growing concern that federal prevention monies have not only been wasted, mismanaged and been ineffective but . . . have been spent on educational programs which teach value relativity and fail to teach that illegal drug use is wrong—just plain and simple wrong.”¹⁶⁶

Representative Ros-Lehtinen identified specific problem programs, and sought an explanation from then-ONDCP Director Brown for federal financing of so-called “values clarification” curricula, including “Quest,” “Here’s Looking At You Too,” and other programs that she questioned may not deliver a no-use message.

Unfortunately, while Dr. Brown acknowledged the potential for abuse¹⁶⁷ and disagreed with any program not teaching no-use, he offered no proposals for heightened accountability. When asked what he would do about the reported SDFS abuses in Michigan, Massachusetts, Texas, Washington State, Kansas, Indiana, and West Virginia,¹⁶⁸ the former ONDCP Director responded that “the Department of Education administers the Safe and Drug Free Schools Program . . . [and] we . . . have been working with [them] in looking at how do you set up standards for addressing the problem.”¹⁶⁹ Brown added that the Education Department was working “to alleviate and hopefully eliminate all the abuses in the program that take place.”¹⁷⁰ He testified that he “would be the first to admit that there are abuses of the [Safe and Drug Free Schools] program.”¹⁷¹

¹⁶⁶ *Effectiveness Hearings*, *supra* note 5, at 158 (testimony of Rep. Ileana Ros-Lehtinen).

¹⁶⁷ Brown, for example, admitted that, “[c]learly, as in the case of many programs, there are abuses.” *Effectiveness Hearings*, *supra* note 5, at 160.

¹⁶⁸ *See id.* at 158–60.

¹⁶⁹ *Id.* at 159–60.

¹⁷⁰ *Id.* at 160.

¹⁷¹ *Id.* at 161.

A series of letters confirming these concerns from around the nation was introduced at that congressional hearing, along with a study released by the Michigan State Office of Drug Control Policy documenting abuses in that state of the Safe and Drug Free Schools monies.¹⁷²

Making clear that she favored accountable prevention programs, Ros-Lehtinen introduced evidence that

in Michigan, more than \$10 million in Federal funds intended to provide our children a front line defense against drugs was utilized for the following: Over \$81,900 for large teeth and giant toothbrushes; over \$1.5 million on a human torso model used in one lesson of one grade, not even in the drug section of the curriculum; wooden cars with ping pong balls, over \$12,300; hokey pokey song, over \$18,000; over \$7,000 on sheep eyes, whatever that is; dog bone kits, \$3,700; bicycle pumps, \$11,000; latex gloves, \$12,000; over \$300,000 was spent on how we feel about sound.¹⁷³

Representative Ros-Lehtinen concluded with another constituent complaint, quoting: “These nondirective programs are often funded through Federal Drug Free School grants, yet they do not usually comply with Federal law requiring that students be taught that drug use is wrong and harmful.”¹⁷⁴

Additionally, a July 15, 1994, letter from Dr. Brown to the Assistant Secretary of the Office of Elementary and Secondary Education concerning the Safe and Drug Free Schools Program was introduced into the record at public hearings on April 6, 1995. Congresswoman Ros-Lehtinen read the letter aloud and reminded Dr. Brown that, “you, yourself, pointed out seven accountability issues” in this letter, adding “I believe that it’s hypocritical—excuse me, sir—but for you to attack some of us who are pointing out the ineffectiveness of the programs when you saw and wrote on it yourself.”¹⁷⁵

On balance, expert opinion appears divided between those who favored 1995 cuts based on reported abuse, and those who did not favor such cuts; the pivotal question was whether to fund programs that are successful in some locations, but also have

¹⁷² *Id.* at 158–61.

¹⁷³ *Id.* at 158–59.

¹⁷⁴ *Id.* at 159.

¹⁷⁵ *Id.* at 161–63. Brown’s only reply was that he was “far from being hypocritical” and that it was his “responsibility” to address “areas where we need improvement.” While noting that there may be “some abuses in the program,” he saw deep cuts in the program as inappropriate. *Id.* at 163.

accountability problems. These programmatic concerns, however, did not alter the general support of Committee members for heightened prevention efforts.

3. No Prevention Leadership from the "Bully Pulpit"

One aspect of prevention at the federal level involves the President using the "bully pulpit."¹⁷⁶ "In conjunction with the importance of national leadership," Bonner explained, "is the importance of a clear, coherent and simple message from the President."¹⁷⁷ "The message should emphatically imbue our youth with the moral understanding that the use of illegal drugs is wrong," Bonner continued. "Messages not only matter; they are critical to curbing drug use among children. Reagan's 'Just Say No' program played a crucial role in affecting the attitudinal changes necessary to achieve the Reagan-Bush successes. We need that moral message if our national strategy is to prevail in the minds of our youth."¹⁷⁸

From 1993 through 1995, President Clinton rarely spoke about the need for either demand-side reduction of illegal drug use or supply-side measures to stem international narcotics trafficking.¹⁷⁹ Indicating precisely the paucity of presidential reference to the drug issue, Representative Zeff stated:

In 1993, President Clinton made seven addresses to the nation; drugs were mentioned in none. His presidential papers reveal only thirteen references to illegal drugs in a total of 1,628 statements, addresses, and interviews. During 1994, presidential leadership was little better—of 1,742 presidential statements, only 11 contained any mention of illegal drugs.¹⁸⁰

¹⁷⁶*Effectiveness Hearings*, *supra* note 5, at 43–44 (testimony of Judge Bonner).

¹⁷⁷*Id.* at 44.

¹⁷⁸*Id.*

¹⁷⁹Notable exceptions to this statement are the President's late-1995 speech to the United Nations, which addressed international crime and illegal drug trafficking; the President's "Remarks to the National Leadership Forum of Community Antidrug Coalitions," on November 2, 1995; and the President's January 1996 State of the Union Address, in which crime and drugs were mentioned.

¹⁸⁰*See Zeff, Missing Leader in the Drug World*, *supra* note 57.

4. Treatment Programs Face Concerns over Effectiveness and Accountability

Drug treatment, despite facing serious criticism about effectiveness and accountability, remains an important part of any balanced national drug policy. President Clinton's former White House Drug Czar, Dr. Lee P. Brown, asserted in early 1995 hearings that "[p]ast strategies ignore [drug treatment as an] inextricable part of the drug problem."¹⁸¹ In fact, federal funding for treatment has increased every year from 1982 through 1995.¹⁸²

a. *Treatment effectiveness challenged.* Progress has been made in developing a range of drug treatment approaches during the past decade. However, significant doubt remains about the effectiveness of drug treatment generally, and about the accountability of federal drug treatment programs in particular. To date, there is too little reliable research.

On March 9, 1995, former DEA Administrator and federal Judge Robert Bonner testified that "[t]he Clinton strategy badly oversells the efficacy of the treatment of hard-core drug abusers" and fails to acknowledge that "studies repeatedly indicate the low success rates associated with many programs."¹⁸³ Bonner cited the work of Harvard University's Mark Kleiman, a former member of the Clinton Justice Department transition team. Kleiman's work shows that "even the most expensive treatment program—long-term residential treatment programs costing as much as \$20,000/patient—have success rates as low as 15 to 25 percent."¹⁸⁴ Judge Bonner also explained that "with respect to crack addicts . . . after treatment programs, less than 10 percent are free of drugs, free of crack, after 24 weeks, so you don't want to put too many eggs in that [treatment] basket."¹⁸⁵ Other drug

¹⁸¹ *Effectiveness Hearings*, *supra* note 5, at 57 (1995) (testimony of Lee Brown).

¹⁸² *See, e.g.*, LOSING GROUND, *supra* note 86, at 6. Federal treatment spending was \$505.6 million in FY1982, yet in 1995 federal treatment spending topped \$2.65 billion. *See* OFFICE OF NATIONAL DRUG CONTROL POLICY, THE NATIONAL DRUG BUDGET SUMMARY, *supra* note 94, at 238. In President Clinton's FY1997 budget request, while prevention, interdiction and international programs each remain roughly \$100 million below their highwater marks in the early 1990s, treatment funding hits a record \$2.9 billion. *See supra* note 59.

¹⁸³ *Effectiveness Hearings*, *supra* note 5, at 44 (testimony of Robert C. Bonner). Bonner also noted: "Despite its attraction, treatment, as most experts will candidly acknowledge, is not the be-all-and-end-all." *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

treatment studies and testimony explain why drug treatment programs have been unable to register better results.¹⁸⁶

Injecting added concern, John Walters, former Acting Director of ONDCP, testified that the Clinton Administration has failed to create the number of treatment “slots” necessary to accommodate its own stated treatment priority. Walters stated that “[a]lthough federal drug treatment spending almost tripled between FY 1988 and FY 1994, the number of treatment slots remained virtually unchanged and the estimated number of persons treated declined—from 1,557,000 in 1989 to 1,412,000 in 1994.”¹⁸⁷

A reduction in the number of hard-core addicts might constitute one measure of the current strategy’s success. However, arguments that hardcore use has been reduced through emphasis on treatment are belied by recent Drug Abuse Warning Network (“DAWN”) data. The latest DAWN data shows that “drug-related emergency room cases . . . have reached the highest levels ever, in reporting going back to 1978[,]” and “[c]ocaine, heroin, and marijuana cases all increased sharply to record levels [in 1994].”¹⁸⁸ And Walters noted that the current strategy failed to reduce the number of chronic, hardcore drug user numbers—that number is actually rising.¹⁸⁹

b. *Treatment accountability challenged.* Failure of the current strategy to generate even a small reduction in hardcore addiction is partly attributable to the “government’s treatment bureaucracy[,]” which some experts see as “manifestly ineffective.”¹⁹⁰ Addressing accountability, Walters testified that “some of those programs are simply not effective, but there are insufficient structures monitoring performance to force them out of business [F]ederal measures for accountability and targeting must . . . reach through multiple layers of bureaucracy—in the federal government, and in state and local governments.”¹⁹¹ Thus, the

¹⁸⁶John Walters, for example, testified: “Most addicts have been through treatment more than once. The harsh fact is that drug addicts like using drugs They sometimes admit themselves to treatment programs, not to stop using drugs, but to regain greater control over their drug use.” *Effectiveness Hearings*, *supra* note 5, at 29 (statement of John P. Walters). Walters cited leading studies. *Id.* at 30 (citing Yih-ing Hser, et al., *A 24-Year Follow-up of California Narcotics Addicts*, 50 *ARCHIVES GEN. PSYCHIATRY* 577 (1993)).

¹⁸⁷*Id.* at 22.

¹⁸⁸1994 PRELIMINARY ESTIMATES, *supra* note 19.

¹⁸⁹See *Effectiveness Hearings*, *supra* note 5, at 26–29.

¹⁹⁰*Id.* at 22.

¹⁹¹*Id.* at 29.

best treatment programs may be placed at a disadvantage by an inability to weed the good programs from the poor ones.

c. *RAND treatment study of limited value.* In striking contrast to these expert assessments, Drug Czar Lee Brown had urged increased emphasis on drug treatment. To defend this strategic shift, Brown and the White House relied heavily on a June 1994 RAND study ("RAND study") that favors treatment over other use reduction options.¹⁹²

According to Brown, the RAND study found that "drug treatment is the most cost-effective drug control intervention[.]" and that "for every dollar invested in drug treatment in 1992, taxpayers saved \$7 in crime and health care costs."¹⁹³ This study formed the empirical centerpiece of Brown's 1995 request for \$2.8 billion for treatment.¹⁹⁴ Closer examination of the study, however, suggests that the heavy reliance on it by the White House is questionable. The RAND study has clear limitations, operates from assumptions few drug policy experts would accept, and is easily misread.

Of clear value, and not otherwise affected by subsequent criticisms, are two key findings. First, the study appropriately condemned drug legalization.¹⁹⁵ Second, it implicitly condemned the Administration's "controlled shift" of resources from interdiction to source country programs.

On the "controlled shift" issue, RAND concluded that interdiction is more effective, dollar-for-dollar, than pumping money into source country programs. Ironically, the Administration embraced the study's pro-treatment conclusions, and yet rejected this anti-source country program conclusion. As one drug policy expert, who is favorably disposed to the pro-treatment finding conceded, "This analysis implies that the National Drug Control

¹⁹²C. PETER RYDELL & SUSAN S. EVERINGHAM, RAND DRUG POLICY RESEARCH CENTER, CONTROLLING COCAINE: SUPPLY VERSUS DEMAND PROGRAMS (1994) [hereinafter RAND STUDY].

¹⁹³*Effectiveness Hearings*, *supra* note 5, at 57 (testimony of Lee Brown).

¹⁹⁴*Id.* It is also featured prominently in President Clinton's FY1997 request for record levels of treatment funding. *See supra* note 59, at 27.

¹⁹⁵On legalization, the RAND study notes the devastating effect that drug legalization would have on use, through the economic mechanism of reduced prices, or price elasticity. In 1994, the average street or retail price for a pure gram of cocaine was \$143; if cocaine were legalized, the estimated retail price would be \$15–20 per gram. RAND STUDY, *supra* note 192.

Strategy's 'controlled shift' of resources from interdiction to source-country control might be a misstep."¹⁹⁶

The most glaring methodological omission revolves around the study's failure to discuss prevention programs: it simply does not account for prevention as a viable means for reducing demand for cocaine. This constitutes a serious oversight, since prevention is widely recognized as a central and effective means for demand reduction.¹⁹⁷ President Clinton's reliance on the RAND study, which promotes treatment at the expense of prevention, reflects a marginalization of prevention strategy.

The President's 1995 strategy is rhetorically consistent with the RAND study's omission of prevention because the strategy assumes that "anti-drug messages are losing their potency among the Nation's youth."¹⁹⁸

A second serious limitation is RAND's failure to follow users for a meaningful period of time following active treatment. Instead, the study was able to conclude only that cocaine consumption falls during residential and out-patient treatment.

In another admission, the study acknowledged that once treatment ends, only about twelve percent of out-patient and seventeen percent of residential treatment recipients stop heavy use of cocaine.¹⁹⁹ Certainly a national drug policy centered on twelve to seventeen percent reductions in the smaller of the two user populations (i.e., the twenty percent of users who are hardcore users rather than the eighty percent who are casual users) reflects poor judgment.

Fourth, RAND favored treatment chiefly because that approach has a "direct" impact on users. This minimizes supply-side programs (e.g., interdiction, source country, domestic law enforcement), which affect a larger number of users but have only an "indirect" impact. The RAND study acknowledged, however, that higher street prices, resulting from interdiction, source country programs, and domestic law enforcement, reduce consumption.

Finally, the RAND study employed a measure of effectiveness that arguably is flawed. The study did not measure effectiveness by reduction in cocaine users, but rather by reduction in the overall amount of cocaine consumed in the United States. Be-

¹⁹⁶CHRISTOPHER SCHNAUBELT, NATIONAL INTERAGENCY COUNTERDRUG INSTITUTE, DRUG TREATMENT VERSUS SUPPLY REDUCTION: WHICH IS CHEAPER? 2 (1995).

¹⁹⁷See, e.g., JAMES E. BURKE, AN OVERVIEW OF ILLEGAL DRUGS IN AMERICA (1995).

¹⁹⁸See NATIONAL DRUG CONTROL POLICY, 1995, *supra* note 13, at 20.

¹⁹⁹RAND STUDY, *supra* note 192, at 24-25, 88-89.

cause the study found that hardcore users consume, on average, eight times the cocaine that casual users do, RAND found that treatment was the appropriate response.

However, the RAND study's measurement for effectiveness is misguided; it fails to take into account that societal drug use is dynamic, not static. While current cocaine users might respond positively to treatment, the total user population will continue to accelerate as the number of casual users climbs and many of these become hardcore addicts themselves. Unless the number of casual users switching to hardcore users is smaller than the number of hardcore users successfully treated, the treatment approach amounts to a losing prospect.

In fact, casual use is now rapidly growing,²⁰⁰ and with it the number of hardcore users,²⁰¹ even assuming RAND's finding that between twelve and seventeen percent of the current hardcore user population is being treated successfully.²⁰² Thus, if the aim of national drug control policy is to reduce the number of users (not the amount of cocaine imported as RAND suggests), any strategy favoring treatment over effective prevention will be self-defeating.

Moreover, most conservative extrapolations of the number of casual users that become hardcore addicts, for example those given by former Carter Cabinet Member Joseph Califano, indicate that such a strategy will lead to a nation awash in young cocaine addicts. Califano's Center on Addiction and Substance Abuse ("CASA") at Columbia University recently concluded that, "[i]f historical trends continue, the jump in marijuana use among America's children (age 12–18) from 1992 to 1994 signals that 820,000 more of these children will try cocaine in their lifetime Of that number, about 58,000 will become regular cocaine users and addicts."²⁰³

5. Poor Demand Reduction Interagency Coordination

Even more than supply-reduction coordination, inter-agency coordination of demand-reduction programs is in need of serious

²⁰⁰ See *supra* notes 36–43 and accompanying text.

²⁰¹ See *Effectiveness Hearings*, *supra* note 5, at 43–44 (testimony of Robert C. Bonner). See also *id.* at 26–30 (testimony of John P. Walters).

²⁰² See *Effectiveness Hearings*, *supra* note 5, at 61 (testimony of Lee Brown).

²⁰³ Califano and Bennett Press Release, *supra* note 23. See also Joseph A. Califano, *It's Drugs Stupid*, N.Y. TIMES, Jan. 29, 1995, § 6 (magazine), at 40.

rethinking. Neither better prevention accountability nor enhanced treatment effectiveness will address the lingering potential for waste and mistargeting that results from poor demand-side inter-agency coordination.

ONDCP is charged with coordination of federal demand- and supply-side reduction efforts.²⁰⁴ In fact, however, ONDCP seems to have too little budget authority,²⁰⁵ too little support from the President when confronting agency intransigence,²⁰⁶ and is dependent on non-institutional factors in achieving even the current level of coordination.²⁰⁷

In September 1993, the GAO reported that "ONDCP and HHS had major disagreements over the collection and reporting of drug data," that an internal HHS memorandum asserted that

²⁰⁴ONDCP bears "responsibility to monitor and oversee drug control efforts by federal agencies." REAUTHORIZATION, *supra* note 28, at 48. See also 21 U.S.C. § 1504 (1994).

²⁰⁵Note, however, that efforts to increase ONDCP budget authority in the Violent Crime Control Act of 1994 resulted in the award to ONDCP of discretion to shift up to two percent of the Nation's counternarcotics budget from one agency to another. Although this authority carried the symbolic suggestion that ONDCP had some genuine leverage over departments and agencies, the FBI and other agencies were successful in further marginalizing ONDCP's budget authority. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

²⁰⁶GAO has reported a number of examples in which early presidential intervention would have provided ONDCP with missing authority, and likely prevented future inter-agency disputes. For example, GAO reported in 1993, that: HHS officials believed ONDCP's request to "review . . . RFAS [HHS' Requests for Applications for drug treatment and prevention grant monies] for three grant programs and disagreements that resulted from these reviews were a serious source of conflict between ONDCP and HHS." Likewise, GAO reported that when ONDCP attempted to assert its "overall authority to oversee implementation of the national strategy," it was often accused of "micromanagement." In the same vein, "[d]isagreements between ONDCP and HHS over timeliness and quality of drug data have been a problem for the two agencies and have also contributed to strained working relationships." REAUTHORIZATION, *supra* note 28, at 48-49, 51. Perhaps most disturbingly, when ONDCP sought "implementation plans" from the federal agencies involved in executing ONDCP's 400 objectives contained in the National Drug Control Strategy, ONDCP was effectively rebuffed. ONDCP's Director wrote that development of these implementation plans was "the critical step in turning the words of the National Drug Control Strategy into programs that reduce drug use in this country," yet compliance was minimal, since "ED [the Department of Education], DoJ and HHS officials disagreed about the utility of ONDCP's requirement that agencies develop implementation plans for objectives identified in national drug control strategies" and found the requirement "burdensome and of little value." *Id.* at 50.

²⁰⁷For example, a strong personality in the role of ONDCP director, combined with a strongly held priority by the sitting president, appears to produce a stronger and more effective policy than the alternative. These variables, which also affect the willingness of agency and departmental heads to cooperate with the ONDCP director, are non-institutional. On the positive side, the recent appointment of four-star general Barry McCaffrey to White House Drug Czar offers new hope that change may follow. One April 1996 institutional change that could also make an operational difference, and could strengthen both support and coordination, is the announced establishment within the National Security Council of the Global Organized Crime Committee.

there was a “serious [inter-agency] problem . . . in trying to implement new drug abuse programs [while complying with ONDCP oversight],” that ONDCP’s ability to secure “implementation plans” from the agencies for 400 objectives in the drug strategy was being resisted, and that the Departments of Education, HHS, and Justice seemed unable to cooperate with ONDCP.²⁰⁸

Notably, however, GAO reported that “the lessening of friction between ONDCP and federal drug control agencies should not be brought about through elimination of ONDCP’s oversight responsibilities.”²⁰⁹ Nevertheless, these conclusions provide a persuasive argument for rethinking the way in which coordination of demand-reduction is handled. Several competing ideas are now under discussion.²¹⁰

III. REACHING BASIC CONCLUSIONS AND CREATING THE BLUEPRINT FOR AN EFFECTIVE NATIONAL DRUG CONTROL POLICY

A. *Reaching Basic Conclusions*

The Nation’s political leadership appears to have badly misjudged the resilience of the drug abuse epidemic, particularly among America’s youth. At the same time, the President’s National Drug Control Strategies from 1993 to 1996 have also underestimated the enormity of the national security threat posed by spreading international drug cartels in Colombia and Mexico and international drug trafficking, chiefly from Peru, Bolivia, and Colombia, through Mexico and the Caribbean, to the United States. One reason underlying these twin misjudgments may be a simple delay in recognizing the link between a policy of dis-

²⁰⁸ REAUTHORIZATION, *supra* note 28, at 48–50.

²⁰⁹ *Id.* at 51.

²¹⁰ The four remedies suggested by the absence of meaningful ONDCP budget authority are: (1) substantially increased ONDCP budget authority; (2) a wholesale shift of demand side (if not also supply side) coordination authority out of ONDCP to a Secretary, Undersecretary or Assistant Secretary at the agency with chief budget authority (likely eliminating the need for ONDCP); (3) shifting both budget authority and coordination responsibility to a different agency altogether (e.g., all demand reduction programs from HHS and DoED to an independent agency at DoJ that operates similarly to DEA); or (4) making no institutional change but insisting that the President clearly, strongly and consistently support the decisions of his White House Drug Czar and ONDCP.

interest in casual use and the steady rise in both juvenile addiction and violent juvenile crime.

On the other hand, important members of the Administration, including the President's Interdiction Coordinator, and current and former Administrators of his Drug Enforcement Administration, have been vocal about the growing national security threat posed by surging illegal drug use and the international drug cartels. Unfortunately, their voices have been lost in the din of Administration rhetoric.

As the annual release of new drug-use statistics approaches in late 1996, voices advocating serious drug policy rethinking, including redesign and implementation improvement, can no longer be ignored. In fact, the rapid resurgence of juvenile drug use and violent crime, coupled with the growing influence of drug traffickers in both Mexico and Columbia, requires a new commitment to cooperation both from those who have historically favored supply-side efforts and those who have, instead, preferred to conceive of the challenge as chiefly demand reduction.

In general, those who support increased funding and development of prevention or treatment programs, to the exclusion of greater supply reduction efforts, can no longer afford to miss the incontrovertible A-B-C-D connection between (A) supply reduction efforts, (B) street price, street purity, and street availability, (C) casual drug use, and (D) hardcore or addictive drug use, which often ends (either directly or indirectly) in disease, injury, or death. Since violent crime appears to rise with both casual and addictive use, the need for effective supply reduction is compelling. Without it, prevention efforts will be unavailing and treatment programs will be awash in young addicts.

On the other hand, it is also clear that those who support increased funding and development of transit-zone interdiction, source country programs and law enforcement, to the exclusion of greater prevention and research into treatment, can not afford to miss the A-B-C-D connection between (A) increased prevention, (B) decreased casual use, (C) decreased addiction, and (D) decreased disease, death, and violent crime (since both casual and addictive use directly impact violent crime). Without effective and accountable prevention, as well as some hope for progress in treating those whom prevention misses, violent crime will rise, as will nationwide demand, compounding the problems currently facing both interdiction and law enforcement.

Finally, the current crisis should send a shock wave through both the demand and supply reduction communities, not only bringing those communities closer to one another, but making clear that tensions within both communities must dissipate if an effective National Drug Control Policy is to emerge and work. The communities must become better at communicating one, cohesive message to national leaders.

Ultimately, this message must be based on the existing body of empirical evidence, not wishful thinking. There is every reason to believe that major victories can be scored in a well-designed, well-coordinated, and widely supported drug war. However, in setting the course for success, there is no room for apologies. Ineffective, unaccountable, and poorly implemented federal programming should be fixed or scrapped. If preserved, these programs should fit within the overall thrust of the redesigned policy.

In short, we must take stock of how far off track we have gotten, and then design, implement, and adequately fund a comprehensive National Drug Control Policy that will get the Nation back on track.

B. Specific Conclusions on Interdiction, Source Country Programs, Prevention, and Treatment

Despite an expert consensus that interdiction is vital, President Clinton proposed and executed a downgrading of interdiction within the National Drug Control Strategy. He has proposed and supported interdiction budget cuts in 1993, 1994, 1995, and 1996. For FY 1997, while President Clinton has increased interdiction slightly, from \$1.33 billion in FY 1996 to \$1.43 billion in FY 1997, this number is still far below the effective effort in FY 1993, which was \$1.511 billion. Moreover, it is far less than the \$129 million increase in drug treatment funding, which elevates drug treatment part's of the budget from \$2.862 billion to \$2.908 billion.

Overall federal support for transit-zone interdiction, as measured by these budget numbers and other factors, reveal a shrinking Administration commitment to drug interdiction. The other factors include the National Drug Control Strategy's express shift to drug treatment, retirement and redeployment of selected drug interdiction assets to non-drug related missions, failure to

fill the ONDCP position of Deputy Director for Supply Reduction, reduction of the U.S. Interdiction Coordinator's staff to six, White House disinterest in the December 1994 "agency head consensus" favoring increased interdiction support and coordination, diminished rhetorical support from the President, and a reduced national security rank for the Drug War. Strategically, despite the success of interdiction techniques used in the late 1980s and early 1990s, such as "pulsing" of resources in the Caribbean by former U.S. Coast Guard Commandant Paul Yost, the Administration has clearly abandoned the earlier transit-zone strategy.

With respect to the source country programs, in theory, the National Drug Control Strategy was to usher in a "controlled shift" of resources to Columbia, Bolivia and Peru;²¹¹ in practice, while resources have been taken from transit-zone drug interdiction, they have not reappeared in the source country programs. This has meant that "disruption rates" in the interdiction zone are down,²¹² and yet the "controlled shift" has not been implemented.²¹³

Beyond this, in June 1995, the General Accounting Office conducted a comprehensive, in-country investigation of the source country programs and found that no one was "in charge of anti-drug activities in the cocaine source countries" and that there was a "lack of coordination."²¹⁴

Moreover, GAO's investigation also found that "\$45 million originally intended for counter-narcotics assistance to the cocaine source countries were reprogrammed to assist Haiti's democratic transition," and despite a November 1993 promise that he would "develop a separate strategy to combat the heroin trade" within 120 days, President Clinton had not developed or signed any heroin strategy as of June 1995.²¹⁵ These findings suggest a

²¹¹ See *Effectiveness Hearings*, *supra* note 5, at 142-44 (statement of Rep. Zeff).

²¹² "Between 1993 and June 1995, the transit zone 'disruption rate'—the ability of U.S. forces to seize or otherwise turn back drug shipments—dropped 53 percent, from 435.1 kilograms per day to 205.2 percent kilograms [according to JIATF-East]." See *LOSING GROUND*, *supra* note 86, at 13.

²¹³ One report summed up frustration this way: "The trade-off for cuts to the transit zone interdiction forces was to have been a 'new' concentration on institution-building and interdiction in the source countries of Latin America More than 18 months after unveiling the new strategy . . . the shift had not taken place." *Id.*

²¹⁴ See generally U.S. INTERNATIONAL DRUG CONTROL STRATEGY, *supra* note 123, at 2, 4, 8.

²¹⁵ *Id.* at 7.

need for greater source country coordination, funding and consistency.

Turning to prevention policy, experts seem to coalesce around the view that prevention is the foundation of demand reduction, particularly for America's youth. Even among treatment advocates there appears to be growing awareness that prevention must succeed if treatment programs are not to be overrun. Moreover, there is a consensus that prevention should be a priority for national leaders of both major parties, including individual members of state legislatures and Congress, governors, mayors, and the President.

Accordingly, there is understandable support for the Department of Education's Safe and Drug Free Schools program, and it is acknowledged to have resulted in seed money for local program successes. On the other hand, serious accountability problems remain, and there is a clear need for greater financial accountability and program validation.

With the aim of program improvement, not program elimination, a serious program-by-program review must be undertaken at the Departments of Education, HHS and Justice, and program accountability mechanisms should be inserted in the governing statutes and departmental regulations. Existing accountability regulations must also be enforced.

Finally, while most agree that treatment is part of any effective use-reduction strategy, there is evidence that many existing public programs are ineffective or poorly monitored, and thus difficult to defend objectively. The much-touted June 1994 RAND study supporting treatment appears to be of limited utility, since it omits prevention from the demand-reduction mix, and suffers methodological flaws that compromise chief findings.

Empirically, the Administration's shift to treatment of older, chronic, hardcore addicts has not reduced the number of hardcore addicts. In fact, it may have increased the number of existing and future addicts, by failing to create ample treatment slots, overselling treatment's efficacy, and allowing the number of casual users to rise. There is little room for de-coupling from treatment the opportunity cost it has occasioned, namely a reduced emphasis on casual and juvenile drug use and the corresponding increase in both, along with juvenile crime.²¹⁶

²¹⁶There are also indications that "one in three juvenile detainees were under the

The gravamen is this: while research into identifying effective treatment methods (including chemical approaches) should remain part of the overall strategy, federal funding must be targeted at (A) proven and effective programs (often located in correctional institutions) or (B) basic treatment research. Funding for general treatment programs with no proven track record, or a record of low effectiveness, should be avoided.

Second, treatment should not have been disproportionately funded, as it has been in 1993, 1994, 1995 and 1996. That shift within the demand reduction mix has had the effect of reducing the federal emphasis on prevention. Since eighty percent of drug use is casual use by youth, the strategy should be directed at this at-risk population. There must be a recognition that reducing use among this population will ultimately reduce the addict population.

C. Blueprint for an Effective National Drug Control Policy

1. Overview

The blueprint for an effective National Drug Control Strategy necessarily includes rethinking on many levels. There must be a basic re-focusing of the Strategy on transit-zone interdiction and nationwide prevention, rather than the recent shifts to unproven treatment. Source country programs must also be better coordinated, better funded, and more consistent (although there has been a marked improvement in coordination since the middle of 1995 and programs are operating more effectively, albeit on a shoestring budget, in 1996).

There must be rethinking about the basic design of each component of the drug war, including transit-zone interdiction, prevention and education, source country programs, law enforcement and drug treatment. Why not return to "pulsing" of interdiction resources or not? Why can not re-establish key intelligence resources for better use of Coast Guard, DEA, Customs, DoD, and State Department interdiction assets? Why not increase joint interagency task forces and restore lost detection and monitoring assets? How do we raise media involvement in prevention, fol-

influence of drugs at the time of their offense." RAND STUDY, *supra* note 192, at 64-65.

lowing the example of groups like The Partnership for a Drug Free America, and encourage better prevention in schools, communities and families?

How can we elevate the drug issue to its rightful place as the number one national security priority? How do we enhance drug-related law enforcement? Why not insist on full accountability in all federal programming? How do we stop funding low success-rate treatment programs, and start financing research into improved treatment methods? These and questions like them now confront those who want to tie together the disparate strands of our federal counternarcotics effort.

Coordination is the next big obstacle. Are there common sense ways to enhance interagency and interjurisdictional coordination? To improve resource management and increase the Nation's "bang for the buck?" How can these efforts be institutionalized, and how do we change our national complacency on the drug war? If it is really a national security threat, why not pattern our response on fighting a foreign adversary? What tools does law enforcement need, and what incentives can be created for better coordination between federal, state, and local law enforcement agencies? If the effort is reorganized and a hierarchy established for greater effectiveness, who should be placed "in charge?" What must a President do to support this hierarchy and generate lasting results? These are some of the main questions that confront anyone who studies the Nation's counternarcotics effort.

2. Strategic Changes

The current juvenile youth use and drug-related crime crisis, as well as the historical example set by drug strategies in the late 1980s and early 1990s, compel strategic rethinking. We need a better overall strategy, better use of existing federal resources, increased funding for priority programs, better coordination, greater consistency and more conscientious oversight.

Strategic recommendations likely to reposition the United States to "win" the drug war—that is, to permanently disrupt the flow of illegal drugs from foreign cartels and traffickers, and substantially reduce domestic demand—are several.

First, to assure that the Drug War becomes a top national priority, the President must clearly and unequivocally inform the Office of Management and Budget ("OMB"), Congress, and the

more than fifty federal agencies and departments with counter-narcotics programs that this is one of his top budget and personal priorities.

In practical terms, he must signal OMB, agency heads, and Congress that counternarcotics spending is a top priority among competing agency or departmental preferences. Instead of allowing the State Department's INL Office to be cut as other offices are uncut or grow, the President should make clear that INL funding is a priority within the State Department's budget. The same signal should flash down the corridors to all federal agencies and departments.

Second, based on the foregoing evidence and analysis, the National Drug Control Strategy must favor accountable prevention over unproven treatment programs. At the heart of this change is the rise in casual use among America's youth and its link to addiction; the correlation of casual and addictive drug use with rising juvenile crime; and the low success rates associated with many publicly funded treatment programs.

Third, in concert with the foregoing, an effective strategy must embrace renewed transit-zone interdiction, adding back lost assets and making drug interdiction a priority.

This means never again diverting \$45 million, or any number, out of transit-zone interdiction funding to a mission as unrelated and controversial as rebuilding Haiti; while no judgment is passed on the Haiti mission, vital counternarcotics funding should not have been reprogrammed.

Drug interdiction along the land bridge with Mexico must be elevated to a higher priority within the overall Treasury budget, which oversees U.S. Customs. The United States Embassy in Mexico must also rank counternarcotics its number one priority, especially in light of the growing influence of Mexico's four drug cartels.

Only by making stronger intelligence-cued transit-zone interdiction a priority again can the nation reverse the rise in illegal drug importation, high drug availability, high drug purities, and low street price.

3. Accountability Changes

To restore accountability to the federal counternarcotics effort, the President should comply with the Anti-Drug Abuse Act of 1988, and promulgate a clear set of measurable, short-term (and

long-term) goals in the annual National Drug Control Strategy. Measurable goals have been sorely missed since 1992, making defense of counternarcotics spending substantially more difficult.

The National Drug Control Strategy should not be merely descriptive; it must be more than a collection of loose goals to which agencies roughly aspire. The Strategy must become the standard against which success or failure is measured. More specifically, the Strategy should be the basic document against which future funding is weighed.

To restore accountability to demand-reduction programs—prevention and treatment—the President and Congress must work to implement stricter accountability mechanisms. In practice, the Safe and Drug Free Schools Act should be revisited and its language tightened, if the statute has permitted misapplication of anti-drug funds; the Department of Education should become a more vigilant watchdog agency when they learn that monies are reportedly being misused. Complete record keeping and accountability should be reflexive, not a tooth-pulling effort spurred only by constant congressional inquiry.²¹⁷

Prevention programs that have no means of assuring accountability, or which cannot demonstrate achievement of any measurable goals, or which do not fund “no use” messages should be unfunded. Similarly, treatment programs unable to assure accountability and effectiveness should be not be funded.

Likewise, supply reduction programs must be held to the highest measure of accountability available. While effectiveness may be more difficult to measure on the supply side, programs that have no means for assuring accountable expenditures or which fail to meet previously established goals should be unfunded in subsequent budget cycles.

²¹⁷Record keeping, for example, under the Safe and Drug Free Schools and Communities Act of 1994, 20 U.S.C. §§ 7101–7105 (1994), by states and the Department of Education has been questioned and appears to have been often incomplete. The National Commission on Drug Free Schools recommended, after extensive study that: “The Department of Education should monitor closely the development and enforcement of school and college antidrug policies [and] . . . should ensure that schools conduct periodic evaluations of all drug education and prevention programs.” NATIONAL COMMISSION ON DRUG FREE SCHOOLS, TOWARD A DRUG-FREE GENERATION: A NATION’S RESPONSIBILITY 79 (1990).

4. Coordination Changes

First, there must be a clearly established “chain of command” on both the demand and supply reduction sides of the counter-narcotics effort. Optimally, the pinnacle of these chains will be the same person, a well-supported and hand-picked White House Drug Czar. While other potentially viable options have been circulated,²¹⁸ and some less viable options,²¹⁹ the White House Drug Czar is—institutionally—an important foundation upon which to build.

The White House Drug Czar should be the chief voice within the Administration on whether counter-narcotics programs continue to be funded or not, and at what levels, in consultation with OMB and the appropriations committees. In all anti-drug efforts, the Drug Czar—and not individual agency heads—should be viewed by OMB and Congress as the primary decision-maker.

To achieve this goal, the President must be unequivocal, vocal and constant in his support of the Drug Czar, and should delegate to him or her the fullest authority possible, within the bounds of the law, on all issues relating to the nation’s counter-narcotics efforts. The President should insist that all relevant agency heads coordinate anti-drug activities directly through that person, and that all major counternarcotics decisions be approved by that person. If the Drug Czar concept is to work, in addition to the foregoing, the Drug Czar should be a member of the National Security Council, have an office in the White House,

²¹⁸One such option was circulated by Representative Barton (R-Tex.) in early 1996, and suggested a re-configuration of the counternarcotics effort, assigning major new authority to an independent and consolidated federal counternarcotics agency. The aim of that bill is to “consolidate within a single Federal agency Federal programs and functions relating to services for the prevention and treatment of substance abuse.” Draft of proposed bill entitled “Drug Abuse Prevention Act of 1996” (February 1996) (on file with the author). While still under discussion, this thoughtful effort might well increase certain efficiencies and streamline the relevant chains of command. It is also likely to engender considerable agency and departmental opposition, since many agencies and program administrators likely believe that they could—if so directed—more effectively coordinate within the current counternarcotics structure. The Barton proposal, however, which has strong support from some sectors of the drug prevention community, is important and worthy of further consideration.

²¹⁹Pessimists, or those who do not realize how effective past, coordinated counter-narcotics efforts have been, gravitated to a bill offered by Senators Richard Shelby (R-Ala.) and Bob Kerry (D-Neb.), which would have eliminated the White House Drug Czar and ONDCP. While this measure died, it was likely to have been counterproductive. One valuable political asset in the drug war is the Drug Czar’s cabinet rank, and another is the ONDCP’s independent authority to garner attention from the President, Congress and other opinion leaders.

share authority with other Cabinet members to negotiate on behalf of the President with foreign countries, and have a permanent place at every Cabinet meeting. Moreover, one document should govern all counternarcotics efforts, and that document should be the National Drug Control Strategy.

The President should maximize the Drug Czar's authority by funding ONDCP back to late 1980s levels; delegating authority for counternarcotics program prioritization, in consultation with OMB, to ONDCP; giving ONDCP the authority to evaluate anti-drug program effectiveness across all agencies; and giving ONDCP primary authority to offer recommendations to Congress for program continuation, enhancement, reduction or elimination. The President should also insist that all agency heads meet personally with the ONDCP Director at least quarterly, following a format similar to the never-repeated October 1994 drug interdiction agency-head conference, and the President should publicly support efforts of the White House Drug Czar and ONDCP in the media, with cabinet officials, and in periodic addresses to the nation.

To assist ONDCP, anti-drug programs that receive their justification in the annual ONDCP Drug Strategy Budget should be identified with specificity, and the fifty-plus agencies that receive funding through these programs should be required to place details of each program before the ONDCP Director well in advance of the production of succeeding annual budgets.

5. Other Leadership Changes

At the most basic level, there must be greater parental and community leadership on this issue. Strong families are central to winning the drug war, and their efforts must be supplemented by educators, corporate, church and synagogue leaders, the media, the film industry and every individual in a position of community influence.

Nationally, in an effort to demonstrate the President's consistent support for the Nation's Drug Control Strategy, the President should speak out regularly, utilizing the presidential "bully pulpit" to elevate the issue and build public support for demand- and supply-reduction efforts.

To bring the issue immediately back to the forefront of the nation's agenda, the President should also address the nation from the Oval Office or address a Joint Session of Congress on

the topic of exploding teenage drug use; commence a series of domestic White House Drug Policy Conferences, including one each on prevention, narcotics-related law enforcement, interdiction, source country programs, treatment programs, and the role of the media; meet personally with congressional leaders on this issue at least once or twice annually, for example, with the Bipartisan Drug Policy Group (currently co-chaired by Representative Zeff and Representative Charles Rangel (D-N.Y.)); appoint a bipartisan White House Commission on "Winning the Drug War" to study the evolving options in depth; and convene an international "President's Summit" on counternarcotics, in a Central or South American capital, such as Lima or Mexico City. Absent national and international use of the "bully pulpit," other changes are not likely to succeed.

A number of other concrete changes could be implemented swiftly, and would markedly alter the public perception and actual effectiveness of the drug war.

Some are specific to supply reduction. Among these, the President, through National Drug Control Policy, should consider elevating the drug war threat within the National Security Council's list of national security priorities to the top position. He should also restore funding for interdiction to 1992 levels; restore funding to ONDCP lost in 1993 Administration cuts; and restore funding for intelligence lost between 1993 and 1995. Future National Drug Control Strategies must reverse the erosion in key interdiction assets.

On the personnel side, the Strategy must recognize the specialized nature, and long term utility of internationally based DEA, U.S. Coast Guard, DoD, FBI, and intelligence community personnel.

From a policy perspective, the President should also issue the missing agency Implementation Guidelines for the November 1995 Heroin Strategy; assure PDD-14 is made effective by proper funding and coordination of source country programs; and insist on accountability mechanisms in source country programs to ensure proper resource management, inter-agency coordination, clarity and targeting (specifically answering the individual concerns in the June 1994 GAO testimony).

The President must also avoid the kind of deadend streets that current policy creates; he must establish a process for direct, regular communications between the U.S. Interdiction Coordinator (USIC) and the National Security Advisor, if not also be-

tween the USIC and the President. Consideration should also be given to making the USIC operational, and reserving most counter-narcotics policy to the ONDCP Director.

To strengthen the law enforcement component, the President should insist on a strategy that restores support to law enforcement's counter-narcotics mission through a combination of block grants, increasing Byrne Grants, heightened drug prosecutions in the federal courts, and increased cross-over of high technologies available to the military but not yet economical to law enforcement.

These advances could be further aided by encouraging wider use of joint interagency task forces, which have tended to reduce jurisdictional conflicts, bureaucratic impediments, and restrictive regulations. The joint interagency task force concept has worked well, as examples like Operation Streetsweeper, a New Hampshire effort, illustrate.²²⁰

Other potential policy changes appear on the demand reduction side. An effective National Drug Control Strategy must reaffirm the central place of drug prevention in the overall national drug strategy; respond to accountability concerns raised by the GAO and Department of Education investigations of prevention programs; and encourage greater private sector and media support for drug prevention efforts nationwide.

From a broader policy perspective, the Strategy must offer greater flexibility to states and localities, through mechanisms such as separate prevention block grants (which may become more accountable if authorized separately from treatment grants). Programs supported must be clearly limited to "no use" messages and "no use" curricula. More effort should be given to innovative means for encouraging cooperation between prevention and law enforcement, while increasing support for overlapping programs.

To protect effective drug prevention programs, Congress should only fund "validated" prevention programs, and—on treatment—should encourage establishment of generally accepted criteria for effective drug treatment. Where treatment works, it should be reinforced; Congress and the President should encourage greater application of effective treatment programs in correctional institutions. An effective Strategy should also explore means for establishing more overall treatment "slots," so long as the un-

²²⁰See *Correction: Prison Sentence*, UNION LEADER, Dec. 5, 1995, at A3.

derlying treatment programs are effective. The Strategy must be intent on reducing the Washington "treatment bureaucracy," in order to allow a greater flow of funds to the states and localities.

On all demand reduction efforts, especially youth-targeted prevention, ONDCP and the Strategy should create opportunities for the President to speak out on the issue; in the end, his "bully pulpit" is the single most powerful prevention tool.

6. A Few Bold Ideas

Beyond the federal strategy, accountability, coordination, and the concrete changes proposed above, there are a few bold ideas that merit further consideration. Among these ideas, without passing judgement on their workability, legality, cost, or political viability in this Article, are the following.

A more comprehensive regime of private and public sector drug testing should be explored. Excellent legislation has recently been suggested by such groups as the Institute for a Drug-Free Workplace, including both incentives for voluntary corporate drug testing and in particular, new measures for safety-sensitive positions. Privacy and civil rights considerations must enter into the legislative calculus, but acceptability, societal needs, and the science surrounding drug testing are all evolving. Evolution in this area suggests opportunity. The time may soon be right for broad drug testing legislation.

Notably, recent tests indicate that drug testing through non-intrusive hair samples can be highly effective, and could be widely implemented.²²¹ A recent GAO report advised that HHS "give high priority to validating self-reports of use of illicit drugs, particularly by focusing on objective techniques such as hair testing,"²²² and set forth six detailed reasons for endorsing new hair-testing technology.²²³

²²¹ See GENERAL ACCOUNTING OFFICE, DRUG USE MEASUREMENT: STRENGTHS, LIMITATIONS AND RECOMMENDATIONS FOR IMPROVEMENT 2-3, 5, 58-60, 68-69 (1993).

²²² *Id.* at 5.

²²³ The June 1993 GAO report stated that: "Although recognizing the need for further scientific study of hair analysis, we [GAO] endorse its field trial use in community drug prevalence measurement studies for the following reasons: (1) multiple independent studies have demonstrated that illicit drugs can be detected in the hair, (2) National Institute of Standards and Technology tests have demonstrated that laboratories can identify drug residues in hair specimens with a high rate of success, (3) the Federal Bureau of Investigation chemistry and toxicology laboratory has been working with illicit drugs regularly for several years and has not found passive exposure or environmental contamination to be a practical concern for cocaine, (4) NIDA's Division

Whether these developments counsel drug testing for the entire private sector, everyone tangentially benefiting from federal assistance, all federal employees, or merely a selected increase in testing remains an open question, but the need to re-visit this topic is fast approaching. Novel ideas worth added thought are drug testing in association with issuance of drivers' licenses and reduced liability for employers who voluntarily drug test.

Similarly, on the legal front, serious consideration should be given to expanding the reach of U.S. counternarcotics laws' through a review of current extraterritoriality limits; an effort to expand the legitimate reach of these laws could be pressed either through U.S. courts or through bilateral agreements with nations also struggling with the narcotics problem. A Panama-based counternarcotics center might coordinate regional efforts like Operation Green Clover and a regional riverine strategy.

As a general matter, the priority level associated with narcotics crime prosecution should be raised within the Department of Justice, and more thought should be given to specialized federal narcotics courts. The legal question should be explored whether U.S.-based pro-legalization groups might also be required to register as foreign agents if they receive any substantial funding from foreign drug-producing or processing nations. Federal agencies should be restricted from cooperation with any pro-legalization groups, with the exception of legalization of otherwise illicit drugs for specific, FDA-approved or regulated medical purposes, such as morphine for pain. Federal encouragement for corporate anti-drug efforts should be expanded.

Other ideas worth revisiting are broader application, perhaps in Colombia, Bolivia, and Mexico, of the successful Peruvian "shoot down" policy, through which Peru has dissuaded many narco-traffickers.²²⁴

There are many untried and plainly bold ideas, some of which are worth rethinking. These are a few. The time is fast-approaching, however, when greater willingness to confront drug abuse

of Epidemiology and Prevention Research proposed that exploratory hair testing be adopted in the 1992 NHSDA, (5) several prominent laboratory and social science drug researchers have endorsed self-report validity testing using hair analysis, and (6) a Food and Drug Administration official saw no problem in conducting exploratory self-report validation research studies, as long as specific radioimmunoassay (RIA) hair kits were used and the information derived was not used for product marketing and clinical assessments." *Id.* at 59.

²²⁴ See, e.g., Elijah Gosier, *Drug War's More Than Photo Op.*, ST. PETERSBURG TIMES, June 27, 1994, at 1.

and narco-trafficking through novel approaches will be necessary.

7. One Closing Thought

Overall, this blueprint is only a starting point for the next President, the next Congress, and the next White House Drug Czar. A great deal more thought and detail will be required over the next decade (or longer) to actually turn back the rising tide of drug abuse and trafficking. Clearly, a crisis is upon us, and it is for our children that we must now sit up and take notice. As a matter of national policy, we must recognize both the gravity of the present crisis and the room that exists for optimism. We must together engage in re-designing our national strategy, and simultaneously improving implementation of that strategy. Like it or not, our nation's drug control policy is collapsing. We must now rebuild it, based on a sound blueprint, before our own indifference remakes the society in which we live. At the personal level, as well as at the national level, that responsibility belongs to all of us.

ARTICLE

“BUDGETIZED” HEALTH ENTITLEMENTS AND THE FISCAL CONSTITUTION IN CONGRESS’S 1995-1996 BUDGET BATTLE

CHARLES TIEFER*

Congress initially established health care entitlements outside of the appropriations process, shielding them from annual budget battles. While this non-integrated model of entitlements helped protect the rights of the sick and the elderly, it also contributed significantly to a soaring deficit. Congress now realizes that it cannot afford to allow health care entitlements to remain isolated from the rest of the budget process. In this Article, Professor Tiefer uses the 1995-1996 budget battle to explore the means by which future Congresses may integrate health care entitlements into the budget process and the future effects that the budgetization of health care entitlements will have on individual security.

The dramatic budget battle waged by Congress and President Clinton in 1995-1996 mixed publicly understandable political clashes and public appeals with an arcane, esoteric evolution in the theory of entitlements and the budget.¹ An early model of entitlements, which extended from the New Deal’s Social Security laws to Medicare and Medicaid, has evolved into the national cornerstone both of individual financial and health security and of the government’s “fiscal constitution.”² As medical

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¹ For the evolution of the budget process apart from entitlements change, see Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429 (1992); James A. Miller & James D. Range, *Reconciling an Irreconcilable Budget: The New Politics of the Fiscal Process*, 20 HARV. J. ON LEGIS. 4 (1983).

² The fiscal constitution is the legal structure that governs all official activity relating to the fiscal processes of spending, borrowing, and taxing. It consists of constitutional provisions (such as the Appropriations Clause) authorizing these fiscal processes, these provisions’ implementing statutes, and the internal procedures and precedents for these fiscal processes. These statutes and procedures range from the original 1791 law chartering the Treasury Department to the ever-evolving congressional processes for the consideration of budgets, appropriations, taxes, and reconciliation bills. For varied uses of the concept of the fiscal constitution, see Kenneth Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977); Wm. Bradford Middlekauff, *Twisting the President’s Arm: The Impoundment Control Act as a Tool for Enforcing the Principle*

care costs exploded with inflation in recent decades and health care expenditures (government and private payments) for the average household reached \$8,000 in 1992,³ health entitlements became a form of “new property”⁴ essential to personal security.

The traditional entitlement form, however, only provided individual security by not being integrated into the annual congressional appropriations process.⁵ Growing Medicare and Medicaid outlays, which account for almost \$400 billion in the fiscal year (FY) 1996 budget, have not only expanded a federal budget already in deficit but will continue to grow uncontrollably.⁶ The original model of these legislated entitlements neither established spending limits nor forced any trade-offs with other government spending or taxes. This fiscally non-integrated model of entitlements conjoined with President Reagan’s massive 1981 cuts in upper income taxes to produce a decade and a half of high deficits. Meanwhile, already established demographic trends of a growing aging population, and a retiring “Baby Boom” thereafter, portend a zooming future draw upon these uncontrolled entitlements. In sum, the isolation of the original entitlements from the political adjustments of the appropriations process has protected individual rights in the short term but has left these entitlements without a firm basis in the long term. Somehow, the future fiscal constitution must integrate entitled groups, like the elderly, as claimants in the annual struggle over increasingly limited government dollars.

of Appropriation Expenditure, 100 YALE L.J. 209 (1990); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1363–64 (1988); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 643 (1988) [hereinafter *Rewriting the Fiscal Constitution*].

³ C. EUGENE STEUERLE & JON M. BAKIJA, *RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM* 245, 252 n.14 (1994).

⁴ “New property” consists of government grants of benefits (such as unemployment compensation), typically governed by statute and regulation, which are analogous to government grants of land or other “old property,” typically governed by common-law rules. See Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). See *infra* text accompanying notes 20–21.

⁵ For an introduction to the fiscal integration of entitlements, see AARON WILDAVSKY, *THE NEW POLITICS OF THE BUDGETARY PROCESS* 273–74 (2d ed. 1992); HOUSE COMM. ON THE BUDGET, 100TH CONG., 1ST SESS., *THE WHOLE AND THE PARTS: PIECEMEAL AND INTEGRATED APPROACHES TO CONGRESSIONAL BUDGETING* (Comm. Print 1987) (report prepared by Allen Schick).

⁶ For an introduction to the problems of Medicare, Medicaid, and the appropriations process, see *BALANCING RESPONSIBILITIES, PRIORITIES, AND DOLLARS* (Diane Rowland et al. eds., 1993); MARILYN MOON, *MEDICARE NOW AND IN THE FUTURE* (1993); STEUERLE & BAKIJA, *supra* note 3, at 235–52.

For decades, Congress attempted to augment the legislative machinery by an annual budget process to integrate spending and taxing in order to cope with deficit problems. The 1995-1996 budget battle brought this evolution to the crucial step of transforming the nature of entitlements into what will be described as "budgetized" entitlements—entitlements which are integrated, like appropriations, into the annual budget process. The lack of a comprehensive balanced budget deal on entitlements in 1995-1996 may suggest that any transformation will occur, at most, incrementally.⁷ Yet, regardless of when changes in entitlements occur or whether the changes are comprehensive or incremental, the 1995-1996 battle has marked out the future path for entitlements from isolation to integration. The budget proposals of 1995-1996 are prophetic examples of how the evolution of the fiscal constitution will reshape individual rights. This transformation has profound implications because of the enormous importance of legislated entitlements, compounded by the fact that the transformation has received little study.⁸

The transformation of entitlements legislation will create an entirely new body of law, but to what end? "Budgetizing" entitlements will produce a majoritarian democratic annual balancing of individual security for particular groups. At best, the legislative machinery's trade-offs will implement some more efficient and humane policies in health care payment and delivery systems instead of making inevitably necessary savings by the crude reduction of benefits. At worst, the "budgetized" model

⁷ Congress did eventually pass an omnibus appropriation bill for fiscal year 1996 which the President signed on Apr 26, 1996. See Balanced Budget Loan Down Payment Act of April 26, 1996, Pub. L. No. 104-134, 142 Cong. Rec. D386 (daily ed. Apr. 29, 1996). See also Jerry Gray, *The Budget Truce: The Details*, N.Y. TIMES, Apr. 26, 1996, at A22. However, since the bill only concerned appropriations, and not entitlements or taxes, it had virtually none of the significance for entitlements that would have ensued from what had been attempted throughout 1995 as a comprehensive budget bill. When I refer to the 1995 budget bill throughout this Article, I am referring to the comprehensive budget bill which was never signed into law, and not the omnibus appropriation bill which was enacted by Congress and the President in April of 1996.

⁸ Scholars have articulated little legislative theory about entitlements over the years. In particular, they have ignored how the fiscal constitution actually directs individual rights and will redirect them in the future.

As former Solicitor of the House of Representatives, I have taken part in years of separation of powers disputes over fiscal legislation. See, e.g., *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989) (vacating ruling striking down as unconstitutional a limitation in an appropriations bill), *on remand*, 732 F. Supp. 13 (D.D.C. 1990). I have drawn on such experience for a description of the congressional budget and appropriation processes. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 848-919, 921-1010 (1989).

may impose crude reductions in the form of denials of basic health services, specifically for those with the weakest political representation.

Legal understanding of the entitlements transformation requires tracing entitlements from their legislative sources of stability. Part I of this Article analyzes how the fiscal constitution developed the original model of entitlements legislation with no spending limits or suggestions for budget trade-offs. This Part applies relevant analytic theories from constitutional law, public choice theory, and positive political theory to entitlement legislation. It focuses upon the largely unarticulated role of congressional procedure which pits appropriations claimants—like defense and domestic spending—against each other but has left entitlements in protected isolation.

Part II discusses the evolution of the budget process for entitlements and the significance of the stages of the 1995-1996 battle. This Part describes and analyzes the new legislative machinery for changing entitlements. It then discusses how this new machinery has affected committee and floor processes in 1995-1996, the Senate supermajority requirements for ending debate and constraining amendment, and presidential-congressional interactions. Such spectacles as the veto bargaining and the presidential-congressional summitry receive a grounding in the fiscal constitution's evolution.

Part III then analyzes the new model of "budgetized" entitlements and its future effects on individual security and on the fairness of the distribution of benefits. This Part further studies the change in health entitlement legislation from an original model of rights operating in fiscal isolation to a "budgetized" model of forced savings mechanisms and annual legislative bargaining. Given the firm demographic projections that an aging population will keep health entitlement costs rising to unsustainable levels, the 1995 comprehensive budget bill offers a fascinating, if frightening, look into Congress's view of health care entitlements as America enters the twenty-first century. The new "budgetized" system may push three enormous and expensive claimant groups into the annual struggle for the government's limited funds: the "managed care elderly," the "fee for service" elderly, and the impoverished on Medicaid. Part III goes on to discuss specific developments that may help alleviate this struggle.

Finally, a short conclusion sums up the transformation of Medicare and Medicaid from "traditional" entitlements, protected against the annual appropriations process, into "budgetized" entitlements.

I. ENTITLEMENTS LEGISLATION AND APPLICABLE ANALYTIC THEORIES

A. *Entitlements Legislation*

Prior to the New Deal, government expenditures consisted almost solely of annual appropriations—a form of spending adjusted each year. The Constitution embodied the Framers' understanding that limited-time appropriations, by requiring perennial renewal, subjected spending to close congressional control.⁹ Numerous constitutional provisions, such as the Appropriations Clause and the Origination Clause, similarly embodied the original understandings that democratic decision making should fit particular congressional procedures on fiscal legislation. Confirming these expectations, Congress could and did react readily in the 1800s and 1900s to coordinate spending with changing conditions, such as by rapid adaptation in military spending during swings from peacetime to wartime. The fiscal constitution's elaboration further effectuated this fiscally integrated appropriation system.¹⁰ Today, appropriations go through a process of annual enactments, reviews, and reshapings, which pit appropriation claimants against each other and against taxpayers.¹¹

⁹ Art. I, sec. 8, cl. 12, gives Congress the power "[t]o Raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." The "Raise and Support Clause" shows a sophisticated awareness of how limited-term appropriations foster congressional control, in this instance, over a standing army. See WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 29, 192 n.19 (1994), citing Bernard Donahoe & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788*, 33 REV. POL. 202 (1971); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1187-88 (Carolina Academic Press 1987) (1833).

¹⁰ Fiscal integration is the concept that fiscal decisions, such as how much to spend on any particular project, should occur in coordination with other related fiscal decisions, such as how much to spend on alternative projects or how much to raise or lower taxes in light of these spending decisions. See note 5, *supra*. Regarding the fiscal constitution generally, see, e.g., Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 70-74 (1983); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419 (1994); and the sources cited in note 2, *supra*.

¹¹ For a discussion of the annual appropriations process, see Louis Fisher, *The*

In contrast to appropriations, entitlements legislation does not expire at the end of a fiscal year. Hence, entitlements are not annually reviewed by Congress as part of the appropriations process. Rather, standing provisions in the United States Code determine an entitlement program's eligibility criteria and benefit levels, which remain permanently effective until the enactment of a new statute for repeal or modification.

The modern era¹² of entitlements legislation began with enactment of the Social Security Act of 1935 and its major amendments in 1939, as a system of "social insurance" income security.¹³ From its inception through its many statutory adjustments, Congress attempted to bolster support for Social Security by justifying it as a social insurance program providing personal security with fiscal restraint in a manner analogous to privately purchased retirement annuities. Congress distinguished Social Security from appropriated charity by having the eligibility requirements include long-term employment and by utilizing a system of employer and employee "contributions." Congress further differentiated Social Security from appropriated charity by having the benefit levels reflect the individual's contribution history and by using dedicated "independent payroll financing" (financing by payroll taxes rather than by general revenues) paid into "trust funds." This ideological basis of fiscal isolation protected the system from congressional alteration when political majorities shifted after the New Deal.¹⁴

Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 CATH. U. L. REV. 51 (1979); TIEFER, *supra* note 8, at 848-919, 921-1010.

¹²Historically, entitlement spending dates back to 1776, when the Continental Congress established the first pension program for disabled veterans. In August 1776, the first national military pension law formally set benefits for disabled soldiers: half-pay for life or for as long as they were disabled. Before the 1930s, Congress had previously established, as entitlements, federal retirement for civilian and military employees and veterans' benefits. George Hager, *Entitlements: The Untouchable May Become Unavoidable*, 51 CONG. Q. WKLY. REP. 22, 24-25 (1993).

¹³The acts created the Old Age and Survivors program and also established the unemployment compensation system. For Social Security, see Title II of the Social Security Act, 49 Stat. 622 (1935) (principally codified at 42 U.S.C. §§ 401-433 (1994)).

¹⁴It is largely for ideological reasons that Social Security survived intact the transition from the "friendly" Democratic Presidents and Congresses of the 1930s and 1940s to the new Republican President and significantly hostile Republican Congress in 1953. At that time, when the portion of the elderly population receiving Social Security benefits was small, it would not have affected a large group to replace it with the Republican proposal for an expanded old age public assistance program. However, public support for Social Security's ideology rather than its then still-narrow base of pure beneficiary self-interest kept Social Security intact. Robert M. Ball, *The Original Understanding on Social Security: Implications for Later Developments*, in SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS 21, 31 n.40 (Jerry L. Mashaw & Theodore

Congress also established public income assistance programs for particular groups in poverty, such as Aid to Families with Dependent Children (AFDC) in 1935, and various programs for old age assistance and assistance for the blind or disabled, which in 1972 united and expanded to become the Supplementary Security Income (SSI) program.¹⁵ The public assistance entitlements depended on a different ideological basis of public support than the social insurance entitlements; Congress based public assistance entitlements on the worthiness of the impoverished blind, disabled, elderly, and children with single parents for receiving assistance. Similar to the social insurance entitlements, Congress protected the public assistance entitlements from the annual appropriations process by basing the model of benefits on permanent legislation, not appropriations.

When Congress created health security programs in 1965, its linking of Medicare, the program of health care for the elderly, to Social Security helped spread the social insurance umbrella over Medicare as well.¹⁶ Medicare had two parts. Part A was hospital insurance covering hospital care, which Congress paid through employee and employer contributions to a trust fund. Part B was supplemental medical insurance covering doctor care, which Congress paid through a mix of beneficiary premiums and general taxpayer revenues. Congress also enacted Medicaid, a federal-state program of health care for the poor, as an entitlement analogous to the public assistance entitlements.¹⁷ At the time of enactment, Congress did not foresee that Medicare and Medicaid would be particularly costly. It established these entitlements, like Social Security, outside the fiscal coordination of the annual appropriations process. Moreover, it established them on a rights-oriented basis.¹⁸

R. Marmor eds., 1988); MARTHA DERTHICK, POLICYMAKING FOR SOCIAL SECURITY 154-56 (1979).

¹⁵For AFDC in its current form, see Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821, 877-898 (1968) (codified generally at 42 U.S.C. §§ 601-617 (1994)). For the enactment of the SSI program, see Supplemental Security Income for the Aged, Blind and Disabled Act, Pub. L. No. 92-603, 86 Stat. 1465 (1972) (codified as amended at 42 U.S.C. §§ 1381-1383d (1994)).

¹⁶Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified as amended at 42 U.S.C. § 1395 (1994)). For reasoning behind the establishment of Medicare, see *infra* text accompanying note 128.

¹⁷Grants to States for Medical Assistance Programs Act, Pub. L. No. 89-97, 79 Stat. 343 (1965) (codified as amended at 42 U.S.C. § 1396 (1994)). For the establishment of Medicaid, see *infra* text accompanying note 129.

¹⁸See *infra* text accompanying note 129.

The high inflation of the late 1970s and early 1980s fueled both cost of living allowance (COLA)-driven increases in income entitlements¹⁹ and also a particularly explosive rise in the cost of medical entitlements. This was in mid-swing when President Reagan came to office in 1981, eager to cut taxes for persons in top income tax brackets and for corporations. To help pay for those cuts, President Reagan used the 1981 budget process to push omnibus legislation cutting spending for the poor. These cuts targeted appropriated programs, but also curbed the Medicaid entitlement and even trimmed Social Security. In 1981–1982, President Reagan’s initial backing of another round of Social Security cuts proved politically disastrous. Because the 1981 savings did not match the cost of the Reagan tax cuts and defense buildup, the budget fell into a deep, long-term imbalance. The budget process simply had not forced trade-offs between the increasing cost of entitlements and the conservative political drive to cut upper-income taxes. Moreover, even though inflation gradually decreased, the costs of health care entitlements climbed in the 1980s and early 1990s. Meanwhile, budget projections of the mid-1990s began factoring in the enormous rise in health care costs to come from the demographic shifts to an aging population.

Ultimately, the fiscal constitution will have to deal with these phenomena. Congress must coordinate the level of spending on health care entitlements with the provision of funding from either dedicated financing or general revenues. The 1995-1996 budget battle signified how Congress may do this, namely, by “budgetizing” entitlements and enhancing the processes for integrating entitlements into the annual budget process.

B. Public Choice and Positive Political Theory Applied to Entitlements

Broader theories of legislation shed light on the changing treatment of entitlements by the fiscal constitution, in particular the desire to protect beneficiaries against cuts from shifting political majorities. The Constitution has been used to protect persons possessing something akin to property rights. In 1964 and

¹⁹ An exception is AFDC, which, lacking a COLA, does not provide beneficiaries with minimum protection comparable to Social Security and SSI.

1965, Professor Charles A. Reich coined the phrase "new property"²⁰ to describe a change from viewing entitlement benefits as "privileges" or "gratuities" to perceiving them as a type of property interest. Reich argued for constitutional protection of entitlement beneficiaries, at least against administrative arbitrariness.²¹ In 1970, the Supreme Court adopted a considerable portion of this analysis in *Goldberg v. Kelly*,²² finding constitutional due process protections against administrative termination of AFDC benefits.

While the Due Process Clause protected entitlement beneficiaries against administrative actions, it did not give them protection against shifting majorities in Congress. In *Flemming v. Nestor*,²³ the Court's majority, over a vigorous dissent, refused to find a constitutional barrier to legislated withdrawal of social insurance entitlements, rejecting a theory which would "engraft upon the Social Security system a concept of 'accrued property rights.'"²⁴ *Flemming* did not end all substantive constitutional protection.²⁵ Yet, it meant that beneficiary protection against shifting majorities in the political fiscal struggle involved something other than ordinary constitutional analysis. The fiscal constitution required a different kind of analysis in this context.

Public choice analysis has augmented considerably the available tools for analyzing the protections available to entitlement beneficiaries. Public choice can be defined as "the economic study of nonmarket decision making, or simply the application of economics to political science."²⁶ One of the basic legislative

²⁰ See *supra* note 4.

²¹ He enlarged upon the arguments of others that "such rights as Social Security must be surrounded by substantial and procedural safeguards comparable to those enjoyed by traditional rights of property." Reich, *The New Property*, *supra* note 4, at 786 n.233 (internal quotation omitted).

²² 397 U.S. 254 (1970).

²³ 363 U.S. 603 (1960). Ephraim Nestor had paid into Social Security's insurance trust fund from 1936 to 1955, but Congress had enacted a law retroactively withdrawing retirement benefits from aliens deported for Communist Party membership, a fate that befell Nestor. Pursuant to the law, his wife's benefits were terminated, and she challenged the retroactive-withdrawal law. *Id.*

²⁴ *Id.* at 610.

²⁵ The Court revisited the nature of entitlement benefits in various contexts, such as successful challenges on gender classification grounds to benefit schedules that discriminated against insured women employees. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975). See Grace G. Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233 (1980); Judith O. Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573 (1987); Peter W. Martin, *Social Security Benefits for Spouses*, 63 CORNELL L. REV. 789 (1978).

²⁶ DENNIS C. MUELLER, PUBLIC CHOICE 1 (1979).

issues analyzed by public choice concerns the “durability” of legislation: whether or not—and why—as majorities shift in elections, legislatures repeal or change the work of prior legislatures. Interestingly, the analysis of “durability” makes the exalted law of the Constitution merely one aspect of a more general theory of legislation. As then-Professor, now Judge Richard Posner insightfully described, an enacting Congress has several ways of erecting procedural barriers to the change or repeal of some right. Enshrining the right as an amendment to the Constitution does not totally preclude congressional change, but it does raise the barriers to the level applicable to legislated constitutional change.²⁷ If Congress, with state ratification, places something in the Constitution, that provision can be repealed or changed, just as Prohibition was repealed by enacting and ratifying the Twenty-First Amendment.

As Posner elaborated, even if Congress only enacts a provision as a statute rather than as a constitutional provision, Congress can still surround the legislation with effective protection.²⁸ This line of reasoning makes the protection of entitlement beneficiaries a problem in public choice theory’s analysis of factors impeding legislative repeal. Public choice analysis of factors affecting legislative action can roughly be separated into two lines: interest group analysis, where the interesting interplay is with ideological justifications for legislation, and decision theory analysis, where the interesting interplay is with positive political theory of congressional procedure.

1. Interest Group Analysis: Protecting “Social Insurance” Entitlements

Interest group analysis begins with the premise that individuals normally do not participate in government enough to obtain benefits because of collective action and free rider problems. However, senior citizens have a sufficient personal stake and sufficiently high levels of voting and political participation (particularly at the higher income levels), which allow them to partially overcome these problems and oppose some kinds of financ-

²⁷ William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 892 (1975).

²⁸ *Id.* at 877-79. See Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 345-46 (1988).

ing changes in Social Security and Medicare.²⁹ A powerful illustration of the interest group clout of high-income Medicare beneficiaries occurred after Congress enacted a catastrophic health protection plan in 1988 based on charges proportional to affluence. While this was widely viewed as a sound way to pay for this expanded benefit, in a raw exercise of interest group pressure the aggrieved interest group forced enactment of a repeal of that new charge in 1989.³⁰ Besides the particular interest-group clout of high-income beneficiaries, the establishment of Social Security and Medicare as "social insurance" had contributed to popular ideological protection for their general eligibility and benefit criteria.

Neither of these factors gave invincible support to Medicaid, the poverty medical entitlement. As for interest group analysis, the poor simply lack political strength comparable to the affluent elderly,³¹ although Medicaid's nursing home benefits have greater interest group strength as they partially serve the middle class elderly facing the risk of impoverishing expenses of long-term care. Medicaid does have ideological protection similar to Medicare arising from the worthiness of medical assistance given at a time of need, even if it does not have the "social insurance" umbrella. Notably, Medicare's doctor care provision (Medicare Part B), like Medicaid, is predominantly funded from general tax revenues, not independently financed by social insurance contributions. In a central paradox affecting the legislated model of entitlements, medical insurance, as a distribution of in-kind benefits, strikes economists as much less efficient than distribution of cash. According to the economists' view, the poor and elderly, given the cash equivalent, would buy cheaper health care.³² However, medical insurance has more political support because of the greater "worthiness" of in-kind distribution of

²⁹ GORDON TULLOCK, *ECONOMICS OF INCOME REDISTRIBUTION* 119, 133 (1983).

³⁰ Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683, repealed by Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, 103 Stat. 1979 (1989). See MARILYN MOON, *MEDICARE NOW AND IN THE FUTURE* 107-37 (1993); Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 81 n.21 (1993).

³¹ More generally, "an interesting and important conclusion of public choice theory is that government wealth transfer programs tend to benefit upper middle class and upper class participants in the political process. The well-to-do, as a general rule, are better represented by lobbying organizations than are the poor." Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 108-09 (1990) (footnote omitted).

³² STEUERLE & BAKIJA, *supra* note 3, at 242-43.

health benefits to the elderly and the poor in time of need, like the worthiness of in-kind distribution of food stamps and child nutrition to the hungry.³³ These interest group and ideological considerations, quite clearly reflected in the 1995-1996 budget battle, will figure prominently in the "budgetized" model of entitlements.

Interest-group and ideological analyses might explain some of the strength of health entitlements legislation. However, they fail to capture much of the basis for how those entitlements remained protected against heavier congressional cuts during the enormous rise in spending on health entitlements. Neither the elderly nor the poor are so politically powerful that they continually secure enactment of favorable legislation, or even annual confirmation of their existing benefits in direct competition with other programs. As the costs of the health care entitlements dramatically increased from the 1960s to the 1990s, the expansion of government payments for Medicare and Medicaid did not come from enactment of new legislation or renewed appropriations.

Even for Medicare Part B, greater changes would have occurred had the program been fully part of the intensifying struggle in the annual appropriations process. In fact, majority votes in Congress did approve significant, if special, types of Medicare and Medicaid cuts in the 1980s and 1990s. These occurred as Congress began creating the modern federal legislation of health care finance. Culminating these budget-driven cuts, the 1995-1996 budget battle powerfully dispelled the view that Medicare, let alone Medicaid, had so much electoral support as to preclude a voting majority for cuts on the floor of Congress. Quite the contrary, congressional majorities in 1995 voted for enacting large-scale cuts in both Medicare and Medicaid and for extraordinary revisions of the programs once it became procedurally possible to do so in a tax-cutting budget process.³⁴

2. Positive Political Theory of Congressional Procedure and Models of Entitlements Legislation

In recent years, public choice's decision theory side has led to keener appreciation of the significance of congressional proce-

³³For a discussion of cash versus in-kind benefits for elderly beneficiaries, see *id.* at 241-46.

³⁴See *infra* notes 78-81, 86 and accompanying text.

ture for shaping the law. This approach has built upon Arrow's Theorem, which shows, accepting certain assumptions, that a decision group like a legislature, whose members have complex political preferences, does not necessarily have a single outcome.³⁵ Depending on how Congress proceeds, it may come to any of a variety of majority preference expressions, or none at all. Critics of legislatures consider Arrowian problems so intractable as to doubt that legislation expresses a coherent legislative purpose and to brand the notion of legislative "intent" incoherent, irrelevant, or even a cover for deception.³⁶

Supporters of legislative coherence employ a variety of responses to these critics. One of the most interesting focuses on the institutional workings of Congress as both legitimate and significant.³⁷ Then-Judge, now Justice Breyer, himself a former Senate chief committee counsel, has developed some of the key arguments in an influential article on legislative history.³⁸ Breyer argues that "knowledge of the institutional workings, internal understandings, and societal role of Congress helps to determine Congress's purpose in enacting [statutes]."³⁹

A further development of this concept depends upon "positive political theory," the study of real political institutions rather than the shadow versions derivable from abstract economic assumptions; it looks at the positive dimension of how they work rather than the normative dimension of how they ought to work. Looking at how Congress actually orders and organizes its consideration of legislative proposals reveals that a change in the

³⁵KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46-60 (2d ed. 1963). See also DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 33-46 (1970) (proving Arrow's theorem). For discussions and implications, see, e.g., Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873, 902 (1987).

³⁶See Frank H. Easterbrook, *Statutes' Domain*, 50 *U. CHI. L. REV.* 533, 547-48 (1983). See also Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223 (1986); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 *DUKE L.J.* 948 (1986); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 *COLUM. L. REV.* 2121, 2124-2126 & n.22 (1990); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *HARV. L. REV.* 761, 774 (1987).

³⁷See generally Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 *VA. L. REV.* 561 (1977); Saul Levmore, *Parliamentary Law, Majority Decision Making, and the Voting Paradox*, 75 *VA. L. REV.* 971 (1989).

³⁸Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. CAL. L. REV.* 845 (1991).

³⁹*Id.* at 866.

fiscal constitution's integrative mechanisms inevitably reshapes the nature of entitlement rights and explains why 1995-1996 opened a window into the future.

Positive political theory remarks that Congress sifts all legislation through a series of "negative legislative checkpoints,"⁴⁰ also called "veto gates."⁴¹ For example, each chamber refers all bills to particular committees of jurisdiction, which sift the bills and allow most to languish and die except for the ones that the committees shape and report.⁴² This particular veto gate helps to start the comparison between appropriated programs and the original model of entitlements legislation.

As previously noted, the Framers established a system of appropriations recognizing that, because appropriations expire, Congress will have to enact them anew. In practice, this creates the modern annual struggle on the floor of Congress between appropriation claimants and taxpayers. Appropriation committees do not have the choice that other committees have of not reporting bills; if they fail to move on any one of their thirteen annual regular appropriation bills, the programs funded by that bill would become unfunded and shut down upon the expiration of the previous fiscal year. The budgetary impasse of late 1995 illustrated the elementary distinction between appropriated programs like the federal civilian workforce payroll system, which, during the two 1995 government-wide shutdowns, simply ceased to pay civil servants in the absence of new appropriations, and entitlements, which, like most taxes, do not require enactment of new bills to continue and which continued to pay during the 1995 shutdowns.

Appropriation committees cannot refuse to report appropriation bills and thus do not possess a veto gate to keep from the floor means for amendment of their appropriated programs. Hence, every year, the appropriations committee must furnish the shifting congressional majorities with a vehicle to work their will. However imperfectly, this means that contested appropriated programs like the breeder reactor cannot avoid annual tests on the

⁴⁰ Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 398, 408 (1992).

⁴¹ See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720-21 (1992).

⁴² Many discussions of congressional committees start with Woodrow Wilson's famous comment in 1885 that "Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work." WOODROW WILSON, CONGRESSIONAL GOVERNMENT 69 (1956 ed.).

floor of their majority support; these tests can occur, year after year, until some shift in the majority leads to the termination of the program.⁴³ Unprotected by Congress's procedural "durability" factors, domestic and defense appropriations face the raw shift of majorities and the unblunted interplay of interest group strength and ideological support.

In contrast, entitlements do not require annual legislative enactment; no bills need come to the floor to perpetuate the program. Thus, the committee of jurisdiction can bottle up reform bills, and a majority on the floor that would vote to reduce spending has no opportunity to act. This is how committee veto gates protect the durability of enacted entitlements and tax legislation.

Taking the committee system as the first veto gate, several others warrant brief mention. Another veto gate is the ability of Senators to filibuster a bill—debate it at length—absent the vote of a supermajority of sixty Senators to cut off the filibuster. Because proponents of appropriated programs have no choice but to move appropriation bills through, they cannot operate this veto gate against amendments to cut the funding of their program. However, as no annual bill need be passed to continue entitlements or most taxes, opponents of changes in those programs can use the filibuster veto gate to require a supermajority in order for any changes to be enacted.

A third veto gate is the one with which the term "veto" associates naturally, the President's veto. Again, this veto gate does not protect appropriated programs from shifts in majorities; it only forces a round of veto bargaining with the President. Conversely, this veto gate does protect the status quo on taxes and entitlements, since the President can veto bills to make changes—unless some automatic savings-forcing mechanism is operating. This veto gate and the absence of automatic savings-forcing mechanisms proved decisive factors in the 1995-1996 budget battle.⁴⁴

⁴³38 CONG. Q. ALMANAC 292-93 (1982).

⁴⁴See *infra* notes 115-120, 127-136, and accompanying text.

II. THE 1995-1996 BUDGET BATTLE

A. *The 1995-1996 Budget Battle in the Evolution of Budget Procedure*

The 1995-1996 budget battle both took place within, and concerned revision of, the system established by the Congressional Budget Act of 1974.⁴⁵ That act was the resolution of a seven-year budget war between the President and Congress from 1966 to 1973 over two ways that Congress, with its previously dominant appropriations process, had lost its control over federal spending. The first issue involved President Nixon's use of impoundments—unilateral presidential decisions—not to spend appropriated funds.⁴⁶ Apart from a brief revival in the late 1980s, the 1974 Act largely laid impoundments to rest.⁴⁷ However, a second important factor had already emerged: “uncontrolled” or “back door” spending, such as entitlements.⁴⁸ Accordingly, the act began the shift to a new role for entitlements in the budget process.⁴⁹

Institutionally, the key creation of the 1974 Act was the establishment of the Senate and House budget committees. Budget committees provided new arenas for proposing fiscal legislation and for discussing these bills. These committees became an institutional power base in Congress against deficits, and in the long term served to work against fiscal isolation of legislated entitlements and tax expenditures.⁵⁰ Over time, the budget committees' roles and powers grew along with changes in the budget process made by Congress, both informally by experimenting with new practices and formally by amending the Congressional

⁴⁵ Congressional Budget and Impoundment Control Act of 1974. Pub. L. No. 93-344 (1974).

⁴⁶ TIEFER, *supra* note 8, at 856 and sources cited therein.

⁴⁷ The Reagan Administration made a brief, unsuccessful effort to revive the use of policy deferrals in the 1980s following the invalidation of the legislative veto. *See City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987); *Defects in the Deferral Mechanism in the Impoundment Control Act: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 2d Sess. (1986); *Oversight on the Impoundment Control Process Hearings Before the Task Force on Enforcement, Credit, and Multiyear Budgeting of the House Comm. on the Budget*, 97th Cong., 2d Sess. (1982); Middlekauff, *supra* note 2.

⁴⁸ The other two kinds consisted of contract authority and borrowing authority. *See* Kate Stith, *Rewriting the Fiscal Constitution*, *supra* note 2, at 593, 606-07 (1988).

⁴⁹ *See* TIEFER, *supra* note 8, at 856-58 (discussing the enactment of the 1974 act), 908-09 & n.166 (explaining the point of order regarding new enactments).

⁵⁰ For the developing role of the budget committees, see *id.* at 858-59.

Budget Act.⁵¹ In the most recent rules change at the 1995 start of the 104th Congress, the House Budget Committee was given jurisdiction over changes to the Budget Act itself. This added jurisdiction allowed it to develop amendments to the Act on its own authority, and, in effect, gave the committee authority over this part of the fiscal constitution.⁵²

When the appropriations process dictated almost all spending, an annual process of fiscal integration could take place through the President's budget proposal and the ensuing annual consideration of appropriations. However, the Act recognized the need for an additional annual process that could integrate taxes and entitlements.⁵³ That budget process commences after the President's proposal in January. During the spring, the House and Senate budget committees report on their proposed annual budget resolution. This resolution, typically passed in the spring or summer, serves as the blueprint for congressional budget action for the remainder of the year.⁵⁴ Because this is a concurrent resolution, it does not go to the President for signature or veto.⁵⁵

An additional part of the process, important in budget battles since 1980 and crucial in 1995, is the procedure of "reconciliation." For reconciliation, the budget resolution forces the creation of an omnibus "reconciliation bill" that incorporates Congress's savings and revenue increases which are either proposed by or negotiated with the President. Ultimately, this bill often becomes popularly known (as in 1995-1996) as the budget bill.⁵⁶ Budget "deals" between Congress and the administration over budget bills, featuring budget summitry and veto bargaining, have led to the passage of major budget bills in 1982, 1984, 1987, 1990, and 1993.⁵⁷

⁵¹ *Id.*

⁵² H.R. Res. 6, 104th Cong., 1st Sess., § 202 (1995); 141 CONG. REC. H26 (daily ed. Jan. 4, 1995) (amending clause 1(d) of House Rule X). For a discussion of the rules change and the accompanying statements of understanding, see ROBERT KEITH, CONGRESSIONAL RESEARCH SERVICE, BUDGET PROCESS CHANGES MADE IN THE RULES OF THE HOUSE IN JANUARY 1995 (H.R. RES. 6) 9-12 (1995).

⁵³ TIEFER, *supra* note 8, at 856-58.

⁵⁴ *Id.* at 873-83.

⁵⁵ Congressional Budget Act of 1974, Pub. L. No. 93-344, § 301, 88 Stat. 297, 306-08 (codified as amended at 2 U.S.C. § 632 (1994)).

⁵⁶ TIEFER, *supra* note 8, at 884-900 (discussing reconciliation bills).

⁵⁷ 1993 CONG. Q. ALMANAC 116-17. For descriptions of this period, see CONGRESSIONAL BUDGETING: POLITICS, PROCESS, AND POWER (W. Thomas Wander et al. eds., 1984); RUDOLF G. PENNER & ALAN J. ABRAMSON, BROKEN PURSE STRINGS: CONGRESSIONAL BUDGETING, 1974-88 (1988).

The last key components of the budget system are savings-forcing mechanisms. In 1985, Congress responded to rising deficits by enacting the Gramm-Rudman-Hollings ("GRH") Act,⁵⁸ which it amended after the 1987 Supreme Court decision of *Bowsher v. Synar*.⁵⁹ Among other budget changes, the GRH Act created an automatic procedure for enforcing its annual ceilings for the deficit by directing the Executive Branch to "sequester" enough spending to avert a breach of the deficit ceiling.⁶⁰ Unlike reconciliation bills, which mixed revenue changes and spending cuts, "sequestration" only cut spending, although it largely exempted entitlements from sequestration. Thus, the GRH Act hardly increased fiscal integration at all: it continued to treat appropriations as the problem, not the fiscally isolated entitlements and taxes.⁶¹

The latest budget battles have illustrated this budget process. In 1990, President Bush and Congress struck a long-term deal, enacted as a reconciliation bill, after a drawn-out budget summit and floor fights following the President's dropping of his pledge against new taxes.⁶² In 1993, President Clinton signed, as a reconciliation bill, the largest deficit reduction program ever.⁶³

These latest battles have prefigured 1995 developments. To obtain party support for enactment of the 1993 program, House Democratic budget hawks required President Clinton and Congress to subscribe to a version of savings-encouraging mechanisms.⁶⁴ Senate Democratic budget hawks also insisted upon the

⁵⁸ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 as amended by Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (codified as amended at 2 U.S.C. §§ 901-908 (1994)).

⁵⁹ 478 U.S. 714 (1986). In *Bowsher*, the Court ruled that the 1985 version was unconstitutional because it gave the Comptroller General, an official subject to removal by an Act of Congress, a role in the budget process. The 1987 amendment removed the Comptroller General's unconstitutional role. It also made a number of other changes, such as listing additional programs exempted from sequestration cuts. For simplicity, the description here is solely of the statute as amended in 1987. *Id.*

⁶⁰ For a description of the expenditure ceiling, see Stith, *Rewriting the Fiscal Constitution*, *supra* note 2, at 627-30; for the sequestration rules, see *id.* at 630-33.

⁶¹ Stith, *Rewriting the Fiscal Constitution*, *supra* note 2, at 654-59.

⁶² Joyce & Reischauer, *supra* note 1.

⁶³ The 1993 program included a tax increase, primarily in the top bracket of the personal income tax, and appropriation cuts. However, it also included an affluence-related step, namely, the taxing of Social Security benefits for recipients above a certain threshold, and it further developed federal health care finance law. See 1993 CONG. Q. ALMANAC 107-08.

⁶⁴ These new procedures were originally proposed as the "Budget Control Act of 1993," and when the Senate balked, they were instead promulgated by Executive Order, see Exec. Order No. 12,857, 58 Fed. Reg. 42,181 (1993), and House rule change, see

creation of a commission, the "Kerrey Commission," which, in 1993-1994, reviewed and ultimately supported entitlement cuts. The commission's reports urging and analyzing entitlement cuts in late 1994 and January 1995 were released in time to influence the new Congress.⁶⁵

B. Stages of the 1995-1996 Budget Battle

In the 1995-1996 battle, the comprehensive budget bill went remarkably far through the lawmaking process, even though it failed to become law.⁶⁶ As the demographic and health cost trends of the near- and medium- term resurrect the issue of health care entitlement finance with ineluctable urgency in coming years, Congress will inevitably have to enact measures to integrate health care finance into the budget in order to reconcile the scale of costs and the available revenues.

The distance traveled by the 1995 comprehensive budget bill presages the shadow it will cast in years to come in two inter-related ways. First, it illustrates how far congressional procedures have already moved away from their earlier role of protecting entitlements toward facilitating substantial changes in entitlement programs. Second, 1995-1996 shows the political power of a host of complex proposals for integrating entitlements with the budget that, although not enacted this time, can achieve passage in an altered and compromised form. Although the President's veto of the comprehensive budget bill and the unsuccessful bargaining that followed it prevented the 1995 comprehensive budget bill from becoming law, the presidential-congressional bargaining process contains fresh new lessons about both the character of budget bills that will likely become law in the future and the procedures that will be used to enact these

H.R. Res. 235, 103d Cong., 1st Sess. (1993) (enacted). Henceforth, the President had to keep track of how entitlement spending compared with projections in the previous budget resolution. If spending exceeded projections, he had to propose legislation to cover the excess, such as through spending cuts or revenue increases. These then received fast-track consideration in Congress.

⁶⁵BIPARTISAN COMMISSION ON ENTITLEMENT AND TAX REFORM, FINAL REPORT TO THE PRESIDENT (Jan. 1995); BIPARTISAN COMMISSION ON ENTITLEMENT AND TAX REFORM, STAFF REPORT ON ENTITLEMENT REFORM OPTIONS (Dec. 1994) [hereinafter "Kerrey Commission Staff Report"].

⁶⁶The comprehensive budget bill traveled through the adoption of a budget resolution, out of committee to passage in both the House and the Senate, through conference to President Clinton's desk, and then, following his veto, through presidential-congressional summitry of epic proportions.

future budgets. The 1995-1996 budget battle, by exemplifying both the procedures for enacting changes in entitlements and the substantive content of the proposed changes, provides great insight into the coming budgetizing of entitlements.

1. Budget Resolution and House Passage of the Comprehensive Budget Bill

The start of Congress in 1995 found a new majority party in both the House and the Senate, with a correspondingly new budget program. Congress set out in the late spring of 1995 to follow the same budget process used to construct the major budget packages in 1981 and 1993, although this time, the government was politically divided between the Republican congressional majority and the Democratic President.⁶⁷

In May and June 1995, as in 1981 and 1993, Congress began with House and Senate adoption of an initial budget resolution giving expression to its overall spending and revenue goals.⁶⁸ As a concurrent resolution not signed by or submitted to the President, the budget resolution does not have the force of law outside of Congress. However, it has both procedural force in directing Congress's internal action and political force as the majority that votes for it commits itself politically to the agreed-upon trade-offs in spending and revenue. In budget procedure terms, the resolution built on prior statutes by extending the previous system of five-year deficit reduction goals to include a seven-year goal to enact a complete budget plan.⁶⁹ Its adoption marked the first climax in the struggle among fiscal claimants.

Following the precedent established over the last twenty-one years, the 1995 adoption of a budget resolution proceeded on a party-line basis. This precedent was quite different from legislative approaches to entitlements in the era before the budget

⁶⁷In 1981, when the President and the Senate were Republican, the House of Representatives had a nominal majority that was Democratic, but on the budget package, the operative majority was Republican.

⁶⁸H.R. Con. Res. 67, 104th Cong., 1st Sess. (1995) (enacted). The resolution was passed largely on party-line voting.

⁶⁹H.R. REP. NO. 120, 94th Cong., 1st Sess. 136 (1995); TIEFER, *supra* note 8, at 863-71 (detailing the procedure for adoption of a budget resolution). The procedures for adoption of the budget resolution, including the equivalent of cloture in the Senate, are found in Congressional Budget Act of 1974, Pub. L. No. 93-344, § 305, 88 Stat. 297, 310-12 (codified as amended at 2 U.S.C. § 636. (1994)).

process was developed.⁷⁰ Before 1974, the growth of social insurance entitlements after the New Deal took place with some masking of party differences.⁷¹ Yet political scientists from the 1940s to the 1970s unsuccessfully urged politicians to follow the "responsible party" theory: democracy would work better if electorate majorities could hold parties with clearly distinguished positions on central issues responsible at the polls.⁷² One of the central issues on which parties could distinguish themselves was fiscal proposals.

Starting in 1974, budget bills began to fulfill these notions of sharp party differences, particularly in the House.⁷³ Pushing this trend even further, in 1995 the Republican majority devised its budget plan through closed-door intra-party bargaining. Most remarkably, for Medicaid, the Republicans utilized a closed-door regional bargaining process in the Republican Governors Association.⁷⁴ The congressional majority and minority were polarized on the budget issue, with the Republicans developing a fixed determination to enact a large tax cut—even though this would be counter-productive to their goals of fiscal integration and deficit reduction. Ultimately, this party-line behavior would become a major stumbling block for the development of a comprehensive compromise with the President.

As laid out in the reports of the budget committees, the majority party envisaged an immediate tax cut and a seven-year

⁷⁰H.R. Con. Res. 67, 104th Cong., 1st Sess. (1995). See also H.R. CONF. REP. NO. 159, 104th Cong., 1st Sess. (1995) (conference report on budget resolution).

⁷¹MARTHA DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* (1979).

⁷²For a review of the literature, see Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1603–05 (1988). See, e.g., W. BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970); A. RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT* (1962).

⁷³During the 1980s, Congress did more of its legislative work in omnibus bills, particularly the omnibus budget reconciliation bills, with the formulation and enactment of budget bills by intra-party bargaining thus approximating a "responsible party" position. TIEFER, *supra* note 8, at 53; Alan Ehrenhalt, *Media, Power Shifts Dominate O'Neill's House*, 44 CONG. Q. WKLY. REP. 2131, 2136 (1986). For the rise of party-line voting in the House on budget enactments, see, e.g., ALAN SCHICK, *CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING* 235–56 (1980).

⁷⁴The 30-member Republican Governors Association worked on the Medicaid plan for nine months, coming to a conclusion on September 19 that would become the Republican committee-level Medicaid proposal on September 20. Colette Fraley, *Republicans are Standing Firm on Giving Medicaid to States*, 53 CONG. Q. WKLY. REP. 2901 (1995); Judith Havemann & Amy Goldstein, *GOP Moves to End Medicaid Entitlement*, WASH. POST, Sept. 20, 1995, at A1, A4.

path to a balanced budget,⁷⁵ paid for by savings primarily from health insurance entitlements. Pursuant to the reconciliation procedure,⁷⁶ the budget resolution contained provisions, known as "reconciliation instructions," directing committees to report proposed changes in legislation in order to implement those savings.⁷⁷ The proposed changes in law generated by these instructions would be packaged by the budget committees into the "budget bill." The 1995 budget resolution had reconciliation instructions for \$632 billion in savings over seven years, with over \$530 billion coming from the Senate Finance Committee with its Medicare and Medicaid jurisdiction.⁷⁸

For the first time, proposals for massive cuts in entitlements received approval from a congressional majority. This majority had not bound itself in the budget resolution regarding how specifically to make those savings, although the budget committees provided some indication of the majority's views. For Medicare, the main cuts would come from provider (e.g., hospital and doctor) payment cuts, managed care, Medicare Part B premium increases, and one modest affluence-testing step: requiring the wealthiest beneficiaries of Medicare Part B to pay full premiums.⁷⁹ Like previous steps toward affluence-testing of entitlements, this avoided a head-on clash with the core ideological support for the social insurance principle. The doctor care of Medicare Part B, unlike the "social insurance" of Social Security and Medicare Part A, is paid for with a combination of individual premiums and general revenues, not independent payroll financing,⁸⁰ so adjusting the premiums to fit the affluence of high-income beneficiaries does not directly clash with the social insurance principle. For Medicaid, the budget proposal anticipated vast

⁷⁵H.R. REP. No. 120, 104th Cong., 1st Sess., at 136 (1995) [hereinafter "House Budget Report"].

⁷⁶For overviews of reconciliation, see HOUSE COMM. ON THE BUDGET, 98TH CONG., 2D SESS., A REVIEW OF THE RECONCILIATION PROCESS (Comm. Print 1984); ALLEN SCHICK, RECONCILIATION AND THE CONGRESSIONAL BUDGET PROCESS (1981); TIEFER, *supra* note 8, at 884-908.

⁷⁷TIEFER, *supra* note 8, at 886-91 (discussing reconciliation instructions and their compliance mechanism).

⁷⁸H.R. CON. RES. 67, 104th Cong., 1st Sess. § 105(a) (1) (G) (1995); SENATE COMM. ON THE BUDGET, 104TH CONG., 1ST SESS., BALANCED BUDGET RECONCILIATION ACT OF 1995: COMMITTEE RECOMMENDATIONS AS SUBMITTED TO THE SENATE COMMITTEE ON THE BUDGET PURSUANT TO H.R. CON. RES. 67, 104-36 (Comm. Print 1995).

⁷⁹House Budget Report, *supra* note 75, at 92-94.

⁸⁰Independent payroll financing would be the kind of dedicated employer and employee payroll taxes that fund entitlements such as Social Security and Medicare Part A without having to tap into general revenues.

reductions in federal contributions accompanied by optimistically termed "block grants" that would allow the states "flexibility" in implementing innovative health-care programs.⁸¹

The rapid movement of a comprehensive budget bill through committees in late September 1995, pursuant to the budget resolution's reconciliation instruction, showed the significance of the budget process. Ordinarily, legislating involves committee consideration of bills at length in hearings and in amendment consideration ("mark-up") sessions, where committees test the bills and build their strength in anticipation of their reaching the floor. In the budget process, however, bills need not linger in committee, since it is the previous adoption of the budget resolution that forces proposals onto the floor. Over intense protests by the minority party that there was only one day of hearings and a rushed mark-up, the 1995 comprehensive budget bill components sped through committee on party-line votes.⁸²

Not only does the usual budget bill pass unblocked through the committee veto gates, but powerful procedural tools also push the bill through the veto gates ordinarily operative at later stages. Party leaderships and the budget committees have a decisive role in bringing budget bills onto the floor despite the ordinary veto gates limiting floor access. Moreover, procedures then limit and shape the floor consideration of alternatives.

For the original model of entitlements, these procedures have operated like veto gates to protect the entitlement. In the House, for instance, the germaneness rule⁸³ has allowed committees control over changes in entitlements. Once the committees shape the bills they report, germaneness then limits the extent of alternatives on the floor. Floor amendments are not germane if they propose "irrelevant" trade-offs, and the tight germaneness rule renders out of order much of what some would consider reshaping

⁸¹ House Budget Report, *supra* note 75, at 87–88. Other than repeated use of the term "block grants," the committee gave few specifics beyond the numbers of the necessary cuts. See Colette Fraley, *States Guard Their Borders as Medicaid Talks Begin*, 53 CONG. Q. WKLY. REP. 1637 (1995). Apparently, Congress anticipated that states would reduce eligibility benefits for those in poverty.

⁸² Judith Havemann, *House Panel Votes to End Medicaid*, WASH. POST, Sept. 23, 1995, at A1; Eric Pianin & Judith Havemann, *House Medicare Tussle Over Cuts Turns Real*, WASH. POST, Sept. 21, 1995, at A8.

⁸³ For public choice analysis of how the germaneness rule affects legislation, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 55 (1991); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1229 n.32 (1994). For a comprehensive discussion of germaneness in the House, see TIEFER, *supra* note 8, at 420–48.

ing.⁸⁴ Hence, so long as the committees with jurisdiction over entitlements like Medicare and Medicaid brought bills to the floor with a limited focus, amendments to reshape the programs were not in order.

“Budgetized” entitlements have quite a different interplay with those floor-controlling procedures. They operate in Arrovian terms to effectuate the particular savings preferences of the majority party. They allow a majority party—whether Democratic in 1993, or Republican in 1995—to maintain discipline and enact the product of its intra-party bargaining. Specifically, the budget procedure opens the veto gate of the Ways and Means Committee by adopting reconciliation instructions that force the committee to report entitlement changes. Then, the majority party limits floor consideration to a few alternatives by having the House adopt a resolution shaped by the majority party (known as a modified closed rule), specifying that no amendments other than a few alternatives can be offered. Such a resolution preserves the majority party’s unified support of the budget bill; supporters can vote for the bill as a whole package, having only test votes which affirm their support for the comparatively attractive package. These procedures prevent the minority party from offering amendments that would disrupt majority party unity by forcing majority party members to vote, not for the package as a whole, but separately for its particular unpopular parts in isolation. Thus, cuts in Medicare and Medicaid and the changes in the Medicaid funding formula loading the heaviest impact of the cuts upon particular regions were protected against separate amendment. In 1995, House floor consideration of the comprehensive budget bill started on October 25, consisted of votes on two minority party substitute amendments, and with their defeat, ended the next day with a final vote to approve the majority party version.⁸⁵

⁸⁴ See TIEFER, *supra* note 8, at 433.

⁸⁵ For the use of these procedures in 1995 and how they allowed the House majority leadership to pass its comprehensive budget bill, see Colette Fraley, *Leaders Tweak Medicaid Plan to Keep Votes in Line*, 53 CONG. Q. WKLY. REP. 3309 (1995) [hereinafter *Leaders Tweak Medicaid Plan*]; George Hager, *In the House, GOP Leadership Scores Comfortable Win*, 53 CONG. Q. WKLY. REP. 3287 (1995). For fuller background on how these procedures facilitate passage of House budget bills, including budget bills of the past containing entitlement cuts such as the 1981 bill, see STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE 50–52, 55–57* (1989); TIEFER, *supra* note 8, at 895–97.

This process trumpeted the changed nature of entitlements legislating in the House. Some of the veto gates protecting entitlements had come down. Provider payment cuts, managed care, and even a nominal version of affluence-testing could pass the House as part of a balanced-budget package. The House could, and did, effectuate majority-party trade-offs between spending on Medicare and Medicaid and other spending or tax changes. On the other hand, closed-door intra-party bargaining and immediate committee and House action, without time for deliberation or open consideration of alternatives, took a toll. In the House bill, the heaviest health care cuts came from services for the impoverished beneficiaries of Medicaid; the lightest savings came from affluence-testing.⁸⁶

Moreover, the House changes in Medicaid went beyond savings to alterations of programs on ideological grounds. To please the state gubernatorial proponents of the Medicaid proposal, the House enacted an explicit provision declaring that Medicaid was no longer an entitlement, even though this provision did not make any federal savings. Furthermore, the regional distribution formula devised by the Republican Governors and enacted by the House discriminated in favor of the regions with the heaviest Republican representation and thus against the Northeast.⁸⁷ The bill did not ameliorate its impact on beneficiary eligibility by a set-aside to protect the disabled⁸⁸ and only had weak set-asides for vulnerable categories such as pregnant women and children.⁸⁹ The shifts to managed care for both Medicare and Medicaid came without enhanced safeguards for individual access and quality assurance.⁹⁰

⁸⁶Eric Pianin & John E. Yang, *House Passes Medicare Reform Bill*, WASH. POST, Oct. 20, 1995, at A1, A4.

⁸⁷Of the 30 Republican Governors in the Republican Governors' Association, five, including Governor George Pataki of New York, dissented from the formula. Colette Fraley, *Republicans Are Standing Firm on Giving Medicaid to States*, 53 CONG. Q. WKLY. REP. 2901 (1995). In the Senate, Senator Alphonse M. D'Amato (R-N.Y.) led the effort to change the formula. Colette Fraley, *GOP Plows Ahead on Medicaid With Small Concessions*, 53 CONG. Q. WKLY. REP. 3002 (1995).

⁸⁸H.R. REP. NO. 280, 104th Cong., 1st Sess. Vol. II at 160 (1995) (§ 2115 provides that Medicaid would not be an entitlement).

⁸⁹*Id.* at 156 (§ 2112 provides weak set-asides for vulnerable categories).

⁹⁰*Id.* at 155 (§ 2111 provides weak Medicaid protections).

2. Senate Passage: Moderates' Influence and the Byrd Rule

Senate and conference passage of the 1995 comprehensive budget bill illustrated different kinds of procedural influences on the budgetized entitlements than in the case of House passage. Ordinarily, bills on the Senate floor can be filibustered and are wide open to amendment because the Senate has no general germaneness rule.⁹¹ Thus, ordinarily the Senate floor becomes an open arena for a major bill to face debate and amendments, unless proponents have a supermajority of sixty Senators willing to vote for cloture. The 1974 Budget Act, however, gives budget bills the equivalent of cloture without any supermajority requirement, which again works in Arrovian terms to implement the majority party preference.

On an historic occasion, Senator Robert Byrd (D-W. Va.), who had written the procedural rules in the 1974 Budget Act, protested on the Senate floor about how the expediting procedure was operating.⁹² Senator Byrd contrasted the Senate's traditional month-long debates on vital legislation with what was taking place with the comprehensive budget bill. There were "no hearings on . . . the whole bill, 1,949 pages."⁹³ Since "the limit [on debate time was] 20 hours," the Senate was "about to cast the 35th roll call vote to occur in one calendar day—a new record," with the result that Senators were "down to the point now where [they had] only 30 seconds to the side for debate on an amendment."⁹⁴ The bill manager, Senator Pete Domenici (R-N.M.), responded stating, "[I]f we did not have a reconciliation process, what we wanted to change would take 30 years."⁹⁵ Domenici thanked Byrd for helping to craft the very procedure that Byrd was complaining about, stating, "if you [Byrd] had not helped us put this kind of process together, we could never change the country."⁹⁶

⁹¹ For example, the Gramm-Rudman-Hollings Act, a comprehensive budget cutting statute discussed above, *supra* note 58 and accompanying text, came to the Senate floor as a non-germane amendment. TIEFER, *supra* note 8, at 861 (discussing the attachment of the Gramm-Rudman-Hollings Act as an amendment to the debt limit bill).

⁹² For a description of Senator Byrd's role in writing the 1974 act's procedures, see TIEFER, *supra* note 8, 857–58 & nn.24–25 and sources cited therein.

⁹³ 141 CONG. REC. S16,034 (daily ed. Oct. 27, 1995) (statement of Sen. Byrd).

⁹⁴ *Id.*

⁹⁵ 141 CONG. REC. S16,035 (daily ed. Oct. 27, 1995) (statement of Sen. Domenici).

⁹⁶ *Id.*

Two other procedural phenomena operated on the Senate to shape entitlements legislation: the moderates' influence and the "Byrd Rule." Positive political theorists have noted the crucial role of moderate legislators at key junctures in the enactment of controversial legislation, which gives them a disproportionate ability to shape legislation.⁹⁷ While this observation is not true throughout all legislative processes, it is particularly true of fiscal legislation at certain moments; when fiscal legislation brings its heavy load of unpopular savings to the point of narrowest support, managers have great difficulty holding onto the last marginal votes needed for passage.⁹⁸

In the 1995 battle, moderates had disproportionate influence in the Senate, where the majority party needed its independent-minded moderates for approval both in committee and on the floor. Senator William Cohen (R-Me.), who unbeknownst to Senate leaders was preparing to announce his retirement due to disgust with congressional processes in general, bargained with the reconciliation bill sponsors for a compromise restoration of the 1987 federal nursing-home safeguards for Medicaid, which the House had repealed.⁹⁹ Senator John Chafee (R-R.I.), another moderate, led an extensive effort to soften the ideological changes in Medicaid without preventing savings. When his amendments were passed, he had established a set-aside protection for the disabled, strengthened the set-aside protections for pregnant women and children, and established a set-aside for Medicaid to pay Medicare premiums for the elderly poor.¹⁰⁰

A second, subtle factor also showed the importance of the budget procedure. Senate Democrats invoked the "Byrd Rule,"

⁹⁷ See Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 19 (1994).

⁹⁸ In 1981, almost unnoticed at the time but preserving Medicaid for the following decades, moderates exacted as their price for preserving the bill a considerable softening of the ideological purity of President Reagan's proposals to "block grant" and cap Medicaid. See WILDAVSKY, *supra* note 5, at 320; Kenneth R. Wing, *The Impact of the Reagan-Era Politics on the Federal Medicaid Program*, 33 CATH. U. L. REV. 1, 49 (1983).

⁹⁹ See 141 CONG. REC. S16,039 (daily ed. Oct. 27, 1995) (remarks of Sen. Roth (R-Del.), Chairman, Senate Finance Committee). Cf. Fraley, *Leaders Tweak Medicaid Plan*, *supra* note 85, at 3309-10.

¹⁰⁰ H.R. CONF. REP. NO. 350, 104th Cong., 1st Sess., 1064-67, 1082-84 (1995) (providing for set-asides and nursing home protections); Colette Fraley, *Challenges from Chafee*, 53 CONG. Q. WKLY. REP. 3069 (1995); Colette Fraley, *GOP Leaders Seek to Resolve Remaining Medicaid Issues*, 53 CONG. Q. WKLY. REP. 3210 (1995); Colette Fraley, *Medicaid Plan Hits Snags*, 53 CONG. Q. WKLY. REP. 3145 (1995).

a special rule against extraneous amendments in budget reconciliation bills, to have forty-six provisions struck from the Senate budget version.¹⁰¹ The Byrd Rule was adopted in the early 1980s and was repeatedly strengthened with the awareness that in its absence, reconciliation not only would lower the veto gates against the enactment of savings, but would also lower them for ideological provisions not needed to make savings.¹⁰²

Just as the Byrd Rule angered Democrats in 1993,¹⁰³ it infuriated Republicans in 1995, when it was used to knock out the ideological provision in the House bill declaring Medicaid no longer an entitlement.¹⁰⁴

3. Veto-Bargaining and Presidential-Congressional Summitry

The great constitutional veto gate is the presidential veto. It displayed its importance and power when President Clinton vetoed the comprehensive budget bill on December 6, 1995. While the Constitution's provisions for a presidential veto established a machinery for all Presidents,¹⁰⁵ the type of veto bargaining that occurs now is quite a modern phenomenon. In the first half of the twentieth century, the country elected a President and Congress from different parties only three times.¹⁰⁶ Only after 1954 did a divided government become the rule rather than the exception.¹⁰⁷ It has taken decades for analysts to focus on the problem of divided executive and legislative branches of government. The fiscal effects of veto bargaining on appropriations began attracting serious public choice analysis only in the late 1980s and early 1990s.¹⁰⁸ President Bush's reliance on veto bargaining, par-

¹⁰¹ Eric Pianin, *GOP Moves on Budget, Struggles With Debt Limit*, WASH. POST, Nov. 4, 1995, at A6.

¹⁰² For a discussion of the Byrd Rule, see *The Budget Reconciliation Process: The Inclusion of Unrelated Matters: Hearings Before the Subcomm. on the Legis. Process of the House Comm. on Rules*, 99th Cong., 2d Sess. (1986); TIEFER, *supra* note 8, at 891-94.

¹⁰³ HOUSE COMM. ON THE BUDGET, 103D CONG., 1ST SESS., *THE CONGRESSIONAL BUDGET PROCESS: 1974-1993* 18 (Comm. Print 1994); Mary Jacoby, *Sabo Bill Would Kill Byrd Rule for Good*, ROLL CALL, July 25, 1994, at 12.

¹⁰⁴ 141 CONG. REC. S16,052 (daily ed. Oct. 27, 1995).

¹⁰⁵ See 1980 CONG. Q. ALMANAC 7 (listing President Carter's few vetoes and alluding to even lower veto numbers by Presidents Truman, Kennedy, and Johnson).

¹⁰⁶ Gary W. Cox & Samuel Kernell, *Introduction: Governing a Divided Era*, in *THE POLITICS OF DIVIDED GOVERNMENT* 1, 2 (Gary W. Cox & Samuel Kernell eds. 1991) [hereinafter *DIVIDED GOVERNMENT*].

¹⁰⁷ CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY* 25 (1994).

¹⁰⁸ Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737 (1992); D. Roderick Kiewiet & Matthew D.

ticularly his veto of the Civil Rights Bill of 1990 and his reluctant signature of a revised bill in 1991, attracted the attention of both the Supreme Court and legislative scholars.¹⁰⁹

The 1995-1996 budget brought together the first Democratic President and Republican Congress since President Truman. The past forty years have provided no precedent for guidance on how the tools of power of a Republican Congress, desiring to legislate major entitlements changes, and of a Democratic President, supportive of existing entitlements but needing renewal of appropriations in order to keep the government running, would measure against each other. Examining the differences between appropriations and other fiscal legislation aids such analysis. Because of the annual nature of appropriations, presidential-congressional veto bargaining over appropriations occurs in an orderly context in which both sides know they must bargain to a conclusion.¹¹⁰ The annual nature of appropriations predicated the presidential-congressional budget summitry and negotiations from 1982 to 1990; since the main source of savings in that period was appropriations, the bargaining could proceed to a comparatively orderly conclusion.

In contrast with appropriation negotiations, the two non-appropriation types of fiscal legislation, taxes and the non-budgetized model of entitlements, have no expiration date or savings-forcing mechanism. In tax and entitlement legislation, a President who prefers the status quo need not bargain to a conclusion. Presidents Reagan and Bush reserved their veto power for resisting income tax increases. Similarly, a President resistant to cutting entitlements can veto comprehensive bills and refuse compromise. The famous veto pen that Presidents Reagan and Bush reserved specifically for resisting income tax increases had the same potency in President Clinton's hand for resisting entitle-

McCubbins, *Presidential Influence on Congressional Appropriations*, AM. J. POL. SCI. 713 (1988).

¹⁰⁹The Supreme Court discussed that veto in *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, 1492 & n.9 (1994). For scholarly analysis, see William N. Eskridge, Jr. & John Ferejohn, *Positive Political Theory and Public Law: The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); William N. Eskridge Jr., *Reneging on History? Playing the Courts/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

¹¹⁰Such orderly veto bargaining is evidenced by debate over defense appropriations restrictions on initiatives like Star Wars and aid to the Nicaraguan "Contra" rebels. In these instances, Presidents Reagan and Bush vetoed Congress's appropriations bill, and after orderly veto bargaining, the President and Congress compromised and passed a budget containing only some of the concerned restrictions. TIEFER, *supra* note 107, at 38-40.

ment cuts. Only when entitlements incorporate automatic cutting mechanisms will a President be forced to compromise.

It became clear at the conference stage that the 1995 budget was not headed for compromise. At that stage, party leaderships and the budget committees can shape legislation to compromise with the President and yet achieve passage in Congress.¹¹¹ In 1995, the budget bill conference used its power not to move toward compromise, but to undo some of the ameliorative achievements of the Senate moderates. The conference committee watered down Senator Chafee's set-asides for the disabled, leaving the definition of disability to the states.¹¹² The conference committee also diluted Senator Cohen's federal nursing home standards by permitting states to oversee facilities and by cutting federal funding.¹¹³ Additionally, at the conference stage legislators reduced the minimum state contribution to Medicaid required for states to obtain federal matching funds, allowing states to shrink their Medicaid spending in even larger proportion than the bill's contraction in federal matching funds.¹¹⁴ In sum, by eliminating those provisions in the reconciliation bill that might have made it tolerable to President Clinton, the 1995 conference did not avail itself of presidential-congressional compromise. President Clinton vetoed the bill on December 6, 1995.¹¹⁵

Following President Clinton's veto of the reconciliation bill, Congress resorted to the unsuccessful strategy of shutting down the government by refusing to vote on appropriations. Detailed journalistic accounts have described the ensuing bargaining, the decline of public support for the congressional position, and the increase in support for the President.¹¹⁶ Substantively, the two

¹¹¹The conference committee's powers include procedures that greatly encourage the adoption of a non-amendable, "all-or-nothing" conference report. TIEFER, *supra* note 8, at 817-25.

¹¹²Colette Fraley, *Scaled-Back Medicaid Savings Plan Emerges from Conference*, 57 CONG. Q. WKLY. REP. 3539 (1995); H.R. CONF. REP. NO. 350, *supra* note 100, at 1065.

¹¹³Colette Fraley, *Medicaid Differences Portend Tough Budget Talks Ahead*, 53 CONG. Q. WKLY. REP. 3663 (1995).

¹¹⁴Colette Fraley, *Scaled-Back Medicaid Savings Plan Emerges from Conference*, *supra* note 112.

¹¹⁵Colette Fraley, *Clinton Plan Does Little to End Major Medicaid Disputes*, 53 CONG. Q. WKLY. REP. 3744 (1995).

¹¹⁶One account based on extensive interviews with insiders is in a four-part series by Michael Weisskopf & David Maraniss: *During Clash at Pinnacle, A Fatigued Speaker Weeps*, WASH. POST, Jan. 18, 1996, at A1; *GOP Lost Control of Members and Public Perception*, WASH. POST, Jan. 19, 1996, at A1; *Personalities Shaped Events as Much as Ideology*, WASH. POST, Jan. 20, 1996, at A1; *As Time Ebbs, Futility of Talks Starts to Dawn*, WASH. POST, Jan. 21, 1996, at A1.

sides made progress in their negotiations as to dollar figures of various sources of savings. The unresolvable differences lay in principled disputes over how much to change entitlements, such as whether to preserve Medicaid's guarantees of individual coverage and benefits or, by "block granting" it, to let beneficiaries be cut off by the money-short states.¹¹⁷ On this central question, the presidential-congressional negotiators delegated an effort to work out a compromise to a bipartisan team of governors.¹¹⁸

The National Governors Association succeeded in developing a plan to change AFDC and Medicaid.¹¹⁹ However, the plan ran into Administration opposition, notably, with regard to the health entitlement debate, on the ground that it would deny Medicaid an "enforceable federal guarantee" of a "defined benefit package."¹²⁰ The fact that the Administration opposition to the governors' compromise focused on this aspect of the 1995 comprehensive budget bill should direct scholars to review the other, less controversial, aspects of the 1995 budget bill to anticipate the course of future legislation.

An additional legislative development in early 1996 regarding the fiscal constitution warrants note: the enactment of a statutory line-item veto which is applicable, in a fashion, to entitlements. Proposals for a statutory line-item veto have received extensive commentary in recent years. A line-item veto authorizes the President to react after Congress enacts spending bills by vetoing particular items of spending, preventing these items from becoming effective unless Congress re-approves them by a sufficient override process.¹²¹ The House and Senate each enacted bills to create line-item vetoes in February 1995 and March 1995, respectively, but the conference committee did little to move these

¹¹⁷ Judith Havemann, *Money Isn't the "Deal-Breaker" in Clinton Medicaid Proposal*, WASH. POST, Dec. 8, 1995, at A2; Judith Havemann, *White House Holding the Line on Medicaid*, WASH. POST, Dec. 10, 1995, at A4.

¹¹⁸ Colette Fraley, *Governors Looking for the Key to Open Way for Medicaid*, 53 CONG. Q. WKLY. REP. 3813 (1995).

¹¹⁹ John F. Harris & Ann Devroy, *Governors Agree on Entitlement Overhaul*, WASH. POST, Feb. 7, 1996, at A1; Judith Havemann & David S. Broder, *Governors Offer Deal on Medicaid*, WASH. POST, Feb. 6, 1996, at A1.

¹²⁰ Judith Havemann, *Chief of HHS Objects to Governors' Proposal*, WASH. POST, Feb. 29, 1996, at A6. For the significance of the objection, see *Seeking Medicaid, In Court*, WASH. POST, Feb. 20, 1996, at A10 (editorial).

¹²¹ For descriptions of statutory line-item vetoes and an introduction to the commentary, see generally, Neal Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 993 (1990); Anthony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469 (1994); Paul R. Q. Wolfson, Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838 (1987).

bills as Congress and the President conducted their budget battle. There was limited enthusiasm in Congress to augment sizably and immediately the President's disapproval powers at a time when Congress was not succeeding in overcoming even his existing veto powers.¹²² However, in April 1996 Congress finally enacted a line-item veto, to take effect only after the next Presidential election.¹²³

While the new line-item veto primarily applies to appropriations, it also allows the President an item veto with respect to both the creation of new entitlements and increases in existing ones.¹²⁴ Still, this would not affect continuation, without increase in benefit formulas, of existing entitlements. Costs of health care entitlements rise without increase in benefit formulas, from demographic change and from limited allowances for provider cost increases. For existing entitlements, the significance of the enactment of the line-item veto lay, not in the limited current application of what had been enacted, but rather in the potential for further future expansion of the line-item veto's application. As the future budgetizing of entitlements makes them increasingly subject to periodic congressional cuts, Congress might well decide to expand the President's line-item veto powers to allow him to curb entitlement spending increases that occur by the sheer continuation of existing legislation. After all, the political responsibility for cuts made that way would be his, not Congress's, and such a mechanism could be made to apply selectively to less politically favored entitlements and not to more favored ones (particularly Social Security).¹²⁵ Thus, if Congress decides to expand the power of the line-item veto, this newly created presidential power may come to play an important role in the entitlements budgetization process.¹²⁶

¹²²For a review of the line item veto in 1995, see *Issue: Line-Item Veto*, 54 CONG. Q. WKLY REP. 25 (1996), and related stories cited therein.

¹²³See Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996); John F. Harris, *Clinton Signs Law for Line-Item Veto*, WASH. POST, Apr. 10, 1996, at A1.

¹²⁴Helen Dewar, *Senate Passes Line-Item Veto Bill*, WASH. POST, Mar. 28, 1996, at A1, A8.

¹²⁵The GRH Act's sequestration system provides a model for applying the line-item veto to entitlements. In that law, Congress had provided for achieving spending reductions through presidential sequestration orders to make percentage cuts in the spending on selected existing entitlements; sequestration allowed limited cuts in Medicare, but not in other completely exempt entitlements such as Social Security. For descriptions of how entitlements such as Medicare were only partially, not completely, exempted from Presidential sequestration orders to entitlements, see Stith, *Rewriting the Fiscal Constitution*, supra note 2, at 655 & nn.342-43.

¹²⁶A Democratic President might not make much use of such power, but a Republican

Still, while the 1995-1996 budget battle helped produce a line-item veto, it did not pass a budget deal on entitlements that was ultimately signed by the President. The failure to reach closure on a compromise version of a budget bill on entitlements has left to the future the next steps toward "budgetizing" health entitlements. However, the fact that the comprehensive budget bill had advanced all the way through the House and Senate, had elicited a Democratic President's own proposals that accepted major portions of the proposed legislation, and had lead to discussions of mutually acceptable compromises, leads to the realization that the 1995-1996 budget battle has illuminated the direction that the further legislative evolution of health care entitlements will take. Paths to future further budgetizing of entitlements can be discerned from re-analyzing just what had been proposed, considered, and partly accepted in 1995. Analyzing these aspects of the 1995-1996 budget bill battle requires stepping back and delving more fully into how entitlement funding has worked until now and into how Congress's proposed changes would have altered these workings.

III. LEGISLATION FOR A "BUDGETIZED" MODEL OF ENTITLEMENTS

For decades, entitlements had remained largely immune from change by shifting fiscal realities and electoral majorities due to a legislative system that put obstacles in the way of any legislative change. Yet, considering the demographic projections indicating that an aging population will keep health entitlement costs rising to unsustainable levels, changes will have to occur in entitlements legislation. The 1995-1996 budget battle illustrates both how modifications in entitlements legislation can occur through the budget process and what forms those changes might take.

Part III of this Article examines what the 1995-1996 budget battle can teach about the likely form of "budgetized" entitlements. It starts by discussing the developments that may occur

President—one like President Reagan, who in 1981 proposed tight caps and sharp cuts in Medicaid—might. In fact, the defenders of public assistance entitlements might well have to make other kinds of concessions, either in budgetary procedure or substantively in terms of cuts, to fend off such proposals to extend the President's powers in that fashion.

in the annual budget process so that annual review of entitlements occurs and takes a close look at how such mechanisms would pit groups of those receiving medical services against each other and against other political claimants. This Part then discusses changes in payment and delivery systems that may occur in order to control spending levels without crude reductions in benefits. The remainder of this Part turns to other mechanisms that could help solve some of the funding problems, namely affluence-testing and reductions in tax expenditures on health care.

A. *Congress's Attempt at Mechanisms for Automatic Forced Savings in Medicare and Medicaid*

As previously noted, the original model of entitlements developed differently than appropriated public assistance. Pre-Great Depression America thought that public assistance programs should not be protected against the insecurity of the appropriation process because individuals deserved their income insecurity and had no "right" to a publicly developed benefit. In contrast, 1930s policymakers recognized that entitlements like Social Security should provide a kind of secure "right" to government benefits and ensured their protected status by isolating them from the annual struggle among appropriation claimants.

Initially, for the core social insurance entitlements, beneficiaries had a right to government support because they had "earned" the benefit collectively through their work history and contributions. However, as Social Security went on a "pay-as-you-go" basis so that past contributions did not actually fund current benefits, and as entitlements expanded beyond the core of retirement benefits to include disability and health insurance, the link between personal contributions and government spending became distant. Policymakers justified protection of continued and expanded entitlements by relying on society's sense of obligation to protect and support the elderly and the poor.¹²⁷ Medicare's enactment straddled these concepts. Part A resembled individu-

¹²⁷For discussions at the time of the Great Society, see Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154-55 (1958); Reich, *The New Property*, *supra* note 4, at 785-86. For more recent discussions, see, e.g., Joel Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in an Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1987-88).

ally earned social insurance, and Part B consisted increasingly of general revenue payments for a worthy reason.¹²⁸ Furthermore, Medicaid's enactment aspired to end the poor's reliance on either "charity medicine" or no medical care at all by bringing them into mainstream medicine.¹²⁹

Yet, as soon as the fiscal realities of the unexpectedly growing costs of health care entitlements dawned on Congress in the 1960s and 1970s, it began changing Medicaid.¹³⁰ These changes continued, both for Medicaid and Medicare, through the 1980s and 1990s.

However, change did not come in the form of a repeal of entitlements signifying discontinuation of the ideological bases for beneficiaries' rights. There have been conservative ideological thrusts to radically reduce entitlements, notably in the original proposals for change in Medicaid by President Reagan in 1981 and by congressional Republicans at the start of the budget process in 1985. Yet, until 1995, the budget process had not been used as a tool for achieving enactment of these ideological changes. Indeed, the congressional moderates in 1981 and the Senate moderates in 1995 used the budget process to achieve savings while ameliorating ideological thrusts. Moreover, operation of the Byrd Rule works against utilizing the budget process to change the ideological framework of entitlement. Similarly, even though the budget machinery created in 1993 provided a mechanism for responding to entitlement growth beyond projected limits, it did not implement any particular ideology.¹³¹

¹²⁸For an introduction to the literature on Medicare, particularly its original legislative enactment, see, e.g., JUDITH M. FEDER, *MEDICARE: THE POLITICS OF FEDERAL HOSPITAL INSURANCE* (1977); DANIEL HIRSHFIELD, *THE LOST REFORM* (1970); PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1987); RENEWING THE PROMISE: *MEDICARE, ITS HISTORY AND REFORM* (David Blumenthal et al. eds., 1988).

¹²⁹For an introduction to the literature on Medicaid, particularly the enactment of Medicaid, see SHERI I. DAVID, *WITH DIGNITY: THE SEARCH FOR MEDICARE AND MEDICAID* (1985); ROBERT STEVENS & ROSEMARY STEVENS, *WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID* (1974); Rand E. Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 *YALE L.J.* 243, 286-89 (1978).

¹³⁰Patricia A. Butler, *Legal Problems in Medicaid*, in *LEGAL ASPECTS OF HEALTH POLICY* 215 (Ruth Roemer & George McKray eds., 1980).

¹³¹The proposed Budget Control Act, *supra* note 64, provided that entitlement growth beyond projected limits would trigger presidential action proposals and congressional consideration. Originally these provisions formed Title XVI of the draft conference version of that year's reconciliation bill. When Senate Republicans objected to their adoption on procedural grounds, that title failed to pass the Senate. Instead, the responsibilities of the President and the House to respond to high entitlement growth were promulgated without a statute. The President's responsibility to propose special direct spending messages was promulgated in President Clinton's Exec. Order No.

However, in 1995, Congress created a comprehensive budget bill that would have significantly cut entitlements and changed the nature of how entitlements are viewed.¹³² The Republican majority, using intra-party bargaining, protected these proposed changes from being bottled up in committee, slowed by House floor amendments, and stopped by Senate filibuster. The 1995 comprehensive budget bill did not move toward inter-party legislative bargaining. Instead the budget committees planned proposed caps on, and sequestration of, Medicare and Medicaid¹³³ which were sent by Congress to the President.¹³⁴

Such program-specific caps, sequestration, and mechanisms for legislative action would have profoundly reshaped the fiscal constitution. They would have replaced the previous default for legislative inaction, continuation of the status quo, with an automatic decrease in entitlement spending. Clearly, if anticipated savings fell short of projections, programs would have been cut severely and automatically unless program proponents could make up the missing funds by enacting alternative savings or financing. With such mechanisms in effect, entitlement programs would no longer have received any protection from veto gates; they

12,857, 58 Fed. Reg. 42,181 (1993). The House's responsibility to act on the special messages was promulgated by the adoption of H.R. Res. 235, 103d Cong., 1st Sess. (1993).

¹³² Although the 1995 budget action failed to change entitlements, the problems of demographic trends and sprawling health costs ensure a return of legislative efforts to integrate health care entitlements with the rest of spending and taxing. One might argue that since the bill did not become law, what it would have done had it become law does not matter. However, the history of entitlement legislation supports the view that one learns about what will be enacted from the Congressional actions of prior years. For example, the 1956 disability insurance law had its roots in the 1952 effort and the modest 1954 version. See Jerry L. Mashaw, *Disability Insurance in an Age of Retrenchment: The Politics of Implementing Rights*, in *SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS*, *supra* note 14, at 155 (1952 and 1954 disability insurance). Prediction of the future course of entitlement change can never be an exact science, but using the present course of legislation as a guide for how future legislation would work beats waiting with eyes closed for the future to take us by surprise.

¹³³ House Budget Committee Report, *supra* note 75, at 137.

¹³⁴ Though the GRH Act had utilized forced-savings sequestration systems, over 30 entitlement programs were exempted. See 99 Stat. 1083-84 (1985). The 1990 Budget Enforcement Act (BEA) also proposed sequestration systems, but limited sequestration to new entitlements. The pay-as-you-go, or "PAY-GO" sequestration mechanism of the 1990 BEA protected the spending cuts and tax increases made in that year's deal from subsequent undoing. Under "PAY-GO," the Office of Management and Budget (OMB) keeps track of all new entitlements and new revenue legislation enacted each year. PAY-GO mandates a separate sequestration of the resources available to a prescribed and limited number of mandatory programs if these new laws produce deficit impacts without paying for them. Richard Doyle & Jerry McCaffrey, *The Budget Enforcement Act of 1990: The Path to No Fault Budgeting*, PUB. BUDGETING & FIN., Spring 1991, at 25; Joyce & Reischauer, *supra* note 1, at 436-37.

would have survived intact to the extent they started with or obtained adequate sources of financing through legislative bargaining.

The mechanism proposed by Congress in 1995-1996 that would have accomplished this reshaping of Medicare was initially called the "Budget Enforcement Limitation Technique" (BELT).¹³⁵ This mechanism would have taken Medicare's fee-for-service payment method and covered it with a firm cap. To implement capping, all the familiar machinery of sequestration would have applied. The legislation, had it been signed into law, would have created annual targets, limiting cost by medical sector. It would have also crafted the machinery of automatic presidential orders to reduce provider payment levels to stay within those legislative caps, and those caps would have taken into account the separate large savings in provider payments expected from the 1995 bill. Thus, to make up for the projected increase in costs from now through 2002 under the existing payment formulas, the legislation would have provided machinery to automatically cut literally hundreds of billions of dollars, cumulatively, in the projected "fee-for-service" payments.

Such a system would have rapidly divided Medicare beneficiaries into two very separate groups competing annually with each other, with appropriation claimants, and with taxpayers for limited federal dollars. One Medicare beneficiary group would have been the managed care patients. This group currently accounts for only nine percent of Medicare beneficiaries, but it would have rapidly expanded. The other group would have been the "fee-for-service" Medicare beneficiaries. As the capping mechanism automatically forced reductions on fee-for-service provider payments, providers would have reduced Medicare beneficiaries' access and service unless they had supplementary private insurance that only affluent or employer-subsidized patients could afford. Such a budget mechanism would have had strong repercussions. It would have profoundly affected the health system by rapidly and radically shifting the type of service the elderly receive.

¹³⁵ See 141 Cong. Rec. S15,637 (daily ed. Oct. 25, 1995) (remarks of Sen. Rockefeller) ("And BELT, because I know you are anxious to find out, stands for the 'budget expenditure limit tool.' Interesting phraseology."). See also § 863 of the Balanced Budget Act of 1995, 104th Cong., 1st Sess., discussed in H.R. REP. No. 350, 104th Cong., 1st Sess., pt. 2, at 1267-71 (1995) [hereinafter *Budget Bill Conference Report*].

However, even the Democratic deficit-hawks, who historically have been the impetus for prior sequestration proposals, refused to subscribe to the capping mechanism. These Democrats, known in the House as the "Blue Dogs," took a compromise position between the Democratic President and the congressional Republicans. Although they voted with the Republicans to make unpopular Medicare cuts and agreed on the large Republican figures for savings, the "Blue Dogs" refused to support the Medicare sequestration machinery.¹³⁶

On Medicaid, as the presidential-congressional bargaining proceeded, President Clinton agreed to large, fiscally integrative changes beyond those to be made in Medicare. For example, he supported a cap on the federal match payment for Medicaid beneficiaries. The fact that even a Democratic President, who emerged as a strong defender of Medicaid against proposals to abolish its entitlement status, had agreed to capping it and thereby accommodating it to the budget process signified how broadly the concept of "budgetizing" of entitlements had become accepted. President Clinton's concession established that some form of the budgetizing of such entitlements will occur eventually, with the uncertainty concerning only what form the budgetizing will take and when it will commence. However, the thrust of the Medicaid legislation went much further than a simple cap. It provided for state savings by ending the statutory guarantees for coverage and benefits. As noted, it was on this point that President Clinton and Congress most sharply disagreed and failed to reach agreement. Moreover, no agreement was reached regarding Congress's proposed repeal of Medicaid's Boren Amendment, which required that the provider payment rates be set at a level related to the adequacy of the care provided.¹³⁷ States have resisted the Boren Amendment, and the 1995 comprehensive budget bill included its repeal; the President balked.

¹³⁶ See 141 CONG. REC. 11,221-23, 11,349 (daily ed. Oct. 26, 1995); Alissa J. Rubin & George Hager, *Chances of a Budget Deal Now Anyone's Guess*, 54 CONG. Q. WKLY. REP. 89, 90 (1996).

¹³⁷ The Supreme Court's decision in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), confirmed that providers could use this provision to challenge state rates in federal court as inadequate. See Rand E. Rosenblatt, *Statutory Interpretation and Distributive Justice: Medicaid Hospital Reimbursement and the Debate Over Public Choice*, 35 ST. LOUIS U. L.J. 793 (1991).

B. *Payment and Delivery Changes Promoted by the
"Budgetizing" of Entitlements*

The 1995-1996 budget battle showed how rising costs of health care entitlements give impetus to drawing health care entitlements into a periodic, perhaps even an annual, political competition with other aspects of spending and taxes. This periodic political competition in the budget process would increase the pressures to find savings in the health care entitlements. Yet, the question of just how the legislated changes would obtain the savings still remains. The 1995 legislative proposals showed that implementation of overall spending reductions could occur by furthering ongoing changes in the health care payment and delivery systems which had begun years earlier. On the path of ongoing change, some reforms have already come far, and the 1995 proposals would have simply taken them a few steps further; in other respects the changes are still just emerging from experimental status, and the 1995 proposals would have marked a radical acceleration of the course of reform.

The ongoing changes in payment systems include the completion and refinement of prospective payment for the entire range of health care services. The ongoing changes in delivery systems include making managed care increasingly mandatory for Medicaid and encouraging managed care for Medicare. If Congress responds to the pressure from the budgetizing of entitlements to make savings through changes in payment and delivery systems, Congress may also conduct a corresponding search for approaches to provide patient protections under these payment and delivery systems. Accordingly, this section reviews how budget bills in recent years have already changed the health care finance and delivery system, looks at the 1995 proposals which would have continued or accelerated this change, and examines the corresponding search for patient protections and for administratively supervised, system-reforming experiments.

The current provider payment system, which constitutes the core of modern federal health insurance finance, arose and developed almost wholly through provisions in budget reconciliation bills. Medicare and Medicaid initially employed retrospective payment systems, under which the government reimbursed providers retrospectively for their actual costs. This funding system contributed to the explosion of health care costs since it gave providers incentives to charge more, to control costs little,

and to increase their incomes and profits. Because the programs were isolated from the appropriations process, the legislature was relatively indifferent to the fiscal effects of retrospective reimbursement arrangements.

During the 1980s and early 1990s, Congress authorized the change from retrospective to prospective payment systems for several programs. Under the Boren Amendment to reconciliation bills in 1980 and 1981, Congress allowed states to operate their Medicaid programs under prospective payment systems, in which states could decide prospectively what rates to pay providers for particular kinds of services.¹³⁸ Pursuant to the 1983 Social Security legislation, Medicare hospital reimbursement switched to a prospective payment system, known generally as Diagnosis Related Groups ("DRGs").¹³⁹ Through reconciliation bills during the late 1980s, Medicare doctor reimbursement switched to a prospective payment system known as the Medicare Fee System, or MFS.¹⁴⁰

Prospective payment has been considered a successful health care cost control policy. It discourages providers from running up costs by reimbursing at prospectively set rates.¹⁴¹ The existing prospective rate-setting system allows Congress to make savings simply by legislating rate reductions.

Because previous budget bills had already created evolving prospective payment systems which are well established for hospitals and coming into place for physicians, the 1995 comprehensive budget bill was able to take advantage of those systems to effectuate health care entitlement savings. Congress could save hundreds of billions of dollars by 2002 by reducing the projected prospective Medicare provider payment rates. In the veto-bargaining talks, President Clinton indicated that, as a part

¹³⁸For a description of the origin of prospective payment systems for Medicaid, see CONGRESSIONAL RESEARCH SERVICE, 103D CONG., 1ST SESS., MEDICAID SOURCE BOOK: BACKGROUND DATA AND ANALYSIS (A 1993 UPDATE) 307-08 (Comm. Print 1993).

¹³⁹DAVID G. SMITH, PAYING FOR MEDICARE 50-56 (1992) (discussing the 1983 enactment). See generally Judith R. Lave, *The Impact of the Medicare Prospective Payment System and Recommendations for Change*, 7 YALE J. ON REG. 499 (1990) (discussing effects of prospective payment systems on hospital care); Larry A. Oday & Allen Dobson, *Paying Hospitals Under Medicare's Prospective Payment System: Another Perspective*, 7 YALE J. ON REG. 529 (1990) (responding to Lave's article).

¹⁴⁰SMITH, *supra* note 139, at 153-57, 200-09; James C. Dechene, *Reform of Medicare Physician Reimbursement for Physician Services*, 23 J. HEALTH & HOSP. L. 33 (1990); Barry R. Furrow, *Physician Payment Reform: Plugging the Drain*, 34 ST. LOUIS U. L.J. 821 (1990).

¹⁴¹However, some of its effect may simply shift costs to the private sector, primarily to employer-subsidized health insurance. See MOON, *supra* note 6, at 140-41.

of an overall agreement, he would have accepted a large part of the savings that would occur by reduction in payment rates.¹⁴² This has great significance for the "budgetizing" of Medicare's fee-for-service sector. It means that the implementing of periodic or annual budgetary decisions to achieve some particular level of savings in the cost of Medicare fee-for-service payments could occur through the evolving prospective payment systems. Whereas the old retrospective payment system could not be controlled budgetarily because the government received bills to reimburse only after the hospitals and physicians had set their charges and provided their services, under the evolving prospective payment system Congress could decide in advance of services and billing what level of payment it would make to providers.

In addition, the 1995 bill proposed to push the evolution of the prospective payment system several steps further. It would have extended prospective payment to skilled nursing facilities and home health care.¹⁴³ Moreover, the 1995 bill would have overhauled the complex current physician fee structure, known as Resource-Based Relative Value Scale (RBRVS),¹⁴⁴ and would have ended the separate factor by which surgeons had significantly excepted themselves from the underlying purpose of RBRVS.¹⁴⁵

¹⁴²In early December, the President proposed \$124 billion in Medicare savings over seven years, while the Republican Congress's budget bill proposed \$270 billion; both made most of their savings by reducing provider payment rates. Colette Fraley, *Administration Offers Details for Medicare Negotiations*, 53 CONG. Q. WKLY. REP. 3742 (1995). Figured differently (that is, netted against other costs), these initial savings proposals amounted to \$97 billion in savings for the President and \$226 billion for the Republican Congress; when each side had made concessions during the summitry, the President had reached \$102 billion in savings, and the Republican Congress had come down to \$168 billion. Alissa J. Rubin & George Hager, *Chances of a Budget Deal Now Anyone's Guess*, 54 CONG. Q. WKLY. REP. 89 (1996). While this was a large difference, there was a level of agreement as to the basic approach of cutting provider payments significantly. Moreover, there was a bipartisan Senate group which, with the blessing of both sides, devised in-between proposals. Alissa J. Rubin, *Bipartisan Group Unveils Budget*, 53 CONG. Q. WKLY. REP. 3875 (1995).

¹⁴³Colette Fraley, *Conference Agreement Entails Sweeping Medicare Changes*, 53 CONG. Q. WKLY. REP. 3536, 3537 (1995) [hereinafter *Sweeping Medicare Changes*]. See also *Budget Bill Conference Report*, *supra* note 135, at 1211 (cutting hospital payment levels), 1226 (proposing prospective payment for skilled nursing facilities), 1239-41 (changing MFS), 1256-62 (proposing prospective system for home health services).

¹⁴⁴For background on RBRVS, see GEORGE J. ANNAS ET AL., *AMERICAN HEALTH LAW* 260-62 (1990); BARRY R. FURROW ET AL., *HEALTH LAW* 583-87 (1995). For the changes the 1995 bill would have made, see Colette Fraley, *Conference Agreement Entails Sweeping Medicare Changes*, 53 CONG. Q. WKLY. REP. 3536, 3537 (1995).

¹⁴⁵Under the current RBRVS, payments for physician services are made on the basis of a fee schedule that assigns adjusted relative values to services, which are then converted into a dollar payment amount by one of three conversion factors. There are three factors because surgeons have obtained for themselves a conversion factor

The large statutory provider rate reductions, even without the rate reductions through the previously discussed sequestration machinery (the "BELT" or "lookback sequester"), would likely have reduced provider access and increased out-of-pocket charges. To the extent that the coming years bring sharp provider reimbursement reductions, less affluent Medicare patients would only obtain access to a relatively full range of services at an affordable cost by leaving the fee-for-service sector and signing up for managed care.¹⁴⁶ "Budgetizing" Medicare means that the annual budget process would set the pace of this process by pitting Medicare fee-for-service beneficiaries against other spending and revenue claimants. Over the years, as the fee-for-service beneficiaries failed to prevent cuts in provider payment rates, the less affluent among them would be driven to managed care.

The favored delivery system has become managed care.¹⁴⁷ The Clinton administration has encouraged states to shift Medicaid patients into mandatory managed care by directing the federal Health Care Finance Administration (HCFA) to grant the necessary administrative waivers of requirements in the Medicaid statute. For Medicaid, the anticipated benefits of managed care are improved access to medical care for an impoverished population often denied such access and a shift from the use of expensive emergency facilities to timely access to non-emergency primary care.¹⁴⁸ Because managed care capitated payments are based on the old, inadequate Medicaid provider payments, there are limits on how much can be saved without delivering less service.¹⁴⁹

separate from the factors for primary care and other services. The comprehensive budget bill would have reduced this to a single conversion factor. *Budget Bill Conference Report*, *supra* note 135, at 1239 (describing current RBRVS), 1241 (budget bill conference approves single conversion factor).

¹⁴⁶ See 141 CONG. REC. S15,637-39 (daily ed. Oct. 25, 1995) (statement of Sen. Rockefeller) (arguing that the effects of a \$270 billion cut would include the departure of physicians from the Medicare fee-for-service sector and larger costs for patients in that sector).

¹⁴⁷ Colette Fraley, *Managed Care May Save Money, But Hard to Say How Much*, 53 CONG. Q. WKLY. REP. 2905 (1995) [hereinafter *Managed Care May Save Money*].

¹⁴⁸ Rand E. Rosenblatt, *Medicaid Primary Care Case Management, the Doctor-Patient Relationship, and the Politics of Privatization*, 36 CASE WEST. L. REV. 915, 919 (1986).

¹⁴⁹ Cf. TERESA A. COUGHLIN ET AL., *MEDICAID SINCE 1980: COSTS, COVERAGE, AND THE SHIFTING ALLIANCE BETWEEN THE FEDERAL GOVERNMENT AND THE STATES* 139-42 (1994); Deborah A. Freund & Robert E. Hurley, *Medicaid Managed Care: Contribution to Issues of Health Reform*, 16 ANN. REV. PUB. HEALTH 473, 494 (1995) ("[M]anaged care does not address Medicaid's severe financing problems, which are likely to persist so long as financing of programs and services for the poor are segregated from financing for other beneficiary groups.").

By 1994, more than twenty-three percent of Medicaid beneficiaries were enrolled in managed care; however, only nine percent of Medicare's 37 million beneficiaries were enrolled in managed care.¹⁵⁰ The 1995 comprehensive budget bill urged Medicare beneficiaries to join managed care through a "Medicare Part C" program, with the expectation of saving approximately \$25 billion over the seven-year budget program.¹⁵¹ In addition to administrative efforts to encourage the enrollment of Medicaid patients in managed care, the Clinton administration supported 1995 legislation eliminating the administrative waiver requirement.¹⁵² Furthermore, the President supported voluntary managed care for Medicare.¹⁵³

Medicare and Medicaid beneficiary protections would have to change with fiscal integration and associated cost-cutting measures such as reduced provider payments,¹⁵⁴ managed care, and potential partial federal deregulation of nursing homes.¹⁵⁵ No longer would providers alone determine the patient's level of care. As some of these changes have already occurred under Medicaid waivers, advocates for Medicaid beneficiaries have made considerable advances in pioneering new kinds of beneficiary protections, including guarantees of access, quality assurance, and benefit-refusal dispute resolution programs, as well as the curbing of efforts by managed care providers to elect to serve the healthy and avoid the sick.¹⁵⁶ Similar advances have been

¹⁵⁰ Colette Fraley, *Managed Care May Save Money*, *supra* note 147.

¹⁵¹ See *Budget Bill Conference Report*, *supra* note 135, at 1095-97, 1100-02. Congress also provided for a Medicare savings account program, *see id.* at 1151, and allowed physicians to charge additional fees to Medicare patients beyond the scheduled amount (a previously forbidden practice called balance billing), but the President did not endorse either vouchers or balance billing.

¹⁵² Alissa J. Rubin, *Highlights of Clinton's Proposal to Balance Budget in Seven Years*, 53 CONG. Q. WKLY. REP. 3722 (1995).

¹⁵³ Colette Fraley, *Administration Offers Details for Medicare Negotiations*, 53 CONG. Q. WKLY. REP. 3742 (1995).

¹⁵⁴ Limiting provider payment rates might jeopardize care because providers may sacrifice care to maximize profits, or better-quality providers may refuse to treat government-insured patients. This risk is most prominent under the DRG system because payments are based on discharges and not on length of stay and, therefore, hospitals make money through high turnover.

¹⁵⁵ For a discussion of the need for new beneficiary protections due to these cost-cutting measures, see the sources cited in notes 156 and 158, *infra*. In the 1995 budget battle, critics decried the proposed degree of discontinuation of the 1987 federal statutory nursing care protections, indicating how this change, too, would pose a risk to beneficiaries. See Colette Fraley, *Sweeping Medicare Changes*, *supra* note 143.

¹⁵⁶ See Michele Melden & Lorna Hennington, *Quality Assurance in Medicaid Managed Care*, 26 CLEARINGHOUSE REV. 1450 (1993); Jane Perking & Michele Melden, *The Advocacy Challenge of a Lifetime: Shaping Medicaid Waivers to Serve the Poor*, 28 CLEARINGHOUSE REV. 864 (1994); Jane Perking & Lourdes A. Rivera, *EPSDT and*

made toward protecting Medicare skilled nursing care and Medicaid nursing care recipients.¹⁵⁷ Furthermore, a new species of administrative law has evolved to protect beneficiaries while savings are made.¹⁵⁸

Down the road, there are some experiments that might start by costing more as they provide new benefits, but that may eventually lead to savings in the most intractable cost areas, such as long-term nursing care and end-stage care of the terminally ill. Experiments in community-based home health care and in making hospice care a more appealing alternative could identify approaches that improve care and save money.¹⁵⁹ If any of these approaches prove successful, their replication could facilitate fiscal integration through efficient savings rather than the crude denial of benefits.¹⁶⁰

Because the process of changing Medicare and Medicaid payment and delivery systems began in past budget bills and has made much progress already, the significance of the 1995-1996 budget battle requires seeing the entire trend. In the past era of retrospectively reimbursed fee-for-service care, beneficiaries received their protections on the same bases that they had always received protections—namely the willingness of fee-paid providers to provide adequate service. As the trends toward prospective payment at reduced rates and toward managed care accelerate, beneficiaries must obtain new protections against the risk that access and care under the new payment and delivery systems will diminish. As cost imperatives force Congress to integrate health entitlements with the budget and to implement this inte-

Managed Care: Do Plans Know What They Are Getting Into?, 28 CLEARINGHOUSE REV. 1248 (1995).

¹⁵⁷Toby Edelman, *Final Survey, Certification, and Enforcement Rules for Nursing Facilities*, 29 CLEARINGHOUSE REV. 117 (1995).

¹⁵⁸See Elizabeth Andersen, *Administering Health Care: Lessons from the Health Care Financing Administration's Waiver Policy-Making*, 10 J.L. & POL. 215 (1994); Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855 (1990); Judith M. Rosenberg & David T. Zaring, *Managing Medicaid Waivers: Section 115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545 (1995).

¹⁵⁹For different perspectives on hospices and home health care, see MOON, *supra* note 6, at 157, 196-99; PETER G. PETERSON & NEIL HOWE, ON BORROWED TIME: HOW THE GROWTH IN ENTITLEMENT SPENDING THREATENS AMERICA'S FUTURE 367 (1988).

¹⁶⁰*Cf.* Michele Melden, *The Home- and Community-Based Waiver Program Under Medicaid: An Update*, 29 CLEARINGHOUSE REV. 142, 142-43 (1995) (discussing various waivers available for home- and community-based health care). For example, the 1995 budget battle included Senator Cohen's proposals for an administratively supervised waiver-based approach to partial defederalizing of nursing home standards. See sources cited in note 99, *supra*.

gration by savings in Medicare and Medicaid, beneficiary protections require increased consideration. Part of the breakdown in the 1995-1996 post-veto negotiations concerned the inability, in that political framework, to devise the complex additional protections needed by beneficiaries.

C. Affluence-Testing and "Fungible" Reductions in Tax Expenditures

1. Affluence Testing

Another approach to fiscal integration of medical entitlements is to limit benefits for affluent Medicare enrollees. As social insurance, not public assistance programs, Social Security and Medicare were designed to provide benefits without regard to the beneficiary's financial need. With the shift to an appropriations-like vision of competing claimants for limited funds, this inattention to means could not continue unchecked. For example, beginning in 1983, Social Security beneficiaries whose incomes exceeded a threshold level were taxed on half their benefits. The Clinton deficit reduction package of 1993 raised the taxable portion of benefits to eighty-five percent, with the proceeds paid into the Social Security trust fund.

Congress's 1995 proposals depended heavily on a regressive increase in premiums for physician services (Medicare Part B). Individual premiums cover about thirty percent of the program's costs, and the rest are supplemented by general revenue.¹⁶¹ However, some "Blue Dog" deficit-hawks favored charging the wealthiest beneficiaries a premium reflecting the full cost of services.¹⁶² These efforts, as well as others, represented an important step towards capping subsidies for affluent beneficiaries.¹⁶³ Such proposals could create savings without jeopardizing adequate income security or medical care; in effect, they would end regressive redistributive transfers.¹⁶⁴

¹⁶¹ *Budget Bill Conference Report*, *supra* note 135, at 1250-51.

¹⁶² *Id.* at 1251-53.

¹⁶³ An alternative approach to limiting Medicare benefits of wealthy recipients is to tax the insurance value of their benefits. For a discussion of both the affluence-testing and the income tax approaches, see CONGRESSIONAL BUDGET OFFICE, 103D CONG., 2D SESS., REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS 276-79 (1994).

¹⁶⁴ The effect of proposals selectively to affect affluent beneficiaries can be seen in *id.* at 277-79. The Concord Coalition, a budget reform group, proposed reducing

The fiscally integrative shift to an annual budget review of entitlements puts trade-offs between policies that reduce care for poor beneficiaries and those that reduce subsidies for the rich in stark relief. There are not many alternatives by which funds needed to sustain the present level of entitlements could be raised. If other changes required less wealthy beneficiaries to make sacrifices, it would be more difficult for the wealthier beneficiaries to resist sacrifices they could better bear. This framing of the trade-offs gives progressive policies populist appeal, as reflected in the floor statements on behalf of the modest 1995 affluence-testing measure for Medicare Part B.¹⁶⁵ Just as the dropping of veto gates through the budget process facilitated both the 1993 progressive tax measures and the raising of the taxable portion of Social Security benefits over an income threshold, so it would bring these kinds of proposals increasingly into the annual debates.

2. "Fungible" Reductions in Tax Expenditures and the Effect on Health Finance Policy

Integrating health entitlement spending with the other spending and taxing decisions creates a powerful need to find ways of reducing some other expenditures, particularly if these ways can help the average beneficiary of the government's health care programs. The budget procedure has contemplated reducing tax expenditures as an alternative to cuts in direct expenditures.¹⁶⁶ Since tax expenditures, such as the exclusion from income of employer-provided health insurance subsidies,¹⁶⁷ are linked to

entitlement benefits according to an income scale; the cuts were to begin with a 10% diminution at an income of \$40,000 and grow as incomes rose. See CONGRESSIONAL BUDGET OFFICE, 103D CONG., 2D SESS., REDUCING ENTITLEMENT SPENDING 34-35 (1994).

¹⁶⁵ See 141 CONG. REC. 16,042 (daily ed. Oct. 27, 1995) (statement of Sen. Cohen).

¹⁶⁶ Tax expenditures are government revenue losses resulting from departures from the normal tax structure. Instead of bestowing a benefit upon beneficiaries by paying them more money, the government could subsidize beneficiaries through a policy-based specific tax reduction such as an exclusion from taxable income, a credit, or a deduction. Both direct payments and tax expenditures lead to the same result—less money in the Treasury and more money in the hands of beneficiaries. See generally STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 186 (1985); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970); Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155.

¹⁶⁷ For background and bibliography on these tax expenditures, see SENATE COMM. ON THE BUDGET, 102D CONG., 2D SESS., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS 417-23 (Comm. Print 1992).

the provision of health care, reducing tax expenditures may have a significant impact on health finance policy. The 1986 Tax Reform Act reduced the number of tax expenditures significantly,¹⁶⁸ and by lowering tax rates, the act deprived the remaining tax expenditures of part of their force.¹⁶⁹ However, the continuation of the remaining tax expenditures, as well as the 1993 enactment of an additional personal income tax surcharge for top earners, refreshed some of the significance of proposals to cut tax expenditures.¹⁷⁰

Commentators have long recognized that the reconciliation process could bring down the veto gate barriers to tax increases, including raising revenue by reducing tax expenditures.¹⁷¹ Indeed, certain tax expenditures closely resemble regressively redistributive entitlements. Excluding from taxable income employer-provided health benefits to the affluent and providing Medicare to the wealthy cost the government comparable amounts of money.¹⁷² Thus, cutting a tax expenditure like employer-paid health insurance has health finance policy effects similar to cutting the corresponding entitlement.¹⁷³

Budget law also encourages certain "fungible" trade-offs. In what is called the "fungibility rule," the reconciliation provision of the Budget Act allows the House Ways and Means and the Senate Finance committees to fulfill reconciliation instructions through tax expenditure cuts instead of through entitlement cuts.¹⁷⁴

¹⁶⁸For a description of the law's enactment, see JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH* (1987).

¹⁶⁹Because tax rates are lower, beneficiaries of tax deductions or tax exclusions retain less for each dollar of deduction or exclusion.

¹⁷⁰SENATE COMM. ON THE BUDGET, *supra* note 167; U.S. GEN. ACCOUNTING OFFICE, *TAX EXPENDITURES DESERVE MORE SCRUTINY* 122 (1994).

¹⁷¹For discussions of the budget process and taxes, see TIEFER, *supra* note 8, at 900-08; Joel Havemann, *The Congressional Budget Process and Tax Legislation*, in *THE CONGRESSIONAL BUDGET PROCESS AFTER FIVE YEARS* 174 (Rudolph G. Penner ed., 1981).

¹⁷²The *Washington Post* described the exclusion from taxable income of employer-paid health insurance premiums as "cost[ing] more than \$50 billion a year. That makes it the government's third-largest health care program, a third the size of Medicare." *The Entitlements Debate*, WASH. POST, June 19, 1994, at C6.

¹⁷³When the Congressional Budget Office evaluated the option of taxing employer-paid health insurance, it noted that such taxation, by reducing excess expenditures on such insurance, could have similar anti-inflationary effects on the medical marketplace to reductions in medical assistance payments. See CONGRESSIONAL BUDGET OFFICE, 103D CONG., 2D SESS., *THE TAX TREATMENT OF EMPLOYMENT-BASED HEALTH INSURANCE* (1994).

¹⁷⁴SMITH, *supra* note 139, at 85. The fungibility rule is in the Congressional Budget Act of 1974, Pub. L. No. 93-344, § 310(c), 88 Stat. 297, 315-16 (codified as amended at 2 U.S.C. § 641 (1994)).

From the 1930s to the 1990s, entitlements derived protection from the fact that finance committees held jurisdiction over both entitlements and tax expenditures. This choice of jurisdiction kept entitlements isolated from the committees in which appropriation claimants competed. In the future, entitlement beneficiaries may derive protection from the finance committees' "fungible" authority: cuts in entitlement services may be avoided by reducing tax expenditures instead.

Two aspects of the 1995 debate portend movement on "fungible" tax expenditures. At the beginning of the 104th Congress, the House adopted a new rule requiring a two-thirds vote to adopt income tax increases.¹⁷⁵ At first, this rule seemed to create an obstacle to tax increases. However, when the majority party wished to create a large reduction in the earned income tax credit,¹⁷⁶ the two-thirds vote requirement was waived.¹⁷⁷ Since such a waiver could be achieved by majority vote for any provision to cut tax expenditures in the future, the rule did not create a new barrier to "fungible" savings from tax expenditure cuts in place of savings from entitlement cuts.

Furthermore, when President Clinton needed to fill a funding gap to make his alternative balanced budget proposal during veto-bargaining, he proposed reductions in tax expenditures.¹⁷⁸ Substituting reductions in tax expenditures for reductions in entitlements could happen in committee, on the floor, or in conference and could occur as part of presidential-congressional bargaining. In the long run, substituting budget cuts with tax expenditure cuts seems inevitable.

CONCLUSION

The 1995-1996 budget battle showed what the future holds in the increasing annual struggle over entitlements. The inability of Congress and the President to reach a compromise budget bill on entitlements in 1995-1996 only showed the difficulty—not

¹⁷⁵ See Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347 (1995).

¹⁷⁶ The earned income tax credit is so similar to an entitlement that the GAO analyzed it as one of the eleven chief entitlements in its major study, U.S. GEN. ACCOUNTING OFFICE, BUDGET POLICY: ISSUES IN CAPPING MANDATORY SPENDING 70 (1994).

¹⁷⁷ 141 CONG. REC. H10,854, 10,859, 10,866 (daily ed. Oct. 26, 1995) (presenting text and debate of waiver on two-thirds rule).

¹⁷⁸ Alissa J. Rubin, *Highlights of Clinton's Proposal to Balance Budget in Seven Years*, 53 CONG. Q. WKLY. REP. 3722, 3723 (1995).

the impossibility—of a transition from the original model of entitlement legislation to “budgetized” entitlements. The original model of entitlements created a political constituency for entitlement security. Eventually the limits of the budget will constrain the spiraling spending on entitlements. Congress must, and will, return repeatedly to the problem of integrating entitlement costs into the rest of the budget.

The 1995-1996 budget battle demonstrated that Congress will enact a “budgetized” model of entitlements, in which the political power of entitlement beneficiaries finds its balance in periodic, perhaps even annual, review against the political power of other spending and revenue beneficiaries. The evolution of Medicare and Medicaid payment and delivery systems like prospective payment and managed care, which can help implement spending cuts, will move the budget forward. Just as these payment and delivery systems have largely come into existence in the budget bills of the past decade-and-a-half, they will evolve further, and be augmented and used, in the budget bills of the future. The trend to decide health policy in the budget, sometimes called the “fiscalization” of policy debate,¹⁷⁹ may well be decried by proponents of a better health policy. “Budgetizing”—the periodic pitting of entitlement beneficiaries against other claimants—is not wonderful; in health policymaking terms, it may even be regrettable; but, as entitlements consume an increasing share of the budget, it is inevitable.

After the 1995-1996 battle, Congress faces the challenge of completing the transition to “budgetized” health care entitlements. It is not as difficult a challenge as some may think. After all, the 1995 bill went all the way from the budget resolution, through committees, to House and Senate floor passage, and out of conference. This signifies an extraordinary change from the period when congressional veto gates surrounding entitlements made it impossible to imagine significant entitlements change going very far.

In bringing health entitlements into coordination with the rest of the fiscal constitution, the challenge for the future is to give entitlement beneficiaries forms of protection that will compensate them for provider rate reductions and other sacrifices de-

¹⁷⁹Thomas E. Mann & Norman J. Ornstein, *Introduction to INTENSIVE CARE: HOW CONGRESS SHAPES HEALTH POLICY* 4 (Thomas E. Mann & Norman J. Ornstein eds., 1995).

manded to reduce the projected increases in spending. After all, the goal of Medicare and Medicaid is not spending in itself; it is providing beneficiaries with individual security as well as protecting access and quality of care. As described by a recent study of the changes in health entitlements by budget bills, “[E]very deficit reduction package needed substantial support from liberal Democrats” who “pushed for somewhat bigger cuts to medicare providers to pay for expansion of access to medicaid.”¹⁸⁰ The coalitional politics of the future that will change the fiscal constitution will hopefully make similar trade-offs in which entitlement beneficiaries receive guarantees of access and quality in return for the capping of cost increases and changes in payment and delivery systems.

The radical nature of some of the proposals in the 1995-1996 budget battle offered a frightening vision of how bad the future could be. Transition to a new model of entitlements could occur by crude denial of benefits to those who are politically weakest, particularly at the local level—the poor, the disabled, the victims of epidemics, and the terminally ill. Yet, there were signs during the 1995-1996 debate of more hopeful possibilities. There were steps toward moderation, such as proposals for affluence-testing as an alternative way to achieve savings, even in this period of a conservative tide. There will be a fiscal constitution in the twenty-first century, and it will make trade-offs between entitlement spending, other spending, and revenue. The details of its shape are not crystal clear. Yet, if we have the skills to read them, we have before us in the record of the 1995-1996 budget battle the clues to the direction that the fiscal constitution will take.

¹⁸⁰Joseph White, *Budgeting and Health Policymaking*, in *INTENSIVE CARE*, *supra* note 179, at 59–60.

ARTICLE

PROTECTING SOCIAL SECURITY AND MEDICARE

WILLIAM G. DAUSTER*

In this Article, the Democratic Chief of Staff for the Senate Committee on the Budget presents Medicare and Social Security as essential programs that must be protected. Mr. Dauster argues that Medicare and Social Security have not only alleviated serious poverty among the elderly and extended lives, but that these programs are also overwhelmingly supported by the public. Though protecting Medicare and Social Security hinges on maintaining sufficient funds to sustain programmatic benefits, the author believes Republicans have cynically used the solvency of the Medicare Trust Fund to frighten the American public into making severe cuts in Medicare. Likewise, rather than focusing on how to preserve Social Security, both Democrats and Republicans have debated whether its surpluses should be included in the budget. Mr. Dauster proposes that instead of focusing solely on the trust funds' solvency and budgetary effects, legislators should genuinely attempt to preserve these programs for the American people.

Social Security¹ stands as the greatest legacy of Franklin Roosevelt's New Deal. Medicare² rests as the cornerstone of Lyndon Johnson's Great Society. In 1995, the nation celebrated the sixtieth anniversary of Social Security and the thirtieth anniversary of Medicare. Americans overwhelmingly support these two programs.

Their immense size in the budget, however, makes them targets for conservatives who want to reduce the size of the federal government and the federal budget deficit. Claiming that it wants to "preserve, protect, and strengthen" Medicare,³ the new Repub-

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¹By "Social Security," people commonly mean the Federal programs of Old-Age, Survivors, and Disability Insurance. In this Article, when referring to the "Social Security Trust Fund," the author means the Old-Age, Survivors, and Disability Insurance ("OASDI") Trust Funds. *See generally* SOCIAL SECURITY & MEDICARE BOARD OF TRUSTEES, STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 1995 ANNUAL REPORTS 1 (1995) [hereinafter TRUSTEES' SUMMARY REPORT].

²By "Medicare," people commonly mean the Federal programs of Hospital Insurance (Medicare "Part A" or "HI") and Supplementary Medical Insurance (Medicare "Part B" or "SMI"). In the current debate over Medicare's solvency, people generally refer to the Medicare Hospital Insurance Trust Fund.

³*See infra* notes 188–191 and accompanying text.

lican Congress has set about cutting the growth in the program. This Article examines Social Security and Medicare, reviewing their history, success, popularity, and budgets. The Article then assesses Congress's efforts to protect the two programs.

I. HISTORICAL ORIGINS⁴

A. *Social Security*

When the Great Depression swept America, from 1929 to the beginning of 1933, the nation's economy declined by nearly nine percent per year.⁵ In those four years, per capita personal income fell from \$705 to \$374 (in 1970 dollars).⁶ In 1933, one full quarter of the labor force could not find a job.⁷ Americans began to look to the federal government to play a greater role in the economy.

At this economic abyss, Franklin Roosevelt became President, promising "a New Deal for the American people."⁸ President Roosevelt chose Labor Secretary Frances Perkins to head the Committee on Economic Security, which recommended the creation of the old-age social insurance program that became Social Security.⁹ In January 1935, President Roosevelt presented the plan to Congress as part of a larger social welfare measure, and Congress responded with the Social Security Act of 1935.¹⁰

⁴For discussions of the historical origins of Social Security and Medicare, see, e.g., ERIC R. KINGSON & EDWARD D. BERKOWITZ, *SOCIAL SECURITY AND MEDICARE: A POLICY PRIMER* 27-52 (1993); Ted Marmor & Julie Beglin, *Medicare and How It Grew—To Be Confused and Misjudged*, *BOSTON GLOBE*, May 7, 1995, at 73.

⁵BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, pt. 1, 226 (1975) (ser. F 31) (noting 8.6% average annual growth rates in gross national product).

⁶*Id.* at 225 (ser. F 17-30).

⁷*Id.* at 135 (ser. D 85-86) (reporting that 24.9% of the civilian labor force was unemployed).

⁸Franklin D. Roosevelt, Speech Accepting the Democratic Nomination for President in Chicago (July 2, 1932), in *SPEECHES OF THE AMERICAN PRESIDENTS*, at 481 (Janet Podell & Steven Anzovin eds., 1988).

⁹See KINGSON & BERKOWITZ, *supra* note 4, at 30, 32-34.

¹⁰Ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397e (1994)).

B. Medicare

In the decade following the enactment of Social Security, liberals called unsuccessfully for national health insurance.¹¹ President Harry Truman repeatedly advocated national health insurance funded through payroll deductions, but his efforts were unsuccessful.¹² In 1951, planners at the Federal Security Agency, the predecessor of the Department of Health and Human Services, explored the idea of extending health insurance to retired persons, who had particular difficulty obtaining insurance in the private sector, and the idea slowly gained popularity in the 1950s.¹³

Senator John Kennedy raised health care as a campaign issue in the 1960 presidential campaign. Assuming the presidency after President Kennedy's assassination, President Lyndon Johnson spoke of moving "not only toward the rich society and the powerful society, but upward to the Great Society."¹⁴ In July 1965, at the height of legislative action on President Johnson's Great Society, Congress enacted Medicare into law in the Health Insurance for the Aged Act.¹⁵ When President Johnson signed the bill in Independence, Missouri, former President Truman told President Johnson, "You have made me a very, very happy man."¹⁶

C. Social Insurance

Congress created both Social Security and Medicare as social insurance programs.¹⁷ Congress intended that they operate as earned benefits, not as welfare. All workers pay premiums, or "federal insurance contributions," into the system equal to 1.45% of their wages for Medicare and 6.2% of their wages for Social Security.¹⁸ Social Security contributions are capped at a maximum level. For example, in 1995, the maximum amount of wage

¹¹ See Marmor & Beglin, *supra* note 4, at 74.

¹² See DAVID McCULLOUGH, TRUMAN 473-74, 476, 532, 586, 628, 915 (1992).

¹³ See KINGSON & BERKOWITZ, *supra* note 4, at 44.

¹⁴ Lyndon B. Johnson, Address at the University of Michigan (May 22, 1964), in THE PENGUIN BOOK OF TWENTIETH-CENTURY SPEECHES, at 346 (Brian MacArthur ed., 1992).

¹⁵ Pub. L. No. 89-97, tit. I, 79 Stat. 290 (1965) (codified as amended in scattered sections of 26, 42, and 45 U.S.C. (1994)).

¹⁶ McCULLOUGH, *supra* note 12, at 984.

¹⁷ For a discussion of the social insurance approach, see KINGSON & BERKOWITZ, *supra* note 4, at 13-25.

¹⁸ See 26 U.S.C. § 3301 (1994). See generally the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1994).

income subject to the payroll tax for Social Security was \$61,200.¹⁹ Employers match their employees' premiums.²⁰ The system then protects the workers against defined risks. Social Security protects against the risks of loss of earnings due to retirement, death, or disability. Medicare covers the health-care needs of the elderly and long-term disabled. When the risks become realities, the system pays participants benefits that they have earned by paying the premiums.²¹

II. RESULTS OF MEDICARE AND SOCIAL SECURITY

A. Populations Served

Social Security and Medicare serve an enormous number of people. Social Security pays monthly benefits to 43 million persons.²² Medicare covers about 32 million seniors—virtually everyone age sixty-five or older²³—and 4 million disabled enrollees for hospital and related care (under the Hospital Insurance program).²⁴ It covers nearly as many people for doctors' services, outpatient hospital services, and other medical expenses (under the Supplementary Medical Insurance program).²⁵ Roughly 140 million workers—96% of the nation's workforce²⁶ and 54% of all

¹⁹ See TRUSTEES' SUMMARY REPORT, *supra* note 1, at 2.

²⁰ See 26 U.S.C. § 3111 (1994).

²¹ Participants have earned their benefits by paying into the system at least *some* of the cost of those benefits. Participants have not, however, usually paid into the system enough in contributions to pay for *all* the benefits that they receive. See C. EUGENE STEUERLE & JON M. BAKIJA, *RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY* 98–115 (1994).

²² BOARD OF TRUSTEES, FEDERAL OLD-AGE AND SURVIVORS INS. AND DISABILITY INS. TRUST FUNDS, 1995 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUNDS, H.R. DOC. NO. 57, 104th Cong., 1st Sess. 3 (1995) [hereinafter OASDI TRUSTEES' REPORT] (year-end 1994 data).

²³ See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 16 (1994) [hereinafter 1994 STATISTICAL ABSTRACT] (table no. 16) (middle series projection of 1994 population over 65 years old of 33,170,000).

²⁴ BOARD OF TRUSTEES, FEDERAL HOSPITAL INS. TRUST FUND, THE 1995 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE TRUST FUND, H.R. DOC. NO. 56, 104th Cong., 1st Sess. 1 (1995) [hereinafter HI TRUSTEES' REPORT] (1994 data).

²⁵ BOARD OF TRUSTEES, FEDERAL SUPPLEMENTARY MEDICAL INS. TRUST FUND, THE 1995 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUND, H.R. DOC. NO. 55, 104th Cong., 1st Sess. 1 (1995) [hereinafter SMI TRUSTEES' REPORT] (1994 data).

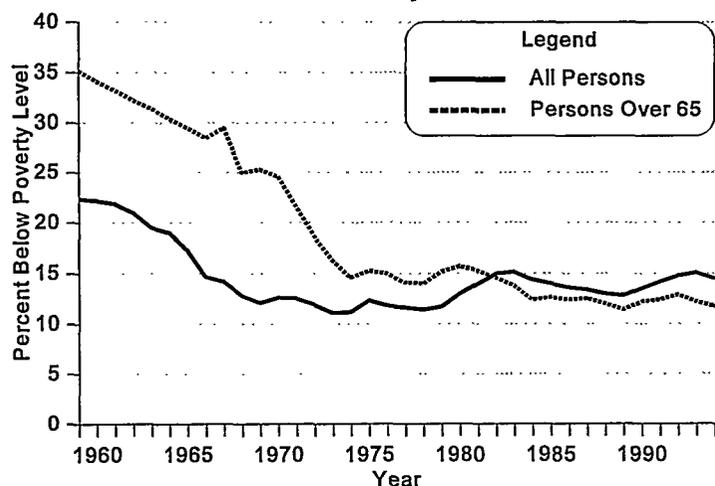
²⁶ See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 2D SESS.,

Americans²⁷—pay Social Security and Medicare payroll taxes to support the programs and stand to benefit from the programs as they grow older.²⁸

B. Poverty

Social Security and Medicare have successfully reduced poverty among seniors. More than one-third of seniors lived in poverty as recently as 1959.²⁹ After the enactment of Medicare in 1965 and its implementation in 1966, poverty among seniors declined dramatically. (See Figure 1.)³⁰ The poverty rate for seniors dropped

Figure 1
Poverty



OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREEN BOOK 3 (Comm. Print 1994) [hereinafter GREEN BOOK].

²⁷ See 1994 STATISTICAL ABSTRACT, *supra* note 23, at 9 (table no. 3) (middle series projection of 1994 U.S. population of 260,711,000).

²⁸ OASDI TRUSTEES' REPORT, *supra* note 22, at 3; HI TRUSTEES' REPORT, *supra* note 24, at 1.

²⁹ See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, INCOME, POVERTY, AND VALUATION OF NONCASH BENEFITS: 1993, at D-17 (table D-5) (ser. P 60-188) (1993) [hereinafter CURRENT POPULATION REPORTS] (noting that 35.2% of persons 65 and older had incomes below the poverty level in 1959).

³⁰ See *id.* at D-13, D-17 (table D-4 for all persons, table D-5 for persons 65 and older); Daniel H. Weinberg, Chief, Hous. & Household Economic Statistics Div., Bureau of the Census, Press Briefing on 1994 Income and Poverty Estimates (Oct. 5, 1995) (supplemental tables B-5 & B-6) (on file with the author). The Bureau of the Census does not provide annual data for persons 65 and older for years between 1959 and 1966.

4.5% in 1968 alone, and since 1984, has remained stable between 11% and 13%, a mere third of its 1959 level.

While it is true that poverty in the population as a whole declined in the 1960s and early 1970s, it did not decline nearly as quickly as it did among seniors. In 1982, the poverty rate for seniors fell below that for the population as a whole, and it has remained there. In contrast, the poverty rate for the population as a whole rose by four percentage points between 1973 and 1993. After hitting a low of 11% in the 1970s, the rate remained about 13% in every year but one since 1980, and it stood at roughly 15% in 1992 and 1993.³¹

Despite progress on poverty among seniors, they are by no means an affluent group. Nearly six out of ten seniors rely on Social Security for most of their income.³² Practically one-third of seniors rely on Social Security for 80% or more of their income.³³ Most Social Security recipients have incomes from other sources of less than \$6,000 per year.³⁴ Fully two-thirds of all Social Security beneficiaries have non-Social Security incomes below \$10,000 per year.³⁵ Similarly, three-quarters of Medicare beneficiaries have total annual incomes below \$25,000.³⁶ Thus, a vast segment of America's seniors need Social Security and Medicare to remain above the poverty level. Without Social Security, most seniors would fall below the poverty level today.³⁷

³¹ See CURRENT POPULATION REPORTS, *supra* note 29, at D-13, D-17. While Social Security and Medicare have buoyed seniors up out of poverty, increasing numbers of children have fallen below the poverty level. See *id.* at D-17 (percentage of all persons under 18 years below poverty level). The poverty rate for children hit its low in 1969, and has increased to nearly 23%, the highest rate since 1964. Changes in family structure account for much of this change in childhood poverty, but decreasing governmental support has contributed as well. Since 1970, for example, the average state grant under Aid to Families with Dependent Children has fallen by more than \$300, after adjusting for inflation. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN Y.B.: 1995, at 22 (1995) (median monthly state AFDC grant for a family of three with no other income).

³² See OFFICE OF RESEARCH AND STATISTICS, SOCIAL SECURITY ADMIN., INCOME OF THE POPULATION, 55 YEARS OR OLDER 31 (chart P-11) (1992) (noting that 59% of the elderly rely on Social Security for 50% or more of their income).

³³ See *id.*

³⁴ See GREEN BOOK, *supra* note 26, at 862 (data for 1992).

³⁵ See *id.*

³⁶ Concurrent Resolution on the Budget for Fiscal Year 1996, Medicare Solvency: Hearings Before the Senate Comm. on the Budget, S. HRG. No. 162, 104th Cong., 1st Sess. 309, 311 (1995) [hereinafter *Medicare Solvency Hearings*] (statement of Karen Davis, President of the Commonwealth Fund).

³⁷ See OFFICE OF RESEARCH AND STATISTICS, SOCIAL SECURITY ADMIN., FAST FACTS & FIGURES ABOUT SOCIAL SECURITY 8 (1995) (using 1992 data, Social Security lifts 38% of the aged out of poverty, leaving only 14% below the poverty level).

Social Security may become an even more important safety net for retirees in the future. Employers are cutting back on pensions that pay defined benefits in favor of defined contribution "401(k)" plans.³⁸ Future generations of retirees may not have contributed enough to their 401(k) plans³⁹ or invested them aggressively enough⁴⁰ to provide pensions as generous as those offered by defined-benefit plans. Once again, Social Security will stand as the bulwark against poverty for those who will not have or could not have adequately saved for their retirement.

Recent trends paint a similar picture of employer-provided health plans for retirees. The percentage of employees covered by such plans declined substantially between 1988 and 1994.⁴¹ During that time period, fewer employers offered such plans. Those that did required retirees to bear a greater share of the costs. Consequently, retirees showed less willingness to enroll in the plans when they were offered.⁴²

Furthermore, to the extent that retiree health plans follow the trend in pension benefits toward defined contributions and away from defined benefits, employer-provided health benefits will also decrease. Thus, the need for Medicare coverage is also very likely to rise, not fall.

³⁸ See PENSION & WELFARE BENEFITS ADMIN., U.S. DEP'T OF LABOR, RETIREMENT BENEFITS OF AMERICAN WORKERS: NEW FINDINGS FROM THE SEPTEMBER 1994 CURRENT POPULATION SURVEY 13-14 (1995) [hereinafter PENSION & WELFARE BENEFITS ADMIN., RETIREMENT BENEFITS] ("One important difference between DB [defined benefits] and DC [defined contribution] plans is the form of benefit payment, with DB plans generally providing pension benefits through a life annuity while virtually all DC plans permit retiring or terminating employees to receive a lump sum distribution of the vested value of their account."); PENSION & WELFARE BENEFITS ADMIN., U.S. DEP'T OF LABOR, ET AL., PENSION AND HEALTH BENEFITS OF AMERICAN WORKERS: NEW FINDINGS FROM THE APRIL 1993 CURRENT POPULATION SURVEY 7 (1994).

³⁹ The Labor Department reports that "20% of workers have absolutely nothing saved in any kind of investment or saving vehicle." Albert B. Crenshaw, *Congress Looks To Give Retirement Plans a Lift*, WASH. POST, Sept. 10, 1995, at H1.

⁴⁰ The benefits consulting firm of Watson Wyatt Worldwide finds that nearly a quarter of people in their 20s have 80% or more of their 401(k) funds in fixed-income investments that have historically yielded much lower returns than stock investments. See David Clay Johnston, *In 401(k)'s, It's Great To Be Young and Bold*, N.Y. TIMES, Sept. 3, 1995, at C3.

⁴¹ See PENSION & WELFARE BENEFITS ADMIN., RETIREMENT BENEFITS, *supra* note 38, at 28.

⁴² *Id.* at 25.

C. Life Expectancy

With the nearly universal health insurance coverage and decreasing poverty achieved by Social Security and Medicare, seniors have begun to live longer.⁴³ In 1930, before Social Security and Medicare, a 65-year-old man could not expect to live to age 77, and a 65-year-old woman had a life expectancy of just over 77. In 1990, a 65-year-old man could expect to live to 80, and a 65-year-old woman could expect to live to 84.⁴⁴

The success of Social Security and Medicare in extending life spans has brought on problems of its own.⁴⁵ As seniors live longer, they get more monthly payments from Social Security and incur more health care expenditures. Part of the difficulty maintaining the solvency of Social Security and Medicare thus stems from their success.

III. PUBLIC PERCEPTIONS

A. Support

Americans strongly support Social Security and Medicare. Six in ten Americans consider Social Security to be one of the government's "very most important" programs.⁴⁶ Even 56% of non-retired people think so, and fully 96% of all respondents believe that Social Security is either important or one of the "very most important" programs.⁴⁷ Similarly, half of all Americans view Medicare as one of the "very most important" programs, while 94% consider it to be either important or one of the "very most important programs."⁴⁸

⁴³ See GREEN BOOK, *supra* note 26, at 855.

⁴⁴ *Id.*

⁴⁵ See *Medicare Solvency Hearings*, *supra* note 36, at 311; ROSS PEROT, *INTENSIVE CARE*, at title page (1995).

⁴⁶ See Madelyn Hochstein, *Social Security and Medicare Anniversary Research: Overview of Results 26* (July 11, 1995) (survey of 2,000 Americans April and May 1995 by DYG, Inc., for the American Ass'n of Retired Persons) (asking, "Compared with other government programs, how important a program do you think Social Security is? Would you say the Social Security system is: one of the very most important programs, important but not one of the very most important, or not a very important program?") (unpublished survey, on file with the *Harvard Journal on Legislation* and the author).

⁴⁷ *Id.*

⁴⁸ See *id.* at 27 (asking, "Compared with other government programs, how important a program do you think Medicare is? Would you say Medicare is: one of the very most

When pollsters ask Americans whether they would spend more, the same, or less on Social Security and health care, roughly half would spend *more*.⁴⁹ Fully 91% would spend the same or more on Social Security and 85% would spend the same or more on health care.⁵⁰ Even as younger Americans grow more pessimistic about their chances of collecting Social Security benefits, they continue to believe that their grandparents currently receive insufficient benefits.⁵¹

Americans view Social Security and Medicare provisions as an almost contractual relationship. Nearly three-quarters of all Americans believe that retirees collect Social Security as “benefits their taxes have already paid for,” and more than half of Americans believe the same about Medicare.⁵²

At least seven in ten Americans, regardless of age, reject the argument that the government must cut Medicare to reduce the deficit.⁵³ A similar share of Americans opposes cutting Social Security for deficit purposes.⁵⁴

B. Confidence

People do harbor concerns about the future of Social Security and Medicare. Only 36% of Americans have confidence in the future

important programs, important but not one of the very most important, or not a very important program?”).

⁴⁹See THE POLLING REPORT, Dec. 26, 1994, at 2 (reporting a Princeton Survey Research Assocs. poll for the Times Mirror Ctr. for the People and the Press conducted Dec. 1–4, 1994, in which pollsters asked: “If you were making up the Federal budget this year, would you increase spending for _____, decrease spending for _____, or keep spending the same for this?” Fully 52% would increase spending for “health care” and 46% would increase spending for “Social Security.”).

⁵⁰See *id.*

⁵¹Elizabeth Kolbert, *Who Will Face the Music?*, N.Y. TIMES, Aug. 27, 1995, § 6 (Magazine), at 56, 59.

⁵²See *id.* at 57 (reporting a survey conducted for the American Hosp. Ass’n finding 72% in favor of the first proposition and 53% in favor of the second).

⁵³See William Schneider, *Countdown to a Political Explosion*, 27 NAT’L J. 2034 (1995) (citing a July 1995 Gallup poll); see also AM. ENTERPRISE, Sept.–Oct. 1995, at 107 (reporting a Yankelovich Partners poll for *Time* and CNN conducted May 10–11, 1995, in which pollsters asked, “I’m going to read you a list of programs that some people have suggested be cut to balance the budget by the year 2002. For each, please tell me if it is more important to make significant cuts in that program to balance the budget or more important to prevent that program from being significantly cut.” For Medicare, only 16% thought it more important to make significant cuts, while 81% thought it more important to prevent Medicare from being cut.)

⁵⁴See Hochstein, *supra* note 46, at 61 (Question: “In order to cut the Federal deficit, people have suggested making spending cutbacks in several programs. I’m going to read you a list of programs. For each, please tell me whether you *favor* spending cuts to reduce the deficit or *oppose* spending cuts.” For “Social Security for the retired,”

of Social Security, with only 8% very confident in the system's future.⁵⁵ Confidence has declined during the last decade. In 1985, 46% of Americans expressed confidence in the future of Social Security.⁵⁶ Surprisingly, in a year of controversy over Medicare cuts, people have greater confidence in Medicare than in Social Security, with 53% expressing confidence in the future of Medicare.⁵⁷

Confidence varies widely among different age groups. Most retired people express confidence in the future of Social Security and Medicare.⁵⁸ More than three-fifths of seniors voice confidence in Social Security, but fewer than a quarter of baby boomers do.⁵⁹ Nearly seven in ten seniors express confidence in Medicare, while only half of baby boomers do.⁶⁰ Baby boomers voice twice as much confidence in Medicare as in Social Security.⁶¹

Did Medicare face a crisis in 1995? Once again, the answer depends on whom you ask. Seven in ten people under 65 think Medicare faces serious problems that require drastic action.⁶² A plurality of seniors, on the other hand, believe that the system is basically sound.⁶³

C. *How to Protect Social Security and Medicare*

How do people who have not yet retired think we should protect Social Security and Medicare? Ninety percent of non-retired Americans agree with the statement, "If I knew the money I pay into Social Security would go into a trust fund that could not be touched, I'd feel a lot more confident about the future of Social Security."⁶⁴ Most non-retired people also express willing-

31% favored cuts; for "Medicare for the elderly," 32% favored cuts; for "Medicare which assists the disabled," 32% favored cuts, and for "Social Security for the disabled of any age," 33% favored cuts.).

⁵⁵ See Hochstein, *supra* note 46, at 55 (Question: "How much confidence do you have in the future of the Social Security system? Would you say you are: very confident, somewhat confident, not too confident, or not at all confident?").

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* at 56-57.

⁵⁹ See *id.* at 57 (62% of respondents 65 or older were either very or somewhat confident, while only 24% of those aged 30 to 49 were).

⁶⁰ See *id.* (69% of respondents 65 or older were either very or somewhat confident, while 48% of those aged 30 to 49 were).

⁶¹ See *id.*

⁶² See Schneider, *supra* note 53, at 2034.

⁶³ See *id.* (41% of respondents 65 or older believe Medicare faces a financial crisis, while 45% say the system is basically sound).

⁶⁴ See Hochstein, *supra* note 46, at 58.

ness to pay more in payroll taxes to insure the availability of Social Security and Medicare.⁶⁵

IV. BUDGETARY REALITIES

A. *Share of the Budget*

When asked why he robbed banks, the bank robber Willie Sutton replied, "Because that's where the money is."⁶⁶ Sutton's Law explains why conversations about reducing the federal budget deficit often turn to Social Security and Medicare.⁶⁷ Social Security has become the federal government's largest mandatory spending program, projected to amount to over a third of a trillion dollars today and half a trillion by 2003.⁶⁸ Medicare requires roughly \$200 billion per year today and at current growth rates will cost more than a third of a trillion dollars in 2002.⁶⁹

Together Social Security and Medicare compose more than one-third of all federal spending and three-fifths of all entitlement spending.⁷⁰ Social Security accounts for 22% of federal spending and 39% of entitlement spending. Medicare constitutes 12% of federal spending and 22% of entitlement spending.⁷¹

⁶⁵ See *id.* at 59 (Question: "I'm going to read you some statements about Social Security/Medicare. Please tell me whether you *agree completely*, *agree somewhat*, *disagree somewhat*, or *disagree completely* with each statement." Among non-retired respondents, 58% agreed either completely or somewhat with the statement: "To insure that Medicare will be there for me when I reach age 65, I would be willing to pay more now in payroll taxes." Fifty-six percent agreed with the statement: "To insure that Medicare will be there for today's older people, I would be willing to pay more now in payroll taxes." Fifty-five percent agreed with the statement: "To insure that Social Security will be there for me when I retire, I would be willing to pay more now in payroll taxes." Fifty-four percent agreed with the statement: "To insure that Social Security will be there for today's older people, I would be willing to pay more now in payroll taxes.").

⁶⁶ WILLIE SUTTON & EDWARD LINN, *WHERE THE MONEY WAS* 119-20 (1976); see also Lawrence K. Altman, *A Law Named for Willie Sutton Assists Physicians*, N.Y. TIMES, Jan. 3, 1970, at A12.

⁶⁷ See, e.g., *The Republican Medicare Plan*, WASH. POST, Sept. 28, 1995, at A28; *Cutting Medicare*, WASH. POST, Sept. 12, 1995, at A18; James K. Glassman, *Social Insecurity*, WASH. POST, Sept. 5, 1995, at A17.

⁶⁸ See CONGRESSIONAL BUDGET OFFICE, *THE ECONOMIC AND BUDGET OUTLOOK: AN UPDATE 26* (1995) [hereinafter CBO UPDATE] (using fiscal year 1996 baseline projection data for current spending).

⁶⁹ See *id.* at 26 (using fiscal year 1996 baseline data for current spending).

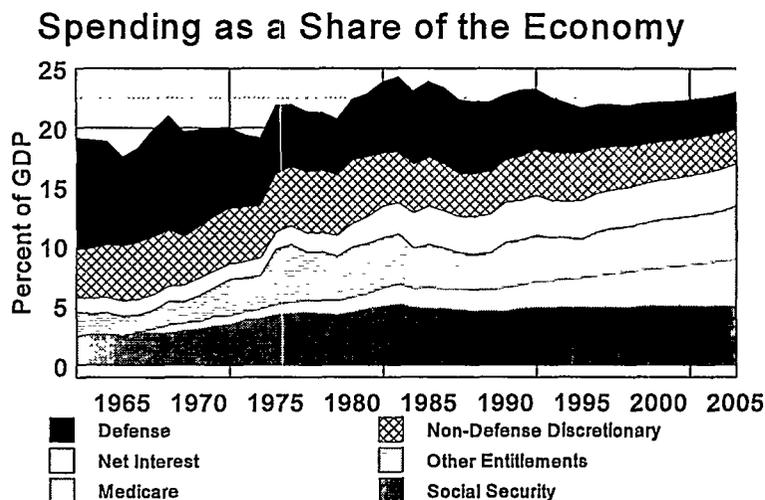
⁷⁰ See *id.* at 22, 26 (using fiscal year 1996 baseline projection data, and using all mandatory spending for entitlements, including offsetting receipts and deposit insurance).

⁷¹ Other spending is allocated as follows: Defense, 17%; Interest, 15%; Other Discretionary, 17%; Other Entitlements, 16%. *Id.*

The Congressional Budget Office ("CBO") projects that the federal government's two major health care programs, Medicare and Medicaid (which provides mostly long-term health care to low-income individuals), will grow at a rate of about 10% per year over the next ten years.⁷² This growth rate is significantly faster than other large components of the federal budget.⁷³ If these projections hold true, by 2001, Medicare will exceed spending on the military, becoming the second-largest program in the government.⁷⁴ By 2002, Medicare will take a larger share of the federal budget than all domestic discretionary programs funded in annual appropriation acts.⁷⁵ By 2002, Medicare will surpass net interest expenditures to finance the government debt.⁷⁶ And by 2005, Medicare spending will grow to twice its present level.⁷⁷

Figure 2 tracks the growth of the six largest categories of government spending over time, measured as a share of the

Figure 2



⁷² See *id.* at 27.

⁷³ See *id.*

⁷⁴ See *id.* at 22, 26.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.* at 27.

nation's economy.⁷⁸ Note that in the forty-three years depicted, the role of the federal government has changed significantly. Exchanging social for military spending, the American people have "beat their swords into plowshares."⁷⁹

In 1962, military spending accounted for almost half of all federal spending. More than twice as much of the budget was devoted to defense as to entitlement spending. With the Great Society, entitlement spending grew dramatically in the decade between 1966 and 1976, stabilizing at around ten percent of the economy through the 1980s. The CBO projects that by 2005, entitlement spending will account for three-fifths of federal spending.

After its Vietnam War peak, military spending declined from 1968 through 1979, increased again with the Carter and Reagan build-up through the mid-1980s, and then began what is projected to be a continuing decline as a share of the economy. Non-defense discretionary spending peaked in 1980, and also began, beginning with the first Reagan budget, a continuing decline as a share of the economy.

Since 1981, Social Security spending has stabilized at a little less than five percent of the economy, and the CBO projects that this spending will grow at roughly the same rate as projected economic growth over the next decade. In contrast, the CBO expects Medicare to grow significantly faster than the economy as a whole.⁸⁰ Growth in Medicare and Medicaid essentially explains the projected growth in the size of the federal government over the next decade. Even with this growth, however, the federal government's spending over the next ten years, relative to the total economy, will remain below its levels during the 1982 to 1986 period of Republican control of the White House and the Senate.⁸¹

⁷⁸ See *id.* at 23 (for projections 1995–2005, using data with inflation in discretionary programs after 1998); OFFICE OF MANAGEMENT & BUDGET, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1996, at 98 (1995) [hereinafter HISTORICAL TABLES] (for most historical data; using total mandatory spending, which includes undistributed offsetting receipts for entitlements); CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1996–2000, at 101 (1995) [hereinafter CBO OUTLOOK] (for historical data on Medicare). This figure and this Article use the gross domestic product to measure the size of the American economy.

⁷⁹ Isaiah 2:4.

⁸⁰ See CBO UPDATE, *supra* note 68, at 27.

⁸¹ See *id.* at 23; CBO OUTLOOK, *supra* note 78, at 97.

That the government devotes a greater share of its resources to Medicare and Social Security is not necessarily bad. The United States could rationally choose to devote a greater share of its resources to the health and well-being of its seniors. As discussed above, these programs are both successful and popular. Seniors have contributed to the economy throughout their lives, and have contributed through their payroll taxes to the Social Security and Medicare systems. By and large they are not affluent recipients, and can use the support.⁸² On the other hand, the levels of growth projected for Medicare cannot go on forever, and as the economist Herbert Stein notes, if something is unsustainable, it tends to stop.⁸³

B. *Deficits*

The government's growth causes concern, as well, because projections for revenues do not keep pace. Since the tax cuts of the early Reagan administration, revenues have remained stable at roughly 19% of the economy, and the CBO projects they will continue to do so. Spending, on the other hand, has dropped below 22% only once since 1980 (in 1995) and is projected to do so only once again (in 1998). Hence, the government runs deficits equal to roughly 3% of the economy.⁸⁴

Figure 3 shows the budget deficit problem that faced the federal government in 1995.⁸⁵ Both the CBO and the Office of Management and Budget projected that the budget deficit would trend upward in nominal dollars for the next decade. The CBO forecasted significantly worsening deficits over the next decade, reaching \$462 billion in 2005. Because of slightly more optimis-

⁸² With regard to military spending, on the other hand, it is not unreasonable to expect that after the fall of America's principal adversary, the Soviet Union, America might devote less funding to defending against the Russian Federation.

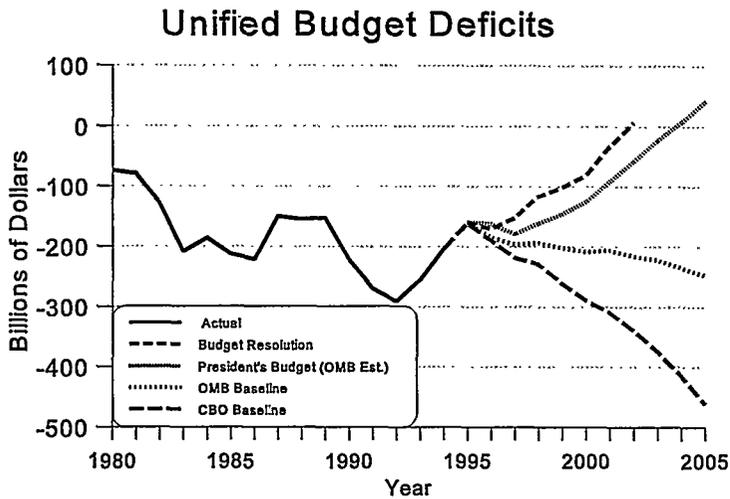
One might reasonably be concerned, however, about the declining share of the economy devoted to domestic discretionary spending. This is the fund from which the government makes its investments in the future of the nation's physical and human capital. See, e.g., OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 1996, at 41-45 (1995) (discussing public investment).

⁸³ See Peter G. Peterson, *A Summit On the Budget*, N.Y. TIMES, Feb. 3, 1987, at A27.

⁸⁴ See CBO OUTLOOK, *supra* note 78, at 93; CBO UPDATE, *supra* note 68, at 23.

⁸⁵ See CBO OUTLOOK, *supra* note 78, at 93 (actuals); CBO UPDATE, *supra* note 68, at 23, 28 (CBO, OMB baseline projections); OFFICE OF MANAGEMENT AND BUDGET, MID-SESSION REVIEW OF THE 1996 BUDGET 5 (1995) (President's budget); H.R. CONF. REP. NO. 159, 104th Cong., 1st Sess. 44 (1995), reprinted in 141 CONG. REC. H6273, H6285 (daily ed. June 26, 1995) (budget resolution).

Figure 3



tic projections for growth in the economy and health care costs, the Office of Management and Budget projected a deficit of \$248 billion for the same year.

By June 1995, both the President and the Congress had agreed on the desirability of enacting laws in 1995 that would cause the deficit to decline to zero in the near future. While Congress in its budget resolution advocated balancing the budget in seven years (by 2002)⁸⁶, the President called for balancing the budget in ten years (by 2005).⁸⁷

In the wake of the 1994 congressional elections, in which Republicans gained control of both the Senate and the House of Representatives, neither the Congress nor the President thought it politically prudent to raise taxes to reduce the deficit. Thus, the burden fell on participants in the budget process to find spending cuts that would reduce the deficit by enough to balance the budget. And that, in turn, leads back to Sutton's Law.⁸⁸

⁸⁶ See H.R. CONF. REP. NO. 159, 104th Cong., 1st Sess. 44, reprinted in 141 CONG. REC. H6273, H6285 (daily ed. June 26, 1995).

⁸⁷ See The President's Economic Plan: A Balanced Budget that Puts People First (June 13, 1995) (available on file with the *Harvard Journal on Legislation*).

⁸⁸ See *supra* note 66 and accompanying text.

C. Social Security

Are Social Security and Medicare part of the deficit problem? One can best understand the relationship of Social Security to the budget deficit by dividing the program's history into three time periods: before the Social Security Amendments of 1983,⁸⁹ between the 1983 amendments and 2020, and the long run thereafter. Each period presents a distinct picture of how Social Security contributes to the budget deficit.

1. Prior to the 1983 Amendments

Before the Social Security Amendments of 1983, Social Security functioned on a pay-as-you-go basis. Revenues coming into the fund roughly matched expenditures from the fund.⁹⁰ The system accumulated relatively few assets in preparation for future retirees. Often through ad hoc legislative changes, Congress increased benefit levels at roughly the rate necessary to keep pace with the growing income to the system from rising wages.⁹¹

During this nearly fifty-year period, Social Security never ran an annual surplus greater than \$6 billion nor a deficit greater than \$8 billion.⁹² For its first twenty-five years of operation, through 1961, Social Security ran small annual surpluses averaging about \$1 billion per year.⁹³ Between 1967 and 1975, the system generated slightly larger surpluses, averaging around \$3 billion.⁹⁴ The Social Security Amendments of 1972⁹⁵ liberalized the program and instituted the Nixon administration's proposal to pay automatic cost-of-living adjustments, or "COLAs." Consequently, from 1976 through 1982, Social Security ran deficits averaging a little more than \$3.5 billion per year, as price inflation

⁸⁹Pub. L. No. 98-21, 97 Stat. 65 (1983) (codified as amended at 12 U.S.C. § 3413, scattered sections of 26 U.S.C., 38 U.S.C. § 3023 note, scattered sections of 42 U.S.C., and scattered sections of 45 U.S.C. (1994)).

⁹⁰See HISTORICAL TABLES, *supra* note 78, at 220-22, 224 (table 13.1—Cash Income, Outgo, and Balances of the Social Security and Medical Trust Funds: 1936-2000).

⁹¹See Robert M. Ball, *Social Security Across the Generations*, in SOCIAL SECURITY AND ECONOMIC WELL-BEING ACROSS GENERATIONS 11, 20 (John R. Gist ed., 1988).

⁹²See HISTORICAL TABLES, *supra* note 78, at 220-22, 24 (table 13.1—Cash Income, Outgo, and Balances of the Social Security and Medical Trust Funds: 1930-2000). Note that these figures include interest paid by the federal government to the trust fund.

⁹³See *id.*

⁹⁴See *id.*

⁹⁵Pub. L. No. 92-603, 86 Stat. 1329 (1972) (codified as amended at scattered sections of 5, 7, 25, 26, 42, and 45 U.S.C. (1994)).

outpaced wage growth.⁹⁶ Thus, before the Social Security Amendments of 1983, Social Security had a relatively negligible effect on the total surplus or deficit of the federal government.

2. Between the 1983 Amendments and 2020

The inflation of the late 1970s and early 1980s drew down the assets (or “reserves”) of the system, and when the recession of 1981 struck, headlines began to warn of the impending bankruptcy of Social Security.⁹⁷ Meeting in 1982 and 1983, the bipartisan National Commission on Social Security Reform made recommendations that Congress enacted into the Social Security Amendments of 1983.⁹⁸ These amendments raised the retirement age through 2027, delayed or reduced COLAs, and instituted a program of payroll tax increases, all to help ensure the solvency of the system for the retirement of the baby boom generation. The 1983 amendments fundamentally changed the relationship of the trust fund to the budget. Beginning in 1984, the Social Security Trust Fund ran a surplus. According to projections, the Trust Fund should run surpluses through 2021.⁹⁹ (See Figure 4.)¹⁰⁰

The National Commission and the 1983 amendments ensured that the Social Security system would take in substantially more revenue, in the form of payroll taxes, than it needed to expend for benefits.¹⁰¹ In five of the years since 1983, the annual surpluses in the Social Security Fund have exceeded \$50 billion.¹⁰² The Fund’s trustees predict that these surpluses will reach \$164 billion in 2011, and will continue through 2019.¹⁰³ These surpluses are valuable because they increase national saving. They decrease the demand for money, lower interest rates, and thus spur growth-producing investment. The desire to protect these sur-

⁹⁶ See Ball, *supra* note 91, at 23.

⁹⁷ See *id.*

⁹⁸ See generally 39 CONG. Q. ALMANAC 219–26 (1983) (providing a history of the Social Security “rescue plan”).

⁹⁹ SOCIAL SECURITY ADMIN., OASDI TRUST FUND OPERATIONS (Apr. 3, 1995) [hereinafter OASDI TRUST FUND OPERATIONS] (tables available on file with the *Harvard Journal on Legislation*).

¹⁰⁰ See *id.*; HISTORICAL TABLES, *supra* note 78, at 224, 226.

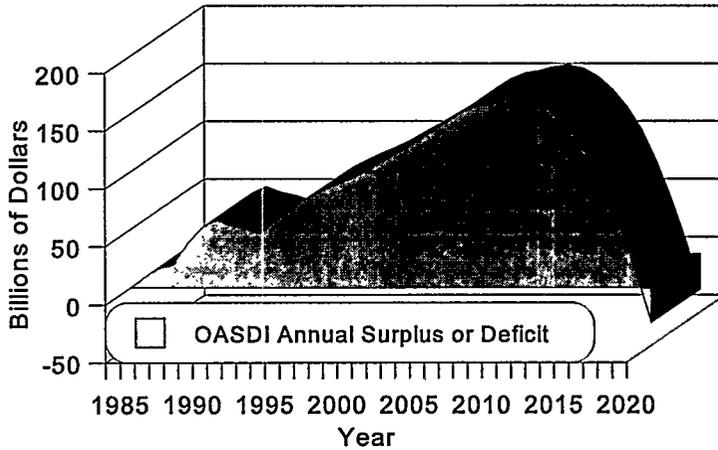
¹⁰¹ See HISTORICAL TABLES, *supra* note 78, at 224, 226; OASDI TRUST FUND OPERATIONS, *supra* note 99.

¹⁰² See HISTORICAL TABLES, *supra* note 78, at 224, 226.

¹⁰³ See OASDI TRUST FUND OPERATIONS, *supra* note 99.

Figure 4

Social Security 1984-2020



pluses has driven much of the debate over Social Security since the 1983 amendments.

Unfortunately, the effects of large deficits in the rest of the federal budget have overwhelmed the benefits from the Social Security surpluses. For most of the post-World-War-II era, the federal government conducted its entire budget roughly on a pay-as-you-go basis.¹⁰⁴ Beginning in the mid-1970s and expanding in the Reagan administration, however, the federal government ran substantial budget deficits in the non-Social-Security programs.¹⁰⁵ These budget deficits have far outweighed the surpluses generated by the Social Security Trust Fund.¹⁰⁶

In Figure 5,¹⁰⁷ the dashed line at the top of the graph illustrates the surplus and deficit history of Social Security. The solid and

¹⁰⁴ See HISTORICAL TABLES, *supra* note 78, at 13–14.

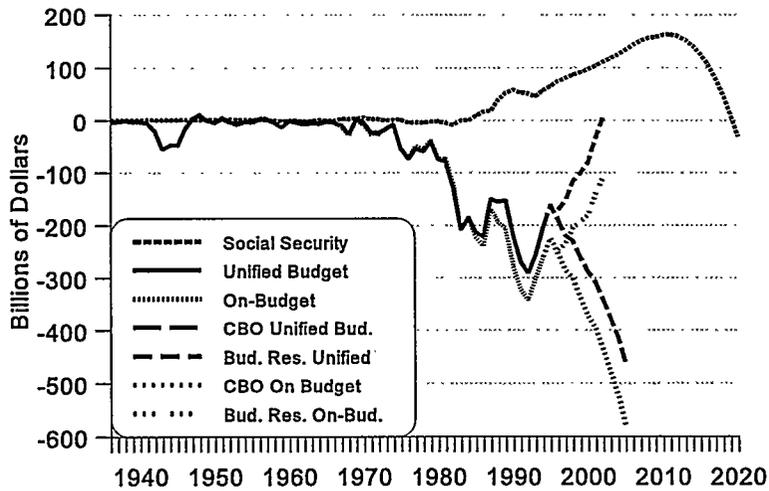
¹⁰⁵ See *id.* at 14.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 13–14, 220–22, 224, 226; OASDI TRUST FUND OPERATIONS, *supra* note

Figure 5

Budget Surpluses and Deficits 1936-2020



the dashed lines below show the deficits of the whole government including the Social Security Trust Fund (the “unified budget deficit”). The bottom dotted lines show the budget deficits of the government excluding the Social Security surpluses (the “on-budget deficit”).

As shown by Figure 5, the availability of the Social Security surpluses makes the unified budget deficit smaller than it otherwise would be. Thus, some accuse policy-makers of using Social Security surpluses to hide the true size of the budget deficit.

The Social Security Trust Fund surpluses must by law be invested in United States government securities.¹⁰⁸ Thus, the Trust Fund loans the United States government money. Some have

99; CBO UPDATE, *supra* note 68, at 23, 28; H.R. CONF. REP. No. 159, 104th Cong., 1st Sess. 44 (1995), *reprinted in* 141 CONG. REC. H6273, H6285 (daily ed. June 26, 1995).

¹⁰⁸Social Security Act § 201(d), 42 U.S.C. § 401(d) (1994); *see also* TRUSTEES’ SUMMARY REPORT, *supra* note 1, at 2–3. The Trustees explain:

In all trust funds, assets that are not needed to pay current benefits or administrative expenses (the only purposes for which trust funds may be used) are invested in special issue U.S. Government securities guaranteed as to both principal and interest and backed by the full faith and credit of the U.S. Government.

characterized this borrowing from the Social Security Trust Fund as improper, and some even describe it as “embezzlement.”¹⁰⁹ Such characterizations are exaggerations at best, as the reserves of the Social Security Trust Fund are invested in the safest possible investment—United States government securities—and are backed by the full faith and credit of the United States. One would find it hard to imagine how the reserves could be more safely housed.

Investing surpluses in United States Treasury securities also means that the Treasury need not borrow as much money from the public to finance the government’s unified budget deficit. Running on-budget deficits that far exceed the Social Security surpluses, however, undermines the benefits of national saving sought in the 1983 amendments. Thus, the first step the government must take to protect the Social Security Trust Fund is to reduce on-budget deficits.

3. 2020 and Beyond

As Figure 4 illustrated, beginning in 2019, the Social Security Trust Fund will stop running surpluses. Social Security’s reserves, its accumulated surpluses, will then begin to decline as the fund begins to pay out more than it brings in, and the trustees project that the assets of the fund will be exhausted in 2031. The trustees state in their 1995 report:

The Federal Old-Age and Survivors Insurance (OASI) Trust Fund, which pays retirement benefits, will be able to pay benefits for about 36 years. The Board believes that the long-range deficit of the OASI Trust Fund should be addressed. The Advisory Council on Social Security is currently studying the financing of the program and is expected to recommend later this year ways to achieve long-range actuarial balance in the OASI fund.¹¹⁰

The retirement of the baby boom generation will cause the Social Security Trust Fund to run increasingly large annual deficits. As Figure 6¹¹¹ shows, beginning in 2020, the deficits in the trust

Id.

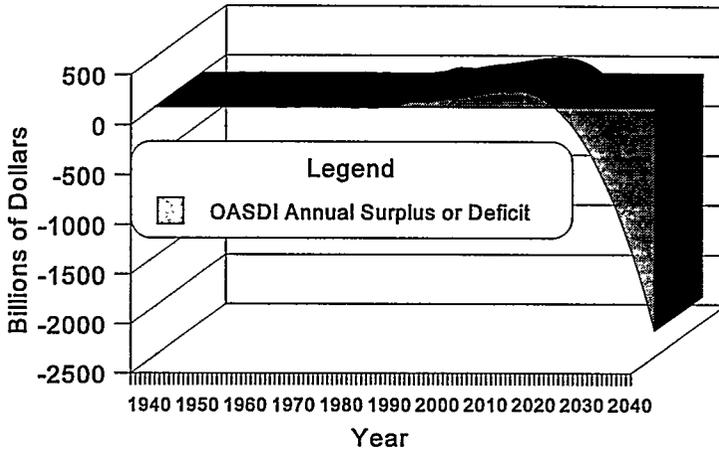
¹⁰⁹ *E.g.*, 136 CONG. REC. S15,780 (daily ed. Oct. 18, 1990) (statement of Sen. Moynihan (D-N.Y.)).

¹¹⁰ TRUSTEES’ SUMMARY REPORT, *supra* note 1, at i.

¹¹¹ See HISTORICAL TABLES, *supra* note 78, at 224, 226; OASDI TRUST FUND OPERATIONS, *supra* note 99.

Figure 6

Social Security 1936-2040



fund will quickly dwarf the reserves that it will have taken the fund more than 35 years to accumulate.

The trustees of the fund predict that these deficits will persist. To remain in actuarial balance, the Social Security Trust Fund requires significant changes in the long run. The good news is that we have time to phase in these changes gradually, if we act now.

D. Medicare

More complex than Social Security, Medicare consists of two federal programs of insurance: Hospital Insurance ("Medicare Part A" or "HI") and Supplementary Medical Insurance ("Medicare Part B" or "SMI"). Unlike the Social Security Trust Fund, which is wholly supported by the payroll tax, different financing mechanisms support the two parts of Medicare. This division

arose from political considerations, not a philosophical rationale.¹¹²

Like Social Security, a payroll tax supports the HI Fund. Thus, one can discuss the solvency of Medicare Part A in similar terms as one discusses the solvency of the Social Security Trust Fund. Solvency of the HI Fund is compromised if growth in the cost of hospitalization exceeds the growth in payroll income.

The SMI Fund, which covers doctors' and outpatient fees, is supported by premiums and general revenues from the Treasury.¹¹³ Thus, the SMI Fund is as actuarially sound as the United States government.¹¹⁴ Consequently, few debate its solvency. Figure 7¹¹⁵ displays the short history of the Medicare HI Trust Fund. In its first twenty years of operation, the fund reported modest surpluses, averaging a little more than \$1.5 billion per year. In the second half of the 1980s, when the government closely controlled the system, Medicare costs rose less rapidly than those for private-sector health care.¹¹⁶ The Fund enjoyed a period of significant surpluses, amounting to nearly \$17 billion in 1989. After 1989, however, the surpluses of the Fund decreased, and the Trustees project that they will return to deficits in 1996 and thereafter.

This deficit trend has caused the Medicare Trustees to issue the following warning:

The Federal Hospital Insurance (HI) Trust Fund, which pays inpatient hospital expenses, will be able to pay benefits for only about 7 years and is severely out of financial balance in the long range. The Trustees urge the Congress to take additional actions designed to control HI program costs and

¹¹² See Marmor & Beglin, *supra* note 4, at 74–75.

¹¹³ The Medicare Trustees explain:

The SMI or Part B program is financed similarly to yearly renewable, term insurance. Participants pay premiums that in 1994 covered about 30 percent of the cost; the rest is paid for by the Federal Government from general revenues. The 1995 monthly premium is \$46.10.

TRUSTEES' SUMMARY REPORT, *supra* note 1, at 2.

¹¹⁴ The Trustees' report explains:

The test for *SMI actuarial soundness* is met for any time period if the trust fund assets and projected income are enough to cover the projected outgo and there are enough assets to cover costs incurred but not yet paid. The adequacy of the SMI Trust Fund is measured only for years for which both the beneficiary premiums and the general revenue contributions have been set.

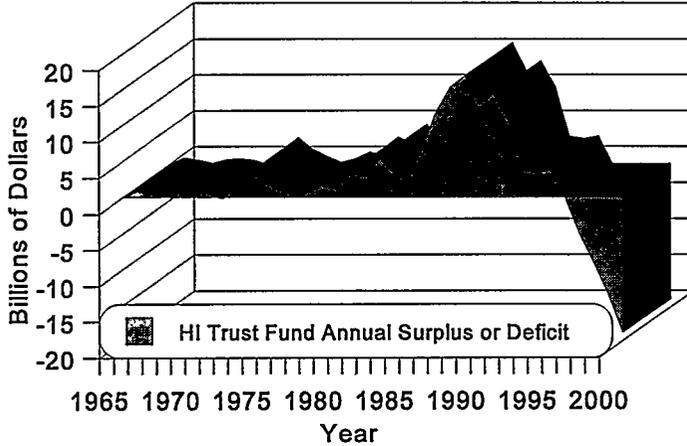
Id. at 4.

¹¹⁵ See HISTORICAL TABLES, *supra* note 78, at 223, 225, 227, 229; SOCIAL SECURITY ADMIN., OPERATIONS OF THE HI TRUST FUND DURING FISCAL YEARS 1970–2004 (Apr. 3, 1995).

¹¹⁶ See Ted Marmor, *The Medicare Solution*, WASH. MONTHLY, Sept. 1995, at 35.

Figure 7

Medicare HI Trust Fund 1965-2000



to address the projected financial imbalance in both the short range and the long range through specific program legislation as part of broad-based health care reform.¹¹⁷

¹¹⁷TRUSTEES' SUMMARY REPORT, *supra* note 1, at i. The trustees also make the following statements regarding Medicare Part A:

Under the intermediate assumptions, the projected year of exhaustion for the HI Trust Fund is 2002; under more adverse conditions, as in the high cost alternative, it could be as soon as 2001.

Id. at 6.

The non-administration, or "public," trustees make these further, more sweeping observations:

There are basic questions with the scale, structure and administration of the Medicare program that need to be addressed. For example, is it appropriate to have a Part A and Part B today, or should this . . . be revised to create a unified program? Is it appropriate to combine participants' social insurance tax contributions for Part A and premium payments for approximately one-quarter of Part B with general revenues? If so, what should be the proper combination? [W]hat rights to benefits and responsibilities to pay benefits are thereby established?

We feel strongly that comprehensive Medicare reforms should be undertaken to make this program financially sound now and over the long term. The idea that reductions in Medicare expenditures should be available for other

Such warnings of the imminent insolvency of the HI Trust Fund are nothing new. In nine previous Trustees' reports, the warning was at least as dire as that in the current report.¹¹⁸ Indeed, in 1994, the Trustees warned that the HI Trust Fund would be depleted within five years.¹¹⁹ Thus, one might doubt the sincerity of politicians who warned of a Medicare crisis in 1995, if they are the same people who dismissed the idea of a crisis in 1994. In fact, prospects for the HI Trust Fund have improved since 1993, when President Clinton's first budget injected a new stream of revenues into the fund and reduced the growth in its spending.¹²⁰

Ted Marmor of the Yale School of Management sums up the situation: "Medicare doesn't need 'saving' or 'rescuing' or any of the other hyperbolic turns of phrase the press and politicians use to discuss the program's future. To borrow from Twain, reports of a crisis are greatly exaggerated."¹²¹

What, after all, does the HI Trust Fund really measure? It certainly does not measure the ability of the government to fund the Medicare program. Once again, in Professor Marmor's words:

If it chooses, Congress can appropriate more money to Medicare; it can change the tax schedule, and so on. To say that 'by law' Medicare beneficiaries will stop receiving hospital benefits in 2002 is to imply that laws are immutable. The only thing that matters is whether Congress will raise taxes to meet expenditures, or control expenditures to stay within revenues. The affordability of the program is indeed a significant issue, but to focus on the trust fund as a symbol occludes, rather than illuminates, the debate.¹²²

There can be no dispute, however, that the situation Congress will face, looking at the long-term picture for the HI Trust Fund, is bleak. (See Figure 8.)¹²³ The deficits of the HI Trust Fund,

purposes, including even other health care purposes, is mistaken. The focus should be on making Medicare itself sustainable, making it compatible with OASDI, and making both Social Security and Medicare financially sound in the long term.

Id. at 13.

¹¹⁸ See JENNIFER O'SULLIVAN, *MEDICARE: FINANCING THE PART A HOSPITAL INSURANCE PROGRAM 6* (May 25, 1995) (CRS Rep. No. 95-650 EPW).

¹¹⁹ *See id.*

¹²⁰ *See id.*

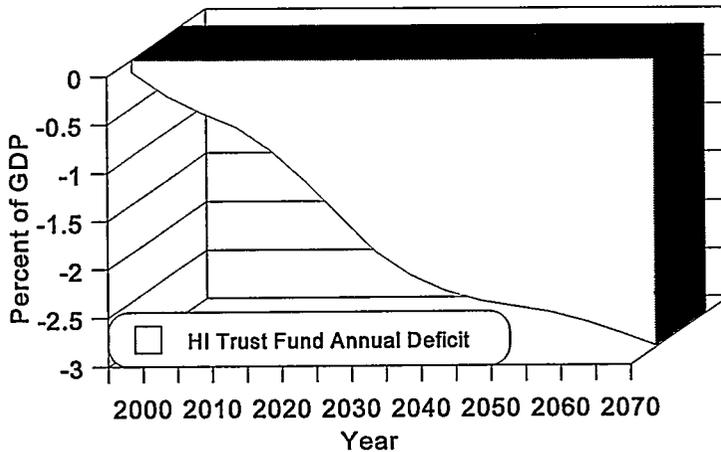
¹²¹ Marmor, *supra* note 116, at 36.

¹²² *Id.* at 36.

¹²³ *See OASDI TRUSTEES' REPORT, supra* note 22, at 188.

Figure 8

Medicare HI Trust Fund 1995-2070



even as a share of the economy, will grow dramatically and projections show no stabilization.

Thus, the impact of the baby boom generation's retirement on Social Security does not directly parallel its effect on Medicare. The Medicare HI Trust Fund is in worse condition than the Social Security Trust Fund.¹²⁴ As the Trustees advise: "A key aspect of thinking about future financing of these trust funds is recognition that under current law the timing and magnitude of the financing problems facing the programs are distinctly different."¹²⁵

This long-run comparison merely parallels the short-run comparison. While in the short run, Social Security expenditures are currently growing at roughly the same rate as the economy, Medicare costs are growing much more quickly, reflecting the rapid growth of medical expenses.¹²⁶ The retirement of the baby

¹²⁴Beginning in the year 2030, HI Trust Fund deficits are projected to reach 2% of the gross domestic product, trending upward toward 3% of the gross domestic product by the year 2070. In contrast, between 2030 and 2070, Social Security Trust Fund deficits are projected to remain between 1.5% and 2% of the gross domestic product. See OASDI TRUSTEES' REPORT, *supra* note 22, at 188.

¹²⁵TRUSTEES' SUMMARY REPORT, *supra* note 1, at ii.

¹²⁶See OASDI TRUSTEES' SUMMARY REPORT, *supra* note 22, at 188.

boomers will add burdens to both systems, but retirement needs will stabilize for the Social Security Trust Fund.¹²⁷ Unless we get better control of the growth of health care costs, however, there will be no end in sight for the growth of HI Trust Fund deficits.

One must remember, however, that these long-term projections are like the glimpses of the future the Ghost of Christmas Yet to Come showed Scrooge.¹²⁸ They are pictures of what *might* be, not what *must* be. These projections are highly sensitive to changes in the economy, fertility, immigration rates,¹²⁹ and even small programmatic changes. Like Scrooge, we still have time—though not much time—to mend our ways.

V. PROTECTING THE SOCIAL SECURITY AND MEDICARE TRUST FUNDS BY TAKING THEM OFF BUDGET¹³⁰

Congress has periodically attempted to protect the Social Security and Medicare Trust Funds by excluding them from the budget or calculations of the deficit. Advocates argue that this protects the programs from being used to reduce the size of the federal deficit. As this Part discusses, however, Republicans have failed to heed federal mandates and continue to show the Medicare HI Trust Fund as part of the overall budget. Further, though Congress ceaselessly debates whether to include the Social Security Trust Fund in deficit calculations, it has not yet taken steps to ensure Social Security's solvency after 2020. This Part reviews the history of the exclusion and inclusion of the trust funds in relation to the federal budget and demonstrates how Congress has wavered on this issue, resulting in a checkered past for both trust funds.

¹²⁷ See *id.*

¹²⁸ See CHARLES DICKENS, *A Christmas Carol*, in CHRISTMAS BOOKS 70 (Oxford Univ. Press 1954).

¹²⁹ At a Capitol Hill conference in early 1994, former Office of Management and Budget Director David Stockman expressed optimism about the long-term solvency of Social Security: to solve the problem, the United States needed merely to annex Mexico. While Mr. Stockman spoke in jest, his remark contains a grain of truth. To the extent that the United States closes its borders to younger immigrants, who tend to have more children, it will decrease the number of future workers supporting future retirees, and add to Social Security's long-term woes.

¹³⁰ Sections A through D of this part draw on the author's work in SENATE COMM. ON THE BUDGET, SOCIAL SECURITY PRESERVATION ACT, S. REP. NO. 426, 101st Cong., 2d Sess. (1990).

A. Commission on Budget Concepts

Before 1969, the government generally used an “administrative” budget, which excluded trust funds, focusing on the movement of funds into and out of the Treasury’s general fund.¹³¹ In October 1967, the President’s Commission on Budget Concepts¹³² recommended that the government move to a “unified” budget in order to reflect the true size of government. The President’s Commission warned that though the budget should include trust funds, it should not ignore their separate status. The Commission suggested:

The budget should include the receipts and expenditures of trust funds. This recommendation fully recognizes that individual trust funds must be accounted for separately, and that their activities must be reported on in a way which allows the identity and integrity of trust fund transactions and balances to be preserved.¹³³

¹³¹For a discussion of the budgetary treatment of Social Security before Gramm-Rudman-Hollings, see CONGRESSIONAL RESEARCH SERV., SOCIAL SECURITY, MEDICARE, AND THE UNIFIED BUDGET, 99th Cong., 1st Sess. (Sen. Comm. on Budget Print 1985).

¹³²The President’s Commission on Budget Concepts comprised the Secretary of the Treasury, the Director of the Bureau of the Budget, the Comptroller General, the chairmen and ranking minority members of the two Appropriations Committees, and other business, accounting, academic, and editorial experts. See PRESIDENT’S COMM’N ON BUDGET CONCEPTS, REPORT 109 (1967). It undertook the first major review of the form of the budget since the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C. (1994)).

¹³³PRESIDENT’S COMM’N ON BUDGET CONCEPTS, REPORT 11 (1967) (emphasis omitted). The Commission’s first recommendation stated: “The Commission recommends—and this is its most significant recommendation—that a unified budget concept . . . be adopted . . .” *Id.* On trust funds specifically, the Commission also stated:

In theory, trust funds do not *belong* to the Federal Government; the Federal Government acts only as *trustee* for them There has never been a question of the Federal Government’s responsibility for determining the size and shape of the major trust fund programs, or for altering or redirecting these programs by appropriate changes in legislation Legislative changes affecting one or another of the major trust funds occur almost every year. Rather than removing funds from the influence of the administration or the Congress, the trust fund technique, in the case of major trust funds, earmarks certain expenditure programs for financing by specific taxes or other revenue sources. This couples the benefits and costs of these programs more closely, and it also lends a degree of assurance to beneficiaries and grantees that trust fund benefit or grant schedules once established will be protected.

With the passage of time, trust fund activities have loomed larger in both absolute and relative magnitude in the total picture of Federal Government receipts and expenditures. Receipts, expenditures, and the surplus or deficit in Federally owned funds, therefore, have correspondingly less significance. It is clear to the Commission that the current surpluses of trust funds must be considered in calculating the effect of Federal Government activities on the level of income and employment, in managing Treasury cash balances, in deciding on Treasury cash borrowing needs, and in program evaluation.

Following the Commission's suggestion, the President started including Social Security and other trust funds in the budget beginning with fiscal year 1969.¹³⁴ Congress followed suit by adopting the unified budget approach in the Congressional Budget and Impoundment Control Act of 1974.¹³⁵

In the late 1970s and early 1980s, controversy arose over the inclusion of Social Security in the budget. In an effort to reduce the deficit, Congress and the President cut the Social Security minimum benefit, student benefit, and lump-sum death benefit, among others.¹³⁶ This caused defenders of Social Security to view its inclusion in the budget as a threat to the program. They believed that exclusion would make policy-makers less likely to cut Social Security, because Social Security cuts would not then yield credit toward a goal of deficit reduction.

Twice in 1981, the Senate approved an amendment offered by Senator Thomas Eagleton (D-Mo.) that would not have excluded Social Security from the budget, but would instead have required a special statement on the outlays, revenues, and surpluses of Social Security as part of the President's budget submissions.¹³⁷ The amendments were dropped by the conference committees on both occasions, but demonstrate Congress's interest in explicitly

The Commission *does not* recommend eliminating the concept of separate trust fund accounting. In many instances, in fact, it sees merit in earmarking specific revenue sources for well-defined programs of a long-run character. The need to respect the integrity of trust funds, and the requirements of control and accountability, in turn require the continued availability of trust fund receipt and expenditure figures separate from those of other funds.

However, in order to further the concept of a unified budget,

The Commission recommends strongly that the President's budget presentation give no attention to a surplus or deficit calculated on the basis of the administrative budget.

The surplus or deficit in the administrative budget is a misleading guide for measuring the fiscal impact of the budget on the economy. The administrative budget does not portray or price out the President's full program, nor does the administrative budget alone accurately measure congressional action on the President's requests. Congressional responsibility for trust fund receipts and expenditures is just as great as for Federally owned funds, since it can and does enact trust fund legislation with considerable frequency, although there is less flexibility available to the Congress to reduce trust fund expenditures.

Id. at 26-27.

¹³⁴See OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 1969 (1968).

¹³⁵Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601-688 and scattered sections of 1 U.S.C. and 31 U.S.C. (1994)) [hereinafter Congressional Budget Act].

¹³⁶See, e.g., Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981).

¹³⁷See 127 CONG. REC. 17,938-41, 23,955 (1981).

monitoring the financial health of Social Security in relation to the budget as a whole.

B. *The Social Security Amendments of 1983*

In response to recommendations from the National Commission on Social Security Reform to remove both Medicare and Social Security from the budget entirely,¹³⁸ Congress reached a compromise by enacting the Social Security Amendments of 1983.

The 1983 Amendments ordered more prominent display of Social Security and Medicare through fiscal year 1992, and then their removal from the budget in fiscal year 1993.¹³⁹

C. *Gramm-Rudman-Hollings*

Enactment of Gramm-Rudman-Hollings¹⁴⁰ in 1985 resulted in a schizophrenic treatment of Social Security. Social Security was

¹³⁸See NATIONAL COMM'N ON SOCIAL SECURITY REFORM, REPORT 2-24 (1983). The report suggested:

A majority of the members of the National Commission recommends that the operations of the OASI, DI, HI, and SMI trust funds should be removed from the unified budget.

Id. The Commission also reviewed arguments for and against displaying Social Security separately but including it in the budget:

The National Commission believes that changes in the Social Security program should be made only for programmatic reasons, and not for purposes of balancing the budget. Those who support the removal of the operations of the trust funds from the budget believe that this policy of making changes only for programmatic reasons would be more likely to be carried out if the Social Security program were not in the unified budget. Some members also believe that such a procedure will make clear the effect and presence of any payments from the General Fund of the Treasury to the Social Security program. (Under present procedures, such payments are a "wash" and do not affect the overall budget deficit or surplus).

Those who oppose this recommendation believe that it is essential that the operations of the Social Security program should remain in the unified Federal budget because the program involves such a large proportion of all Federal outlays. Thus, to omit its operations would misrepresent the activities of the Federal Government and their economic impact. Furthermore, it is important to ensure that the financial condition of the Social Security program be constantly visible to the Congress and the public. Highlighting the operations of the Social Security program as a separate line function in the budget would allow its impact thereon to be seen more clearly.

Id. at 2-24 to 2-25.

¹³⁹See Pub. L. No. 98-21, § 346, 97 Stat. 65, 137-38 (1983), amended by Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 261, 99 Stat. 1037, 1093-94 (1985) (current version at 42 U.S.C. § 911 (1994)).

¹⁴⁰Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177,

taken off-budget, but included in the calculations of the deficit that could trigger across-the-board cuts (or "sequestration").

Gramm-Rudman-Hollings was protective of Social Security in several ways. Section 261(a) of Gramm-Rudman-Hollings amended section 710 of the Social Security Act¹⁴¹ to take Social Security out of the budgetary totals beginning with fiscal year 1986. Gramm-Rudman-Hollings also exempted Social Security from any across-the-board cuts.¹⁴² Similarly, Gramm-Rudman-Hollings

tit. II, 99 Stat. 1037, 1038 (1985) [hereinafter Gramm-Rudman-Hollings], amended by Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, tits. I-II, 101 Stat. 754 (1987) (codified as amended at 42 U.S.C. §§ 901-922 (1994)).

¹⁴¹42 U.S.C. § 911 (1988). Through fiscal year 1992, section 710(a) of the Social Security Act provided:

§ 911. Budgetary treatment of trust fund operations

(a) Federal Old-Age and Survivors Insurance Trust Fund; Federal Disability Insurance Trust Fund

The receipts and disbursements of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, and the taxes imposed under sections 1401(a), 3101(a), and 3111(a) of The Internal Revenue Code of 1986, shall not be included in the totals of the budget of the United States Government as submitted by the President or of the congressional budget and shall be exempt from any general budget limitation imposed by statute on expenditures and net lending (budget outlays) of the United States Government.

42 U.S.C. § 911(a) (1988).

Because of the amendments in Gramm-Rudman-Hollings and the 1983 amendments, beginning with fiscal year 1993, section 710(a) changed so that it also applies to the Medicare hospital insurance trust fund. In the following quotation of section 710(a) as it appears (and has since fiscal year 1993), additions to the version of section 710(a) in force through fiscal year 1992 appear in *italic*, while deletions appear in ~~strikeout~~.

(a)(1) The receipts and disbursements of the Federal Old-Age and Survivors Insurance Trust Fund, and the Federal Disability Insurance Trust Fund, *and the Federal Hospital Insurance Trust Fund* and the taxes imposed under sections 1401(a), 3101(a), and 3111(a) of The Internal Revenue Code of 1986, shall not be included in the totals of the budget of the United States Government as submitted by the President or of the congressional budget and shall be exempt from any general budget limitation imposed by statute on expenditures and net lending (budget outlays) of the United States Government.

(2) No provision of law enacted after December 12, 1985 (other than a provision of an appropriation Act that appropriates funds authorized under this chapter as in effect on December 12, 1985) may provide for payments from the general fund of the Treasury to any Trust Fund specified in paragraph (1) or for payments from any such Trust Fund to the general fund of the Treasury.

42 U.S.C. § 911 note (1994). Section 346(b) of the Social Security Amendments of 1983, Pub. L. No. 98-21, § 346(b), 97 Stat. 138 (1983), and section 261(b) of Gramm-Rudman-Hollings required the text of section 710(a) to change effective for fiscal years beginning with 1993.

¹⁴²See Gramm-Rudman-Hollings § 255(a) (codified at 2 U.S.C. § 905(a) (1988)); H.R. CONF. REP. NO. 433, 99th Cong., 1st Sess. 85 (1985). Note, however, that Gramm-Rudman-Hollings did not exempt administrative expenses for Social Security. See *id.* at 92.

amended the Congressional Budget Act to prohibit congressional consideration of language in reconciliation legislation that would change Social Security benefits,¹⁴³ and set up a requirement for the affirmative vote of sixty senators to waive the point of order for violating that prohibition.¹⁴⁴

On the other hand, Gramm-Rudman-Hollings used Social Security surpluses to mask the size of the deficit and delay the triggering of budget cuts. The Act amended the definition of the term "deficit" to include Social Security within the calculation of the deficit for purposes of determining whether across-the-board cuts would be required.¹⁴⁵

D. Responses to Gramm-Rudman-Hollings

Under Gramm-Rudman-Hollings, many Members of Congress perceived that the surpluses that the government accumulated in Social Security masked the size of the deficit in the operating budget. A number of bills introduced in the Senate in the 100th and 101st Congresses sought to address this problem by repealing the provision that included Social Security in the definition of the "deficit" for purposes of Gramm-Rudman-Hollings.¹⁴⁶ These efforts and the events described in the following paragraphs culminated in section 13301 of the Budget Enforcement Act of

¹⁴³See Gramm-Rudman-Hollings § 201(b); Congressional Budget Act § 310(g), 2 U.S.C. § 641(g) (1994); H.R. CONF. REP. No. 433, *supra* note 142, at 110.

¹⁴⁴See Gramm-Rudman-Hollings § 271(b) (codified as amended at 2 U.S.C. § 901 note (1994)); H.R. CONF. REP. No. 433, *supra* note 142, at 117.

¹⁴⁵See H.R. CONF. REP. No. 433, *supra* note 142, at 77-78, 101.

¹⁴⁶See S. 2211, 100th Cong., 2d Sess., 134 CONG. REC. S3038-39 (daily ed. Mar. 24, 1988) (Sen. Sanford (D-N.C.)); S. 2914, 100th Cong., 2d Sess., 134 CONG. REC. S16, 889-95 (daily ed. Oct. 19, 1988) (Sen. Moynihan); S. 101, 101st Cong., 1st Sess., 135 CONG. REC. S170, S425-29 (daily ed. Jan. 25, 1989) (Sen. Sanford); S. 219, 101st Cong., 1st Sess., 135 CONG. REC. S173, S636-37 (daily ed. Jan. 25, 1989) (Sen. Moynihan); S. 240, 101st Cong., 1st Sess., 135 CONG. REC. S173, S682-84 (daily ed. Jan. 25, 1989) (Sen. Heinz (R-Pa.)); S. 401, 101st Cong., 1st Sess., 135 CONG. REC. S1413, S1421-22 (daily ed. Feb. 9, 1989) (Sen. Hollings (D-S.C.)); S. 537, 101st Cong., 1st Sess., 135 CONG. REC. S2346 (daily ed. Mar. 8, 1989) (Sen. Riegle (D-Mich.)); S. 852, 101st Cong., 1st Sess., 135 CONG. REC. S4384, S4419 (daily ed. Apr. 19, 1989) (Sen. Bryan (D-Nev.)); S. 1752, 101st Cong., 1st Sess., 135 CONG. REC. S13,297, S13,299-300 (daily ed. Oct. 12, 1989) (Sen. Heinz); S. 1785, 101st Cong., 1st Sess., 135 CONG. REC. S13,893 (daily ed. Oct. 24, 1989) (Sen. Moynihan); S. 1795, 101st Cong., 1st Sess., 135 CONG. REC. S14,129, S14,137-38 (daily ed. Oct. 25, 1989) (Sen. Hollings); S. 2868, 101st Cong., 2d Sess., 136 CONG. REC. S9971 (daily ed. July 18, 1990) (Sen. Graham (D-Fla.)). For earlier bills, see S. 724, 99th Cong., 1st Sess., 131 CONG. REC. 5817 (Mar. 20, 1985) (Sen. Hawkins (R-Fla.)); S. 478, 98th Cong., 1st Sess., 129 CONG. REC. S1156 (daily ed. Feb. 15, 1983) (Sen. Riegle).

1990, which sought to take Social Security off budget for all purposes and remains the current law.¹⁴⁷

Senator Lawton Chiles (D-Fla.) represented the views of many Senators when he offered an amendment recommending that "Congress should enact legislation that makes the definition of the deficit exclude the surplus (or deficit) from the Social Security trust fund for all purposes."¹⁴⁸

Senator Chiles compared the Social Security situation to that facing Pharaoh in his dream of seven gaunt cows devouring seven sturdy cows.¹⁴⁹ Joseph interpreted Pharaoh's dream to mean that seven lean years of famine would follow seven years of abundance in Egypt, and advised Pharaoh to set about preparing for the lean years. Pharaoh directed Joseph to increase taxes on the people of Egypt during the time of abundance to prepare for the lean years to come. Senator Chiles questioned whether America was truly saving for Social Security's lean years to come.

After substantial debate, the Senate finally adopted an amendment offered by Senator Pete Domenici (R-N.M.) stating that the National Economic Commission should "study the budgetary treatment of social security."¹⁵⁰ The report of the National Economic Commission, issued March 1, 1989, recommended "validating" the Social Security surplus. By that, it meant using a unified budget, but balancing the non-Social-Security budget entirely. In this way, the unified budget surplus would be "equal to the Social Security surplus."¹⁵¹

¹⁴⁷ See Budget Enforcement Act of 1990, § 13301, Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388, 1388-573, 1388-623 (1990) (codified at 2 U.S.C. § 632 note (1994)).

¹⁴⁸ 134 CONG. REC. S3757 (daily ed. Apr. 12, 1988).

¹⁴⁹ See *Genesis* 41.

¹⁵⁰ 134 CONG. REC. S3878-80 (daily ed. Apr. 13, 1988). For debate on the Chiles amendment generally, see *id.* at S3709-10, S3756-85, S3854-80 (daily ed. Apr. 11, 12, & 13, 1988).

¹⁵¹ REPORT OF THE NATIONAL ECONOMIC COMMISSION 15, 17 n.2 (Mar. 1, 1989).

The majority report stated:

Presently, the annual Social Security surplus offsets part of the deficit in the non-Social Security budget. In effect Social Security is lending its reserves to the rest of the government. Under this practice, when Social Security eventually needs to draw down its reserves, the Federal government will have to raise taxes, cut non-Social Security spending, or borrow enough from the private sector to repay the funds it has borrowed from Social Security.

Time exists to prevent this. The prospect of large Social Security reserves provides an opportunity both to protect the Federal government's Social Security promises and to increase investment in our nation's economic future. This will require altering current practice so that Social Security's reserves are used to create a surplus in the unified budget, not serve simply to offset deficits.

After running a Federal deficit of nearly 6 percent of GNP in 1986,

The 101st Congress debated the budgetary treatment of Social Security both in committee and on the floor.¹⁵² Several Senators called for removing Social Security from the calculation of the deficit.¹⁵³ Indeed, on June 19, 1990, the Senate voted 96-2 to adopt an amendment offered by Senator John Heinz (R-Pa.) that would impede a debt limit extension “if Congress has not acted to remove . . . [Social Security] . . . from the calculation of the deficit.”¹⁵⁴

On July 18, 1990, the Senate Budget Committee, in a 20-1 vote, reported out the Social Security Preservation Act,¹⁵⁵ which removed Social Security from the deficit calculation under Gramm-Rudman-Hollings.¹⁵⁶ The Senate Budget Committee’s Report summarized: “The Social Security Preservation Act amends the definition of the term ‘deficit’ by striking the portion of the definition that includes the receipts and disbursements of Social Security trust funds in the calculations of the deficit.”¹⁵⁷

“validating” the annual Social Security reserves would yield an estimated unified budget surplus of 2 percent of GNP by the year 2000. This will be an immense shift in Federal fiscal policy, and must be undertaken gradually to preserve the stable economic growth now being experienced.

. . . [I]t will increase government savings, contributing to national savings. Higher national savings would lead to increased investment and/or decreased reliance on foreign capital. Either way, it should help improve long-range economic growth. Increasing national investment will help raise future income so workers after the turn of the century can support the higher ratio of older citizens while enjoying higher living standards themselves.

Id. at 15–16 (footnotes omitted). Similarly, the minority report of the National Economic Commission quoted with approval testimony calling for running unified budget surpluses equal to the size of Social Security surpluses. *See id.* at 55–56.

¹⁵²*See Budget Reform Proposals: Joint Hearings Before the Senate Comm. on Governmental Affairs & Comm. on the Budget*, 101st Cong., 1st Sess. 30–42 (1989).

¹⁵³*See* 135 CONG. REC. S15,137–47 (daily ed. Nov. 7, 1989) (statements of Sen. Heinz, Majority Leader Mitchell, and others); 136 CONG. REC. S7935–36, S7949–50, S7956–59, S7974–79 (daily ed. June 14, 1990) (same).

¹⁵⁴*See* 136 CONG. REC. S8153–56 (daily ed. June 18, 1990) (statement of Sen. Heinz); 136 CONG. REC. S8192–97, S8200, S8202–10 (daily ed. June 10, 1990) (adoption of Heinz amendment).

¹⁵⁵S. 2999, 101st Cong., 2d Sess. (1990).

¹⁵⁶S. REP. NO. 426, 101st Cong., 2d Sess., 17–18 (1990).

¹⁵⁷*Id.* at 1–2. Section 2(a)(1) of the Social Security Preservation Act would have removed Social Security from the calculation of the deficit by repealing the second sentence of the definition of “deficit” in the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601–688 (1988). The second sentence of that definition then included Social Security in the deficit. As the law then read, the definition of “deficit” was as follows:

(6) The term “deficit” means, with respect to any fiscal year, the amount by which total budget outlays for such fiscal year exceed total revenues for such fiscal year. *In calculating the deficit for purposes of comparison with the maximum deficit amount under the Balanced Budget and Emergency Deficit Control Act of 1985 and in calculating the excess deficit for purposes of*

E. The Budget Enforcement Act of 1990

The Social Security Preservation Act led up to the adoption of the Budget Enforcement Act of 1990.¹⁵⁸ Section 13301 of the Act categorically removes Social Security from the federal government's budget, and explicitly applies the prohibition to both Congress and the President.¹⁵⁹ The congressional budget resolution may not include Social Security in the federal budget deficit or surplus.¹⁶⁰ The law requires the budget resolution to set forth the on-budget totals.

The Budget Enforcement Act of 1990 also sought to protect Social Security surpluses by creating "firewalls" that prevent damage to the Trust Fund during the budget resolution process.¹⁶¹

sections 251 and 252 of such Act (notwithstanding section 710(a) of the Social Security Act), for any fiscal year, the receipts of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund for such fiscal year and the taxes payable under sections 1401(a), 3101(a), and 3111(a) of the Internal Revenue Code of 1954 during such fiscal year shall be included in total revenues for such fiscal year, and the disbursements of each such Trust Fund for such fiscal year shall be included in total budget outlays for such fiscal year.

Congressional Budget Act § 3(6), 2 U.S.C. § 622(6) (1994) (emphasis added), amended by Budget Enforcement Act of 1990, § 13112, 104 Stat. at 1388-607.

¹⁵⁸For further legislative history of the effort to remove Social Security from the budget, see H.R. CONF. REP. No. 964, 101st Cong., 2d Sess. 1160-61 (1990), reprinted in 1990 U.S.C.C.A.N. 2374, 2865-66; S. REP. No. 426, 101st Cong., 2d Sess. (1990).

¹⁵⁹Section 13301(a) states:

(a) EXCLUSION OF SOCIAL SECURITY FROM ALL BUDGETS.—Notwithstanding any other provision of law, the receipts and disbursements of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund shall not be counted as new budget authority, outlays, receipts, or deficit or surplus for purposes of—

(1) the budget of the United States Government as submitted by the President,

(2) the congressional budget, or

(3) the Balanced Budget and Emergency Deficit Control Act of 1985.

2 U.S.C. § 632 note (1994). For general discussion of the removal of Social Security from the budget and its consequences, see EDWARD DAVIS & ROBERT KEITH, BUDGET ENFORCEMENT PROCEDURES: APPLICATION TO SOCIAL SECURITY REVENUES AND SPENDING (1995); DAVID KOITZ, SOCIAL SECURITY: ITS REMOVAL FROM THE BUDGET AND PROCEDURES FOR CONSIDERING CHANGES TO THE PROGRAM (1993); DAVID KOITZ, SOCIAL SECURITY'S TREATMENT UNDER THE FEDERAL BUDGET: A SUMMARY (1995); CONGRESSIONAL RESEARCH SERV., SOCIAL SECURITY, MEDICARE, AND THE UNIFIED BUDGET, 99th Cong., 1st Sess. (Sen. Comm. on Budget Print 1985).

¹⁶⁰2 U.S.C. § 632 note (1994).

¹⁶¹*Id.*; see also H.R. CONF. REP. No. 964, at 1160-61. The law also prohibits consideration of a budget resolution reported by the Budget Committee that would decrease the Social Security surplus in any of the five years covered by the budget resolution. The fiscal year 1993, 1994 and 1995 budget resolutions require 60 votes to waive this point of order during floor consideration of the budget resolution. See Congressional Budget Act § 301(i), 2 U.S.C. § 632(i) (1994); see also Concurrent Resolution on the Budget for Fiscal Year 1995, H.R. Con. Res. 218, 103d Cong., 2d

In the Senate, these firewalls prohibit increases in Social Security spending¹⁶² or reductions in Social Security payroll contributions¹⁶³ that worsen the balances of the Social Security Trust Fund in either the next year or the next five years. Any Senator can raise a procedural objection to a violation of these firewalls, and it takes an affirmative vote of sixty Senators to overcome the objection.¹⁶⁴ The Budget Enforcement Act set up a similar prohibition in the House of Representatives covering both the next five years and the next seventy-five years.¹⁶⁵

Notwithstanding the clear intention of Congress to exclude Social Security from the budget, the President's budget regularly includes Social Security balances in its most prominent displays of the deficit.¹⁶⁶ The President has the constitutional authority to submit such messages to the Congress as he or she sees fit.¹⁶⁷ While Congress can specify what the President must include, it cannot force the President to exclude anything.¹⁶⁸ Congress itself has abided by the law in form, but players in the budget process speak as if Congress still included Social Security in the budget.

Under Section 710 of the Social Security Act, receipts and disbursements of the Medicare HI Trust Fund, like Social Security, are not to be included in the totals of either the presidential or congressional budgets effective for fiscal years 1993 and after.¹⁶⁹ In addition, the disbursements and receipts of the Medicare SMI Trust Fund are to be displayed separately in the presidential and congressional budgets.¹⁷⁰ For fiscal years 1993, 1994, and 1995, Congress complied with these provisions by providing alternative budget calculations excluding HI receipts and dis-

Sess., § 22, 140 CONG. REC. H2998, H3002 (daily ed. May 4, 1994) (adopted); Concurrent Resolution on the Budget for Fiscal Year 1994, H.R. Con. Res. 64, 103d Cong., 1st Sess., § 10(b), 139 CONG. REC. H1747, H1753 (daily ed. Mar. 31, 1993) (adopted); Concurrent Resolution on the Budget—Fiscal Year 1993, H.R. Con. Res. 287, 102d Cong., 2d Sess., § 12(b), 138 CONG. REC. H3602, H3609 (daily ed. May 20, 1992) (adopted).

¹⁶² See Congressional Budget Act § 302(f)(2), 2 U.S.C. § 633(f)(2) (1994).

¹⁶³ See Congressional Budget Act § 311(a)(2), 2 U.S.C. § 642(a)(2) (1994).

¹⁶⁴ See Congressional Budget Act § 904(c), 2 U.S.C. § 621 note (1994).

¹⁶⁵ See Budget Enforcement Act § 13302.

¹⁶⁶ See, e.g., OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE U.S. GOVERNMENT 15 (1996).

¹⁶⁷ See U.S. CONST. art. II, § 3.

¹⁶⁸ See *id.*

¹⁶⁹ 42 U.S.C. § 911(a) (1994); see also *supra* note 141 and accompanying text.

¹⁷⁰ Section 346(b) of the Social Security Amendments of 1983, Pub. L. No. 98-21, tit. III, § 346(b), 97 Stat. 138 (1983), and § 261(b) of Gramm-Rudman-Hollings 99 Stat. at 1094 require § 710(a) of the Social Security Act to have these effects for fiscal years beginning with fiscal year 1993.

bursements and by displaying the SMI Trust Fund as a separate functional category. They also, however, included such funds in calculations of the total budget deficit.¹⁷¹

The rationale for such schizophrenic treatment of the Medicare Trust Funds was compliance with the now-lapsed requirement of sections 606(b) and (c) of the Congressional Budget Act.¹⁷² Section 606 requires that the budget resolution not exceed a "maximum deficit amount," which is defined by reference to the definition of "deficit" in the Gramm-Rudman-Hollings Act.¹⁷³ Gramm-Rudman-Hollings in turn requires that, notwithstanding any other provision of law, when calculating the baseline deficit¹⁷⁴ for purposes of determining the adjustment to the maximum deficit amounts set forth by the Congressional Budget Act, "the receipts and disbursements of the Hospital Insurance Trust Fund shall be included in all calculations."¹⁷⁵ The budget resolution conferees thus read the requirement of the Congressional Budget Act that the budget resolution not exceed the adjusted maximum deficit amount¹⁷⁶ to require that the budget include HI Trust Fund receipts and disbursements.

In its first budget resolution, the Republican-controlled 104th Congress appears to have ignored Section 710 of the Social Security Act entirely. Not only is the HI Trust Fund used in deficit calculations (as it was in fiscal years 93–95), but it is also included in total budget displays, thus ignoring Section 710's requirement that Medicare be displayed separately. The budget resolution for fiscal year 1996 has no special display of Medicare.¹⁷⁷ Although this presentation may have the virtue of sim-

¹⁷¹ See Concurrent Resolution on the Budget—Fiscal Years 1991–1995, H.R. Con. Res. 310, 101st Cong., 2d Sess., §§ 2, 3(a), 104 Stat. 5163 (1990); Concurrent Resolution on the Budget—Fiscal Years 1990–1992, H.R. Con. Res. 106, 101st Cong., 1st Sess., §§ 2, 3(a), 103 Stat. 2540 (1989); Concurrent Resolution on the Budget—Fiscal Years 1989–1991, H.R. Con. Res. 268, 100th Cong., 2d Sess., §§ 2, 3(a), 102 Stat. 4875 (1988); Concurrent Resolution on the Budget—Fiscal Years 1988–1990, H.R. Con. Res. 93, 100th Cong., 1st Sess., §§ 2, 3(a), 101 Stat. 1986 (1987); Concurrent Resolution on the Budget—Fiscal Years 1987–1989, S. Con. Res. 120, 99th Cong., 2d Sess., § 1(a)–(b), 100 Stat. 4354–55 (1986).

¹⁷² U.S.C. § 665e (b)–(c) (1994).

¹⁷³ 2 U.S.C. § 665(a)(1) (1994).

¹⁷⁴ 2 U.S.C. § 907 (1994) (The baseline deficit is the starting point for budget enforcement. The baseline generally assumes that laws now in effect will continue.).

¹⁷⁵ 2 U.S.C. § 907(b)(3) (1994), as amended by § 13101(e) of the Budget Enforcement Act of 1990, Pub. L. No. 101-508, § 13101(e), 104 Stat. 1388 (1990).

¹⁷⁶ 2 U.S.C. § 665e(b)–(c) (1994).

¹⁷⁷ See H.R. CONF. REP. NO. 159, 104th Cong., 1st Sess., 102–03 (1995).

plicity, it shows little respect for the Social Security Act or the philosophy of separate treatment of Medicare that it embodied.

F. *Debate on the Balanced Budget Amendment*

In 1994 and again in 1995, Congress reconsidered its position on the role of Social Security in the budget in its debate of an amendment to the Constitution requiring a balanced federal budget.¹⁷⁸ The issue of special protection for the Social Security Trust Fund arose repeatedly. In 1994, the principal alternative, offered by Senator Harry Reid (D-Nev.), would have required balancing the operating budget exclusive of the Social Security Trust Fund.¹⁷⁹ In the 1995 debate, Senators Reid and Diane Feinstein (D-Cal.) both offered similar amendments.¹⁸⁰ The day before the majority leader had scheduled the vote on the amendment, Senators Reid and Feinstein met with Senators Kent Conrad (D-N.D.), Byron Dorgan (D-N.D.), Wendell Ford (D-Ky.), and Ernest Hollings (D-S.C.) to discuss their mutual concerns to protect the Social Security program within the context of the amendment. These senators (except for Senator Conrad) then announced their position in favor of a balanced budget amendment with an exclusion for the Trust Funds. The leadership on the balanced budget amendment did not accede to their request, and each voted against the amendment, which then failed by one vote. These swing senators thus had focused the final debate on protecting Social Security, rather than on the balanced budget amendment itself.¹⁸¹

VI. PROTECTING MEDICARE BY CUTTING BACK THE PROGRAM

In 1994 and 1995, fiscally conservative Democrats effectively employed the rhetoric of protecting the Social Security Trust

¹⁷⁸For votes on earlier amendments to constitutional amendments addressing the Social Security issue, see 132 CONG. REC. S2508 (daily ed. Mar. 12, 1986) (Metzenbaum (D-Ohio) amendment to bar cuts in Social Security benefits to balance the budget tabled 57-42); 128 CONG. REC. 19,184 (Aug. 4, 1982) (Cranston (D-Cal.) amendment to exempt Social Security and veterans' benefits from balanced budget requirement rejected 27-73); *id.* at 18,471 (July 29, 1982) (Moynihan amendment to bar any budget calling for Social Security cuts rejected 39-59).

¹⁷⁹*See* 140 CONG. REC. S1823-34 (daily ed. Feb. 24, 1994).

¹⁸⁰*See* 141 CONG. REC. S2342 (daily ed. Feb. 8, 1995); *id.* at S2970-71 (daily ed. Feb. 22, 1995).

¹⁸¹*See* 141 CONG. REC. S3311-14 (daily ed. Mar. 2, 1995).

Fund to blunt Republican charges that the Democrats opposed balancing the budget. Republicans used the same tactic against the Democrats in the 1995 Medicare debate. Since Democrats had championed protecting the Social Security Trust Fund, they would have a hard time explaining why protecting the Medicare HI Trust Fund was not every bit as important. Republicans ignored a crucial difference between the trust funds—the Social Security Trust Fund had accumulated and was accumulating substantial reserves that needed protecting, while the Medicare Trust Fund was merely a political artifice. Republicans effectively hoisted Democrats on their own petard of trust fund rhetoric.

A. *The Cynicism of the Claim to Protect Medicare*

In the wake of the failure of the balanced budget amendment, Budget Committee Chairs Pete Domenici and John Kasich (R-Ohio) put forth proposals to actually balance the budget.¹⁸² The new Republican Congress wanted tax cuts;¹⁸³ it did not want to raise taxes to cut the deficit. It also took the options of cutting Social Security and military spending off of the table. These decisions led them, like Willie Sutton to banks, to Medicare.¹⁸⁴

As previously noted, however, people do not favor cutting Medicare to reduce the deficit.¹⁸⁵ Only one-quarter of Americans want to use budget savings to pay for a tax cut.¹⁸⁶ Nonetheless, pollsters discovered that when people are told that Medicare is going broke in 2002, they are much more likely to believe that some changes are acceptable.¹⁸⁷ As a necessary result of wanting simultaneously to reduce the deficit and to cut taxes, Republicans suddenly developed a keen interest in protecting Medicare.

¹⁸² See S. REP. NO. 82, 104th Cong., 1st Sess. (1995).

¹⁸³ See, e.g., NEWT GINGRICH & DICK ARMEY, *CONTRACT WITH AMERICA 85-90* (Ed Gillespie & Bob Schellhas eds., 1994); Clay Chandler, *Supporters Count on a Capital Gains Cut*, WASH. POST, Oct. 9, 1995, at A24 (“House Speaker Newt Gingrich (R-Ga.) has described tax cuts as the ‘crown jewel’ of the Republican ‘Contract With America.’ For many newer House Republicans, the capital gains proposal is that jewel’s brightest facet.”).

¹⁸⁴ See David E. Rosenbaum, *The Medicare Brawl: Finger-Pointing, Hyperbole and the Facts Behind Them*, N.Y. TIMES, Oct. 1, 1995, § 1, at 18; see also George Hager & David S. Cloud, *Clinton and Congress Speeding Toward Collision Over Budget*, 53 CONG. Q. 2611, 2612 (1995).

¹⁸⁵ See *supra* note 53 and accompanying text.

¹⁸⁶ See Ronald G. Shafer, *Budget Train Wreck?*, WALL ST. J., Sept. 22, 1995, at A1.

¹⁸⁷ See Kolbert, *supra* note 51, at 59.

The House Republican leadership advised its members to use the usually ignored report of the Medicare Trustees to signal that Medicare faced bankruptcy.¹⁸⁸ Members were taught to talk about how they wanted to “preserve, protect, and strengthen” Medicare.¹⁸⁹ Television advertisements spoke of their desire to “save and strengthen” Medicare.¹⁹⁰ When House Ways and Means Committee Chairman William Archer (R-Tex.) discussed a Republican plan to cut Medicare, he declared, “With this bill, Medicare is saved. With this bill, Medicare is preserved.”¹⁹¹

After a summer of this concerted rhetorical effort, approximately three out of five people polled by the GOP said that Medicare “faces serious problems [and] needs reform.”¹⁹² But Americans have had concerns about Medicare and Social Security for more than a decade.¹⁹³ And they distinctly do not believe the Republican position that their main reason for cutting Medicare is to protect the Medicare Trust Fund.¹⁹⁴ Only one in five thinks so, while three in five say that the Republicans need Medicare to cut the deficit or finance tax cuts.¹⁹⁵

Republicans attempted to prevent widespread public recognition of proposed Medicare cuts. Speaker Gingrich and the Republican National Committee’s public relations personnel barged editors and journalists with a sea of faxes and phone calls to dissuade them from using the word “cut.”¹⁹⁶ Pollsters had shown that while three out of five voters opposed cuts in Medicare to balance the budget, a similar majority would accept “slowing the rate of growth of spending.”¹⁹⁷ By conveniently ignoring the effects of inflation, Republicans deny that they are cutting the level of Medicare services, pointing instead to the increasing level of nominal dollar payments to the program.¹⁹⁸

¹⁸⁸ See David Wessel, *In Medicare Battle, Republicans Display Skill at Making Words Mean Just What They Choose*, WALL ST. J., Sept. 22, 1995, at A16.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Robert Pear, *House G.O.P. Plan Doubles Premiums Of Medicare Users*, N.Y. TIMES, Sept. 22, 1995, at A1, A26.

¹⁹² *Id.*

¹⁹³ See *supra* notes 55–63 and accompanying text.

¹⁹⁴ See Wessel, *supra* note 188, at A16.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (explaining that voters opposed “cuts” in Medicare to balance the budget by 63% to 26%, but accepted slowing Medicare’s growth rate by 62% to 29%).

¹⁹⁸ See, e.g., Bob Somerby, *When is a Rise Not a Rise?; GOP Statistics on Medicare*

Some critics view Republican arguments as “disingenuous.”¹⁹⁹ Many of the same people who dismissed managed care in the context of President Clinton’s health care plan of 1994 embraced it in the Republican budget of 1995.²⁰⁰ Some of the same Senators who complained of the speed with which President Clinton sought to push through his 1994 health care plan expedited the 1995 Republican plan.²⁰¹ And some of the same senators who complained about the dire effects of President Clinton’s 1994 health care plan on Medicare supported deeper cuts in the Republicans’ 1995 plan.²⁰²

B. *The Congressional Medicare Plan*

Just days before the first votes, the House and Senate Republican leadership released their plans for cutting Medicare spending by \$270 billion, or fourteen percent, over seven years.²⁰³ Both plans achieved cuts in Medicare through a variety of mechanisms: raising premiums, increasing deductibles, raising eligibility ages, and using managed care to achieve savings.

Both the House and Senate plans increased premiums seniors pay for Medicare Part B from \$553.20 per year to between \$1,080 and \$1,116 per year by 2002.²⁰⁴ The plans also called for

Cuts Leave Something Out, BALTIMORE SUN, Nov. 19, 1995, at D6; John Jacobs, *The Great Medicare Battle Now Begins*, SAN DIEGO UNION-TRIB., Oct. 24, 1995, at B-7.

¹⁹⁹ See, e.g., Kolbert, *supra* note 51, at 59.

²⁰⁰ See Marmor, *supra* note 116, at 33.

²⁰¹ See, e.g., 140 CONG. REC. S12,603 (daily ed. Aug. 25, 1994) (statement of Republican Leader Robert Dole: “[W]e will also refuse to rush through any legislation until we understand the meaning, impact, and side effects of every single [health care] provision.”). Majority Leader Dole then brought the 1995 Republican plan to the floor in the expedited budget reconciliation bill. See S. 1357, 104th Cong., 1st Sess. (1995).

²⁰² See, e.g., 140 CONG. REC. S11,816 (daily ed. Aug. 16, 1994) (statement of Sen. Orrin Hatch: “Is it justice to take almost \$200 billion out of the Medicare program, severely jeopardizing its future?”). Senator Hatch voted in favor of \$270 billion in cuts in Medicare as part of the 1995 Republican budget plan. See 141 CONG. REC. S7473 (daily ed. May 25, 1995).

²⁰³ See “*Medicare Plus*” or “*Medicare Choice*,” *the Essence Is All the Same*, N.Y. TIMES, Sept. 23, 1995, at A8 [hereinafter “*Medicare Plus*”]; Eric Pianin & Spencer Rich, *Senate GOP Offers Plan To Cut Medicare by \$270 Billion Over 7 Years*, WASH. POST, Sept. 23, 1995, at A4; Wessel, *supra* note 188, at A16.

²⁰⁴ See Robert Pear, *Redesign of Two Vast Systems Advances*, N.Y. TIMES, Sept. 23, 1995, at A8 [hereinafter Pear, *Redesign*]; Adam Clymer, *So Many Measures, So Little Time*, N.Y. TIMES, Sept. 25, 1995, at A12. Under current law, the premium would have risen to \$729.60 a year. See Robert Pear, *House G.O.P. Plan Doubles Premiums of Medicare Users*, N.Y. TIMES, Sept. 22, 1995, at A1, A26 [hereinafter Pear, *House G.O.P. Plan*]. President Clinton earlier proposed an increase in the premium to \$996 a year. See also “*Medicare Plus*,” *supra* note 203, at A8.

higher premiums for individuals earning over \$75,000 per year and wealthier couples—those making over \$100,000 in the Senate plan and \$125,000 in the House plan.²⁰⁵ The Senate Finance Committee lowered these thresholds to \$50,000 for individuals and \$75,000 for couples.²⁰⁶

The Senate plan raised the deductible—the amount seniors have to pay before their Medicare insurance begins paying the bills—from the first \$100 to \$210 of doctors' and outpatient costs by 2002.²⁰⁷ The deductible, originally \$50, had been increased only three times in the history of Medicare, most recently from \$75 to \$100 in 1991.²⁰⁸ The Senate plan also increased the age at which one could first become eligible for Medicare from sixty-five to sixty-seven between the years 2003 and 2027.²⁰⁹

Both plans anticipated substantial savings—\$70 billion in the House and \$50 billion in the Senate—from moving beneficiaries into managed-care plans.²¹⁰ The plans attempted to do this by offering cash rebates to seniors who opt out of fee-for-service medicine.²¹¹ Currently, ten percent of Medicare beneficiaries belong to health maintenance organizations (“HMOs”); the Senate plan assumed twice that rate would belong by 2002.²¹² The CBO's analysis of the Senate plan noted, however, that it achieved most of its savings in this area—\$42.6 billion of the \$49.7 billion—through limits on federal payments to HMOs for seniors already enrolled or expected to enroll under current law, not through additional enrollment in the private health plans.²¹³ Indeed, studies have indicated that the government typically loses money on each Medicare beneficiary who joins an HMO, because healthier beneficiaries leave the standard Medicare program.²¹⁴ HMOs have also roused some opposition because of their limitations on choice and their financial incentive to reduce quality of care.²¹⁵

²⁰⁵ See *id.*; Clymer, *supra* note 204, at A12.

²⁰⁶ See, e.g., Judith Havemann & Spencer Rich, *Senate Panel's Health Care Bill Draws Veto Vow*, WASH. POST, Oct. 1, 1995, at A1, A21.

²⁰⁷ See Pear, *Redesign*, *supra* note 204, at 8; “*Medicare Plus*,” *supra* note 203, at A8; Clymer, *supra* note 204, at A12.

²⁰⁸ See “*Medicare Plus*,” *supra* note 203, at A8.

²⁰⁹ See Pianin & Rich, *supra* note 203, at A4.

²¹⁰ See “*Medicare Plus*,” *supra* note 203, at A8; Clymer, *supra* note 204, at A12.

²¹¹ See Pianin & Rich, *supra* note 203, at A4.

²¹² See, e.g., “*Medicare Plus*,” *supra* note 203, at A8.

²¹³ See, e.g., Robert Pear, *Senate G.O.P. Plan for Medicare Uses Benefit Cutbacks*, N.Y. TIMES, Sept. 28, 1995, at A1.

²¹⁴ See Pear, *House G.O.P. Plan*, *supra* note 204, at A1, A26.

²¹⁵ See Judith Havemann, *H.M.O.s, Doctors Battle in State Legislature over Managed*

Apparently stung by Democratic charges that Republicans would cut Medicare to pay for tax breaks for the rich, the Senate Finance Committee approved an amendment to dedicate all Medicare cuts—including those in the SMI program—to the solvency of the HI Medicare Trust Fund.²¹⁶ House Ways and Means Committee Chair Bill Archer and House Commerce Committee Chair Thomas Bliley (R-Va.) announced their intention to support a similar amendment in the House.²¹⁷ While these amendments would have done nothing to change the government's net fiscal health and its ability to fund the Medicare program, they further exploited confusion over the importance of the Medicare HI Trust Fund's solvency.²¹⁸

Democrats indicated that cuts of only \$90 billion over the next seven years would be sufficient to maintain the HI Fund through 2006.²¹⁹ In the past, Congress has successfully turned to smaller, more incremental changes in Medicare to address previous threats of insolvency.²²⁰ Democrats questioned whether the additional cuts advocated by Republicans were intended to finance deficit reduction or tax breaks.

Care Limits, WASH. POST, Aug. 22, 1995, at A4. One advertisement that ran in rural Arkansas showed two men in business suits reading the *Wall Street Journal*, and the copy read, "These men don't know you. They've never been to your home town. They want to pick your doctor." *Id.* Critics also contend that an HMO could fire doctors who prescribe necessary, but expensive care. *Id.* See also Spencer Rich, *Perot Urges Thorough Tests of Major Medicare Changes*, WASH. POST, Aug. 31, 1995, at A4 (explaining that Ross Perot expressed concern to the Finance Committee that HMOs may have too much control over doctors).

²¹⁶See, e.g., Edwin Chen, *GOP's Health Plan Advances on Bumpy Road*, L.A. TIMES, Oct. 1, 1995, at A1.

²¹⁷See Spencer Rich, *Democrats Flay GOP Nursing Home Proposal*, WASH. POST, Oct. 7, 1995, at A5.

²¹⁸See Spencer Rich, *GOP Governors Protest Senate Medicaid Bill*, WASH. POST, Oct. 10, 1995, at A4 (quoting Rep. Sam Gibbons (D-Fla.)).

²¹⁹See, e.g., Rich, *supra* note 218, at A4 (statement of Rep. Jim McDermott (D-Wash.)).

²²⁰Some examples of steps Congress took include:

1981—Raised Medicare Part B deductible from \$60 to \$75 per year; set some limits on hospital and physician payments.

1982—Reduced Medicare payments to hospitals by changing reimbursement rules; made Medicare a secondary payer to employer-provided insurance for workers age 65 to 69; limited payments to radiologists, pathologists, hospital-based physicians, and surgical assistants; pegged the Medicare Part B premium at 25 percent of program costs for 1984 and 1985; required federal employees to pay the Medicare Hospital Insurance tax beginning in 1983.

1983—Created system to reimburse hospitals at a fixed rate for a particular diagnosis for Medicare-covered treatments.

1984—Set a 15-month freeze on Medicare payments to physicians; limited increases in payments to hospital and laboratories.

1985—Extended freeze on Medicare payments to physicians who did not accept Medicare's determination of allowable charges.

Cutting the Medicare program is not the only way to increase the solvency of the HI Trust Fund. For example, Europeans appear willing to pay higher taxes to finance their social safety net.²²¹ Europeans also have shown greater willingness to regulate the prices charged by providers of health services and have thereby achieved lower increases in health care spending than the United States.²²²

In this new conservative era, many people would react negatively to the prospect of increased taxes. Yet the reduction of Medicare spending could well result in a hidden tax on workers with health insurance. According to one study, Congress's reduction of Medicare spending will cause health care providers to raise fees, increasing insurance premiums, and in turn causing employers to reduce wages to keep costs per employee level.²²³

On December 6, 1995, President Clinton vetoed an omnibus budget measure incorporating many of the Medicare program changes proposed by the Republican Congress in the summer of 1995.²²⁴ Congress responded by shutting down the government to pressure President Clinton into budget negotiations. By January 9, the President had offered to cut \$124 billion from Medicare over seven years—\$27 billion more than his original proposal.²²⁵

1987—Imposed two percent cut on overpriced procedures.

1989—Limited Medicare hospital and physician reimbursement rates generally; froze most payments for durable medical equipment; overhauled system for making Medicare payments to physicians by adopting a national fee schedule based on the time, training and skills needed to perform specific services; reduced reimbursement for certain physician services deemed overpriced.

1990—Reduced Medicare payments to hospitals by delaying updates of prospective payment system and imposing a three-month freeze on hospital payments; delayed update of new national fee schedule for physicians; increased Part B deductible.

1993—Further limited payments to doctors, hospitals and other providers of medical services; repealed the maximum earnings cap on the payroll tax and increased the percentage of Social Security benefits of middle- and upper-income retirees that are subject to income taxes.

David E. Rosenbaum, *The Medicare Brawl: Finger-Pointing, Hyperbole and the Facts Behind Them*, N.Y. TIMES, Oct. 1, 1995, § 1, at 18.

²²¹ See, e.g., Julie Kosterlitz, *Viva La Différence*, 27 NAT'L J. 2158, 2162 (1995).

²²² See *id.* at 2161.

²²³ See Morton M. Kondracke, *GOP Medicare Plan To "Tax" Workers*, *New Study Shows*, ROLL CALL, Sept. 7, 1995, at 8 (citing a study by Lewin-VHI).

²²⁴ See H.R. 2491, 104th Cong., 1st Sess. (1995). For President Clinton's veto message, see 141 CONG. REC. H14, 136-37 (daily ed. Dec. 6, 1995).

²²⁵ See The White House, Fact Sheet: The President's Most Recent Offer to Balance the Budget (Jan. 18, 1996) (table entitled "Administration Has Moved Nearly \$100 Billion More on Spending Cuts than Republicans") (on file with the *Harvard Journal on Legislation*). The estimated savings of the President's prior plan totalled \$97 billion. *Id.*

The Republican Congress moved by \$58 billion from \$226 billion (the reestimated value of the omnibus budget bill's cuts) to \$168 billion.

But the closer the two sides came to each other on the overall amount of Medicare cuts, the more it became clear that more than just the amount of deficit reduction separated Democrats and Republicans over Medicare in 1995. Fundamental differences over the size and role of government kept the two sides apart. In the context of the Medicare debate, Democrats refused to impose higher premiums on beneficiaries, even the most affluent. Republicans proposed implementing medical savings accounts to shift risk and responsibility from the government to the beneficiary, but Democrats refused to allow any widespread use of these new plans.²²⁶ Their differences were wide enough to keep the two parties from agreeing on a budget deal in 1995.

VII. PROTECTING SOCIAL SECURITY BY PRIVATIZING THE PROGRAM

The latest development in the debate over protecting Social Security and Medicare occurred early in 1996, when members of the Advisory Council on Social Security began to float the idea of saving Social Security by privatizing the program.²²⁷ A confidential draft of the Council's report proposed investing billions of dollars of Social Security payroll contributions in the stock market.²²⁸ Members also considered diverting the contributions to individual accounts, so that workers could invest in stocks and bonds of their choosing.²²⁹

The draft Council report advocated the change because the stock market had historically provided investors with a higher return than have the bonds in which the law now requires the government to invest Social Security reserves.²³⁰ But no one can guarantee that the stock market will continue to outperform Treas-

²²⁶For criticism of medical savings accounts, see, e.g., *Bad Move on Health Care*, WASH. POST, Mar. 18, 1996, at A16.

²²⁷See, e.g., Spencer Rich, *Moynihan Suggests Social Security Fix*, WASH. POST, Mar. 12, 1996, at A11; *The Threat to Social Security*, WASH. POST, Feb. 27, 1996, at A18; Peter Passell, *Can Retirees' Safety Net Be Saved?*, N.Y. TIMES, Feb. 18, 1996, § 3, at 1 [hereinafter Passell, *Safety Net*]; Robert Pear, *Plan to Put Part of Social Security into Stock Funds*, N.Y. TIMES, Feb. 17, 1996, at 1 [hereinafter Pear, *Plan*].

²²⁸See, e.g., Pear, *Plan*, *supra* note 227, at 1.

²²⁹See *id.*

²³⁰See *id.*

ury securities, as the stock market may not perform as well in the future as it has in the past.²³¹ Indeed, as the baby boom generation begins to retire, it will begin to withdraw funds from the stock market to pay for retirement expenses, decreasing the demand for stocks and potentially depressing the market.²³² The plan would transfer substantial risk from the government to the beneficiary.

To the extent that plans allow workers to direct the investment of their own accounts, it would also lead to greater disparity among benefits. Many would not know how best to invest their money. The loss of the element of progressivity in Social Security's benefit scheme could well lead to the reappearance of poverty among the elderly.²³³

To the extent that the proposal would deprive surviving spouses of their entitlement to income from the personal savings accounts of their husbands, "[i]t could be disastrous for women, especially nonworking women," in the words of one Council member.²³⁴

The proposal would also have distributional effects. The money that workers would invest in the stock market would presumably bid up the price of stocks, and the proposal would presumably benefit the financial services industry handling the transactions.²³⁵ At the same time, as noted above, because the government currently invests Social Security surpluses in United States government securities, the government has to borrow less from the public to finance the current government-wide deficit. Allowing workers to invest some of those surpluses in non-government securities would mean that the government would have to borrow more from the public. This additional borrowing would presumably bid down the price of bonds and bid up the price of interest. The proposal would thus increase the holdings of relatively well-heeled investors at the price of increased interest costs for relatively less well-off mortgage holders and other borrowers.

Many members of the Advisory Council advocated less radical solutions. Six of the thirteen members argued that revisions in

²³¹ See, e.g., Passell, *Safety Net*, *supra* note 227, at 1.

²³² See Peter Passell, *The Year is 2010. Do You Know Where Your Bull Is?*, N.Y. TIMES, Mar. 10, 1996, § 3, at 1.

²³³ See Passell, *Safety Net*, *supra* note 227, at 1.

²³⁴ See, e.g., Pear, *Plan*, *supra* note 227, at 6 (quoting Edith U. Fierst).

²³⁵ See, e.g., *id.*

the way the Department of Labor computes inflation will trim the growth of indexed benefits by enough to eliminate roughly one-third of Social Security's projected seventy-five-year deficit.²³⁶ Another one-third would be closed by taxing Social Security benefits as much as private pensions, and then directing that all the revenues (including those now diverted to Medicare) be used for Social Security.²³⁷

In the end, however, the choices are simple ones: cutting benefits or raising taxes. If all the adjustment came on the tax side, the current payroll tax rate is two percentage points below the amount needed to assure actuarial balance over the seventy-five-year horizon.²³⁸ If all the adjustment came in benefit cuts, however, and if the government did nothing before 2022, the government would have to cut benefits by one-third to keep a positive balance in the Social Security Trust Fund.²³⁹ Plainly, delaying this decision has its costs.

VIII. CONCLUSIONS

Even if the new Republican Congress adopted the long-term solvency of Medicare merely as a rationalization for its budget cuts, those budget cuts will help the long-term solvency of the HI Trust Fund. Had the new Congress succeeded in enacting its plan into law, would it have "saved" Medicare?

Unfortunately, the current debate has focused too much on long-term solvency as the crucial question of Medicare policy. Yes, the nation must fund Medicare for the program to work, but the solvency of the HI Trust Fund does not provide the only measure—or even a good measure—of the program's strength. After all, the long-term solvency of any trust fund is most certain when the trustee extinguishes *all* expenditures out of the fund. Of course, under those circumstances, the trustee totally extinguishes the value of the trust to the beneficiaries, as well.

Instead, policy-makers should focus on how best to maintain the key values of the programs while keeping the costs of the programs within manageable limits. We should not destroy Medicare and Social Security to save them. We need not destroy

²³⁶ See, e.g., Passell, *Safety Net*, *supra* note 227, at 1.

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ See *id.*

Medicare and Social Security to rid us of our deficit problem, either. Rather, we should try to preserve the elements of the programs that have made them so successful.

Part II of this Article focused on populations served, poverty reduced, and lives prolonged by Social Security and Medicare. The nation does not have to sacrifice any of these results to preserve the programs. These should be the touchstones by which we measure any plans that claim to preserve and protect them.

To maintain the key values of reducing poverty and increasing the quality and length of life, any changes to Social Security and Medicare should not reduce benefits to recipients with modest incomes. Across-the-board reductions in cost-of-living adjustments, pushing back the retirement age, and across-the-board increases in premiums or deductibles all fail this test. Each of these policies may help to drive large numbers of recipients into poverty. We need not exempt beneficiaries from sharing in the solution entirely. Rather, we must target any increased contribution that we ask of beneficiaries on upper-income recipients.

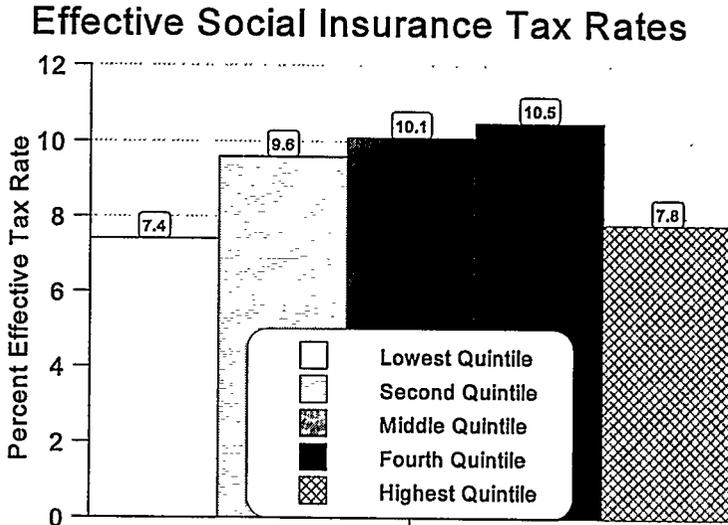
The upper end of social insurance taxpayers, as well, has more to give to ensure the long-term strength of the system. Although the benefits paid by Social Security and Medicare on balance make the programs progressive, the structure of social insurance taxes that fund the program leaves much to be desired. Indeed, middle-income taxpayers pay a higher effective social insurance tax rate under current law than do those at the top of the income distribution.²⁴⁰ (See Figure 9.)²⁴¹

Any solution that only limits publicly provided health care—that is, merely Medicare and Medicaid—without addressing the larger causes of health care inflation is also doomed to failure. The aging of the population, increasingly expensive new technology, and increased health care utilization within all age cohorts have led to increased health care costs in the private sector as well as the public sector. If we do not address these cost growth factors, how can we expect them to abate? If we control payments only in the public sector, then we ensure that private sector health care users will implicitly subsidize the public health care users, or public health care will decline in quality and availability, or both.

²⁴⁰See HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF THE FEDERAL TAX SYSTEM 330–31 (1993) (comparing 1994 projections).

²⁴¹See *id.*

Figure 9



All can agree on the need to contain costs. But as we address that need, we must also recognize other health care needs. We should not lose sight of the objective of covering what the elderly need most, including long-term comprehensive care. And we should not lose sight of the needs of other uninsured and underinsured Americans.

One generation did not cause the long-term solvency problems of Social Security and Medicare. Fairness demands that as many generations as possible contribute to its solution. We should ask for contributions from current recipients, future recipients, current payroll taxpayers, and future payroll taxpayers. Each of these four groups must contribute to avoid intergenerational inequity.

Social Security and Medicare have demonstrated that government can succeed in serving large populations, reducing poverty, and prolonging lives. Understandably, those who wish to attack government and favor private interests find this success threatening. Under the garb of saving these programs, some have set about attempting to dismantle them.

Social Security and Medicare do face long-term problems with the retirement of the baby boom generation, and we do need to set about addressing those problems. We would do better to do that work sooner rather than later, because delay will be harder on taxpayers and beneficiaries alike. But policy-makers should keep the goals of the programs foremost when implementing changes to preserve them. Progressivity of benefits and taxes is key to ensuring that we maintain those goals.

We must preserve Social Security and Medicare, but we should do so in a way that will also preserve their value to society. In doing so, we may broaden those values to assist the populations other than the elderly for whose benefit Franklin Roosevelt, Harry Truman, John Kennedy, Lyndon Johnson, and Bill Clinton all dreamt, but could not deliver.

ESSAY

THE FATE OF PUBLIC DEBATE IN THE UNITED STATES

PHILIP HEYMANN*

JODY HEYMANN**

When people generally are aware of a problem, it can be said to have entered the public consciousness. When people get on their hind legs and holler, the problem has not only entered the public consciousness, it has also become a part of the public conscience. At that point, things in our democracy begin to hum.¹

The Essays that follow are extremely interesting explorations of the politics of legislation in the areas of health and crime. It is difficult not to admire political savvy and to watch with amusement the game of politics. Politics is, after all, at the heart of democracy.

Still, it is tempting to become too infatuated with which moves and which strategies determined outcomes on occasions as important as those described. Sometimes we should step back and take a look at how well the public was served. Making that judgment about how well our politics is working for our country is inevitably affected by one's own views on the issues. But recognizing that pitfall, which we may not always have succeeded in avoiding, is not an excuse for ignoring the broader subject, essential to the health of America. Whether the reader agrees with us or not, she should step back and ask the question: "How well is our national politics serving our citizens?"

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¹ Vice President Hubert Humphrey, Speech at Gannon College (Oct. 11, 1966), in COLUMBIA DICTIONARY OF QUOTATIONS 184 (1993).

I. PUBLIC CALL FOR ACTION ON HEALTH AND CRIME

In 1991, when Harris Wofford won a seat in the United States Senate by campaigning on the need for health reform, the American public was already deeply concerned about our health insurance system and interested in reform.² That interest continued through the 1992 elections and through the Clinton introduction to Congress of the Health Security Act.³ In September 1993, seventy-five percent of those polled believed that Clinton had been right to choose health care as a top priority of his presidency.⁴ But by the end of the health reform debate, most Americans were tired of hearing about the problem and the problem had yet to be addressed.

Public demand for greater protection against crime was just as clear. Since 1973, almost two-thirds of Americans have wanted increased efforts to halt crime.⁵ In the fall of 1993 as many people wanted attention to the crime issue—which had become the electorate's prime concern—as demanded attention to health care reform.⁶

II. DID THE PUBLIC GET WHAT IT WANTED?

Not in health. Polls were clear. Voters wanted the health insurance problem addressed. They wanted universal health coverage. They wanted to know that they would have health insurance even if they left their jobs. They were willing to pay somewhat more to ensure that everyone had health insurance. They wanted Medicare to remain a strong program for the elderly.

But in spite of initial bipartisan support for addressing the problem of health insurance and in spite of months of effort, voters got little of what they wanted. Universal coverage was not

² See Lawrence R. Jacobs et al., *Medical Care in the United States—An Update*, 57 PUB. OPINION Q. 394 (1993) (identifying prominence of medical care in Senator Wofford's and President Clinton's campaigns and reporting poll data).

³ Health Security Act, H.R. 3600, 103d Cong., 1st Sess. (1993) [hereinafter "the Act"].

⁴ NBC News poll, Sept. 22, 1993, available in LEXIS, Market Library, Rpoll file.

⁵ See BEN WATTENBERG, VALUES MATTER MOST 119, 124 (1995) (graphing National Opinion Research Poll).

⁶ See Newsweek poll, Sept. 28, 1993, available in LEXIS, Market Library, Rpoll file (43% felt that health care should be a more important issue for Clinton's attention than crime, 46% felt that it should be less important, 9% thought the two deserved equal attention).

passed in either the 103d Congress or the 104th. Insurance reform did not pass under the 103d Congress. The reform which is currently under debate would require insurers to offer coverage to Americans with health problems but would allow them to offer that coverage at any price, including prices so high that no one could purchase the insurance.⁷ Voters wanted Medicare preserved. Partly in the name of preserving choice under Medicare, Republicans in the 103d Congress helped block many bills that would have both expanded coverage, as most Americans want, and expanded the range of benefits offered under Medicare. With the Republican majority in the 104th Congress confronted with the same budget economics the Democrats had faced in the prior Congress, the Republicans sought to cut markedly the planned growth in Medicare and to pressure the elderly into managed care.

Voters also got too little of what they sought in safety from crime. Although it was nearly derailed, the 103d Congress was able to pass major crime legislation.⁸ Still, in many ways the crime legislation was more successful at showing almost \$30 billion worth of concern than at getting \$30 billion of value out of its proposed solutions. Within a few months of passage, the House of Representatives would vote to reverse much of that legislation. Voters wanted legislation that would reduce violent crime dramatically. They got enhanced *federal* penalties, when almost all of violent crime is prosecuted in *state* courts. They got funds to the states to expand prisons overcrowded with drug offenders, not violent offenders. They got more police for areas already safe, not just for dangerous areas. They got dozens and dozens of new federal death penalties, most of which are unlikely ever to be used. The public was sold "three strikes and you're out" as a way to effectively keep violent criminals off the street, but was provided with little information about the following realities: (a) much of violent crime is committed by relatively young individuals who still will be out committing those crimes before they can be caught and convicted for three strikes; (b) many of the criminals who are caught and convicted for their third strike will be, by that time, at the end of their violent

⁷ See H.R. 3103, 104th Congress, 2d Sess. (1996).

⁸ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.) [hereinafter "the Crime Bill"].

careers; and (c) “three strikes and you’re out” covers some non-violent as well as violent crimes.

III. WHY DIDN’T THE PUBLIC GET WHAT IT WANTED?

No government is perfect. No government is able to effectively address the concerns and needs of its citizens all of the time. Still, the failures of the federal government in addressing the problems with our health care and judicial systems during the 103d Congress were caused by systemic weaknesses which are continuing to impede our ability to address major national problems. These weaknesses affect the information the public receives about legislation and whether the judgment of most Americans truly is reflected in legislative decisions.

For politics to be democratic and useful, all Americans who are affected must have a meaningful chance of being heard and of having their needs met. Our political debates must be factually informed, focused on the major social issues, and comprehensive enough not to leave out anything, such as long-term costs, which is of major importance. While respecting the views of the majority, those deciding must strive to meet the needs of minorities. The debates surrounding the crime and health bills lacked many of these critical characteristics. This Essay will discuss what went wrong, what it means for our ability to address other issues of importance, and what can be done to repair the tears in the fabric of our democracy.

A. Appearances Trumped Reality

Much can be debated about some of the advantages and disadvantages of the approach taken by the supporters of the Health Security Act, both in the forms submitted by Clinton and the versions recommended by congressional committees. The cost predictions can be questioned. Past experience with estimates of health care costs of Medicare and Medicaid demonstrate the fallibility of Congressional Budget Office estimates. However, what can be said with confidence is that the Health Security Act was likely to increase citizens’ choice of health care compared to the present situation. This was true for at least three reasons. First, the plan guaranteed a fee-for-service option for all Americans. Many Americans currently do not have that option from

their employer. Second, versions of the plan guaranteed a point-of-service option, allowing all those who purchase managed care insurance also to enjoy access to providers outside their managed care network. This is a form of choice which many Americans in managed care programs do not now have. Third, the plan guaranteed insurance and with that guarantee gave choices to millions of Americans who could not otherwise afford them. Yet, nothing was more central to the effectiveness of the opposition than the claim that the plan would restrict the choice of individual citizens.

Similarly, appearance trumped reality in the Crime Bill debate. President Clinton's major contribution to the debate in his State of the Union speech in 1994 was to endorse vigorously a federal provision for "three strikes and you're out" that would require a mandatory life sentence for a third felony. The public was led to believe that the objective was to reduce violence, although only a tiny number of violent offenders, it was later revealed, would be affected by the federal statute. What the effects of the proposal would be would depend upon what crimes would count as "strikes," but this never became part of the public debate. Three strikes are plainly too many for very violent individuals. Life in prison without parole is a senseless waste of hundreds of thousands of dollars of federal money for those who will never commit another robbery after the age of fifty. But none of these questions became the subject of serious political discussion. Instead the misperception that parole after many years of prison was one of the major causes of increased violence in the United States (violence which was only increasing for those under twenty-five years old)⁹ was allowed to stand and shape the debate on both sides.

The very popular presence of fifty or sixty new death penalties in the crime legislation is another example of the triumph of appearances. With one exception, all were penalties for murder and thus would have been a single statute in any state law. But Democrats and Republicans wanted them to appear to be a new set of severe punishments for a number of crimes. They appeared to promise many new executions when in reality a federal execution is extremely rare. They appeared to address our fears, but the new death penalties had no significant relationship to the

⁹ See Alfred Blumstein, *Violence by Young People: Why the Deadly Nexus?*, NAT'L INST. JUST. J., Aug. 1995, at 3.

only problem of violence that was growing rapidly, rather than slowly diminishing, in the United States: youth violence.

Costs cannot be dismissed; estimates of benefits must be realistic; and likely but unintended effects cannot be ignored. Making an ordinary local crime of violence into a federal crime as well only appears to be a solution. It is wholly unrealistic (and unwise) to expect federal prosecutors to replace local prosecutors in this area. Only the good sense of federal prosecutors in the exercise of their discretion was being relied upon to prevent dramatic and popular proposals for turning ordinary local street crimes into federal crimes from themselves swamping the federal law enforcement system with many times its present workload.

B. *Money Played Too Large a Role in Shaping the Debates and Votes*

During 1994, millions of dollars were spent in private advertising to influence the national debate on health reform. Total independent expenditures were greater than the amount spent by both sides in a presidential election.¹⁰ This would present no problem if there had been adequate time, money, and effort to respond. There wasn't, and Harry and Louise carried the field.

As Theda Skocpol notes in her new book, *Boomerang*, not-for-profit organizations were under far more constraints regarding their spending than for-profit organizations.¹¹ To maintain their tax-free status, many nonprofits—including those that represented citizens groups concerned with Americans' access to health care—could not take a public stand for or against a specific bill. In contrast, for-profits that were not tax exempt could spend limitless amounts of money lobbying for specific legislation, advertising to the public, and organizing opposition.

The problem in the health debate was not that money had a voice. The problem was that such a disproportionate share of the money was on one side with no interest in fully and fairly presenting the contested issues. And much of the money was

¹⁰James C. Jacks & Lillian Jacks, *Chronology of the Birth and Death of a Health Bill*, J. HEALTH CARE FIN., Mar. 22, 1995, at 59, 66.

¹¹See generally THEDA SKOCPOL, *BOOMERANG: CLINTON'S HEALTH SECURITY EFFORT AND THE TURN AGAINST GOVERNMENT IN U.S. POLITICS* (forthcoming 1996) (on file with the *Harvard Journal on Legislation*).

used to bypass the public debate. Money gave a minority the power to shape votes in Congress through campaign donations, greatly influenced what information Americans received by large scale spending on advertising, and stacked the deck by putting a large amount of money into mock “grass roots” organizing.

Similar distortions affected the crime debate. To defeat any legislation including the assault weapons ban, the National Rifle Association (NRA) pretended its concern was the “wastefulness” of funding for violence prevention programs and made its case in such costly forms as a full page ad attacking Representative Charles Schumer (D-N.Y.). The threat to anyone voting for the bill was clear. In the fall of 1994, the NRA spent \$1.9 million in congressional campaigns,¹² successfully targeting even such longtime supporters of the Second Amendment as Speaker Thomas Foley (D-Wash.) and Judiciary Committee Chairman Jack Brooks (D-Tex.).¹³

*C. No Adequate Recognition Was Given to the Concerns of
Anyone Other than Majorities and Those who Could
Influence Them*

In 1938, President Roosevelt wrote, “[N]o democracy can long survive which does not accept as fundamental to its very existence the recognition of the rights of its minorities.”¹⁴ Almost six decades later, we continue to grapple with this truth.

Congress is now at a stage when costly legislation must be shown to make everyone, not just those at greater risk, better off. This has had a series of tragic consequences, including our decreased ability to address the needs of the neediest in society, the framing of legislation as benefiting all even when it would be better policy to target defined groups, and the selling of legislation as benefiting all even when it is unlikely to do so.

The dangers of violence have been highly concentrated in relatively small central city areas. The most dangerous census

¹²See Elsa C. Arnett, *Hard-line Hammer First Woman to Lead the NRA; New President Is Dedicated Opponent of Gun Control Laws*, MORNING NEWS TRIB. (Tacoma, Wash.), Dec. 24, 1995, at E6.

¹³See Kenneth J. Cooper, *Gun Control Backers Are Tuesday's Targets; NRA Shelling Out Big Bucks Across U.S.*, WASH. POST, Nov. 7, 1994, at A11.

¹⁴Letter from Franklin D. Roosevelt to the National Association for the Advancement of Colored People (June 25, 1938), reprinted in 7 PUB. PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 401 (1941).

tract in San Diego was said to be three hundred times as dangerous as the least dangerous one.¹⁵ In order to pass the Crime Bill, in spite of the fact that violent crime primarily affects a limited population, the bill was written to provide comparable benefits to all Americans—as much to the safe as to the endangered. As a result, the bill was designed to send 100,000 police to a wide range of communities, including those in which violence was not a serious problem, leaving insufficient resources for the communities that were in greatest need.

Health reform was sold as benefiting all even though it was clear from the start that those without health insurance, those at risk of losing insurance and those with inadequate coverage stood the most to gain, while those with few health problems and affordable insurance would be needed to help pay the price. There was no leadership regarding the need to share the cost of covering all Americans. There were no efforts to sell health reform politically on the basis of it being “the right thing to do,” because health care was a basic human need, because full health coverage was provided by most industrial countries, or because meeting basic human needs is important to the social fabric of the country. Similar social legislation has been sold that way previously in American history, and polls showed that Americans were willing to pay higher taxes in order to ensure that all Americans had health insurance. Instead an attempt was made to sell the Health Security Act as a bill that would make everyone better off. When the figures showed that some Americans would have to pay more for insurance, public cynicism filled the leadership vacuum and fear about other untold consequences supplanted any willingness on the part of those who were well off to pay for those who were not.

In particular, the political players paid very little attention to the interests of the poor. Derek Bok, in his speech to the American Philosophical Society in November 1994, commented:

You may be surprised to learn that in some European countries the poor vote more heavily than the middle class Our poor people vote much less; they do not . . . have strong organizations to represent them; they are often totally disconnected from the networks of power in business and govern-

¹⁵ See UNDERSTANDING AND PREVENTING VIOLENCE 88 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds. 1993).

ment. In the end, . . . their needs are ignored much more than they are in other countries.¹⁶

IV. THE CONSEQUENCES FOR DEMOCRACY

The results of the deterioration of public debate include a loss of public faith in democratic institutions, a distrust of government, and reduced public participation.

A. *Public Disillusionment*

In 1977, John Kenneth Galbraith wrote in *The Age of Uncertainty*, "When people put their ballots in the boxes, they are, by that act, inoculated against the feeling that the government is not theirs. They then accept, in some measure, that its errors are their errors, its aberrations their aberrations, that any revolt will be against themselves."¹⁷ In the United States, we have begun to see the opposite: fewer people voting, fewer claiming any responsibility for the government.

The failures of substance and process in our political debate have led to a declining public trust in government institutions and the press. Indeed, our political campaigns as well as our polls show clear signs of a developing political skepticism. Growing numbers believe that politicians will fool us if they can; that lobbyists and lawyers will shape governmental outcomes to the benefit of their employers' incomes; that government does not work; and that in the final analysis, it is all a horse race for political power and patronage. The government's failures—whether they are caused by or create public attitudes—are reflected in them. Asked whether they trust the federal government to do the right thing all or most of the time, sixty percent of those surveyed said yes thirty years ago.¹⁸ The number today is about one-fifth of that, a stunning reduction in confidence.¹⁹

¹⁶Derek Bok, *America's Disenchantment with Government*, Lecture Before the American Philosophical Society (Nov. 11, 1994), in 139 *PROC. AM. PHIL. SOC'Y* 326, 333 (1995).

¹⁷JOHN KENNETH GALBRAITH, *THE AGE OF UNCERTAINTY* 330 (1977).

¹⁸Bok, *supra* note 16.

¹⁹*Id.*

The reasons are not hard to find. Over time, the public becomes aware of the extent to which the public debate about a problem has been shaped by appearances rather than reality. "Three strikes and you're out" may have looked good initially, but after months the press has begun to show who is actually being imprisoned by the federal government because of it (barely two dozen in the first eighteen months) and who is not.²⁰ Those who become aware of the difference between the bill of goods they were sold and what they received—and not just of the fortuitous cyclical fall in crime—become increasingly disillusioned with the process.

This disillusionment is further fed by what the public learns about the process behind passing bills and the role of moneyed interests. While the press is not always effective at either revealing the role of moneyed interests at the time of a debate or at making sure the opinions of those without money are heard from at the time of the debate, the press is good at uncovering the problem after the fact. Then the public becomes further disillusioned with the political process.

That disillusionment itself contributes to a cycle which has the potential to further erode democracy in this country. Democracy needs active public participation to ensure that citizens' views will be represented and needs met. Disillusioned citizens participate even less. The fact that we are already far along in that cycle has been demonstrated in a number of ways. Most striking of all is how few people vote.²¹

B. *A Growing Belief that the Best Government Is No Government*

I cannot but fear that men may arrive at such a state as to regard every new theory as a peril, every innovation as an irksome toil, every social improvement as a stepping-stone to revolution, and so refuse to move altogether for fear of being moved too far. I dread, and I confess it, lest they should at last so entirely give way to a cowardly love of present enjoyment, as to lose sight of the interests of their future selves and those of their descendants; and prefer to glide

²⁰U.S. Dep't of Justice, Districts Handling Three Strikes Cases (unpublished document dated Feb. 14, 1996) (on file with the *Harvard Journal on Legislation*).

²¹See U.S. BUREAU OF THE CENSUS, STAT. ABSTRACT OF THE UNITED STATES 289 (115th ed. 1995) (containing table with information on voting-age population, percent registered, and percent voting from 1980 to 1994).

along the easy current of life, rather than to make, when it is necessary, a strong and sudden effort to a higher purpose.²²

Public disillusionment over government has led to profound doubts as to whether government can help citizens. The belief is so politically popular that Democrats and Republicans alike say "the era of big government" is over.

Yet, debate surrounding the role of the federal government, like debate surrounding how to address such national problems as failures in our health insurance system or violent crime, has fallen victim to appearances. The length of Clinton's Health Security Act—over 1300 pages in the legislative format used for markup—was used as a symbol of big government run amok. In other formats the legislation was about 200 pages in length. However, little was said about the fact that Senator Robert Dole's (R-Kan.) proposal, which he submitted after criticizing the length of the Health Security Act as being representative of its big government approach, was itself over 600 pages in length in legislative format. The reality was that the health insurance companies had found many ways to discriminate against citizens with health problems. So, if the legislation was to address all of the forms of discrimination without proposing a single payer health care system run by the government, it had to be long—as were both the Democratic and Republican versions.

There is a real debate to be had about the appropriate role of the federal government. But, in the current environment, the politicians who refuse to distinguish among situations and instead broadly advocate less government are the winners. Those who engage in a serious debate are not. Any serious debate would examine what role the government should play in a given situation while acknowledging four basic precepts: (1) there are major social problems which the public has an interest in having solved; (2) some problems can be effectively addressed *only* by the national government, while other problems clearly can be more effectively addressed at state or local levels or through the private sector; (3) democratic governments must find a way to protect the interests and address the concerns of minority groups as well as of the majority; and (4) the federal government cannot simply leave this last responsibility to others.

²²ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 323 (pt. 3, ch. 21) (Francis Bowen ed. & Henry Reeve trans., 1862).

C. *Downward Spiral*

Remember, democracy never lasts long. It soon wastes, exhausts, and murders itself. There never was a democracy yet that did not commit suicide.²³

More concerning than any single one of the problems discussed above is the fact that the problems plaguing our political system seem mutually reinforcing. Together they contribute to a dangerous downward spiral which is eroding public debate and democratic participation—activities which are essential to the strength of American democracy.

Distrust creates disinterest and disinterest creates distrust; belief that the process is self-interested generates cynicism which in turn generates self-interest; and the ineffectiveness of solutions encourages a reliance on symbols which cannot provide effective solutions. Ever weakening public debate is leading to failed and partial results which in turn lead to citizen skepticism, then cynicism, then narrowed political horizons and concern. And this makes the conditions of useful political debate far more difficult to achieve.

The opportunities for public participation are narrowing. Congress has limited or even eliminated important avenues of public debate of important issues. There were no Senate hearings on the Crime Bill in 1993 and 1994. Major changes proposed in Medicare in 1995 received a handful of hearings as did major changes proposed in Medicaid and welfare. The newly elected Republican Congress instead used large numbers of public hearings to bring attention to the decade-old details of Whitewater.

There is no more important public issue than this downward spiral. Government is becoming less and less effective at solving major problems. When Derek Bok, former President of Harvard, compared the record of the United States with that of Japan, Canada, England, France, Germany, and Sweden as to sixty measurable goals of government, he found that in over half of the cases the United States was virtually at the bottom of the list in terms of progress in recent decades.²⁴ The real record shows regression, rather than progress, in such matters as rates of pov-

²³ Letter from John Adams to John Taylor (Apr. 15, 1814) in 6 THE WORKS OF JOHN ADAMS 484 (1851).

²⁴ Bok, *supra* note 16.

erty, access to health care, levels of school desegregation, and crime.²⁵

V. WHAT CAN BE DONE?

Public disillusionment and despair about the possibilities of government can be dealt with only by addressing the absence of real debate, the unfairness of a playing field tilted by money, and the growing willingness to ignore the interests of the powerless. It is not an idle dream. It can be done. We have had serious political debates in the United States—from the war in the Persian Gulf to income tax reform and bribery of foreign governments.

This time the solution does not rest with the three branches of government: executive, legislative, and judicial. Rather, it rests with the three branches of society that contribute in critical ways to a democracy: those working in the government, those working with the media and with other forums for public education, and the public.

A. *Making the Debate Real*

The ignorance of one voter in a democracy impairs the security of all.²⁶

Two steps would move us in the right direction. First, we need to ensure that with regard to any major issue, all sides have access to national media for in-depth debate. Second, we need to make sure that there is a price to pay for those who lie or mislead or avoid the hard issues. We should create incentives for contested political issues to be debated in forums in which positions can be challenged and examined in depth. A thirty-second advertising spot can be false or empty without embarrassment. In contrast, a thirty-minute televised debate among proponents of both sides of an issue is far more likely to embarrass emptiness and to expose falsity. For many, it will also diminish the effect of thirty-second commercials on the same subject.

²⁵ *Id.*

²⁶ President John F. Kennedy, Speech at Vanderbilt University (May 18, 1963), in COLUMBIA DICTIONARY OF QUOTATIONS 963 (1993).

Many different approaches can be taken to increase the quality and accessibility of information available to the public. Just as the national networks cover presidential debates and local networks cover senatorial and gubernatorial debates, the networks could devote three to four evenings per year to an hour-long debate on the most pressing issues facing the country. The issues could be chosen either because they were among the top concerns listed by Americans surveyed or because they were about to be addressed by major national legislation. The networks could voluntarily air the debates as they do the presidential debates or the media time could be paid for publicly just as there is public support for presidential campaigns.

Imposing a price for misleading is more difficult, for those who are asked to play the umpire in that game are unlikely to be without their own views on the substance. Still, it is important that there be critiques of what is said on major issues. A number of newspapers and radio and television stations already critique the accuracy of statements made in campaign debates and in political advertisements. This practice can be extended to include critiquing the accuracy of statements made by proponents and opponents of major pieces of legislation or regulation. It could also be extended to criticize practices aimed at limiting public debate, whether by the use of election eve accusations to which the accused cannot respond or by the avoidance of public hearings on major national legislation.

B. *Leveling the Playing Field*

Politics is not just voters responding to positions of elected officials and candidates. It is also voters affecting those positions by convincing the official or shaping the views of enough of the representative's constituents to affect indirectly the position taken. Every American knows that these parts of the game are not played on a level field now.

There are ways that we must ensure as a nation that the voices of those with little money get heard as well as the voices of those far better off. Campaign finance reform is one necessary element. So long as a representative is indebted to specific individuals, corporations, or interest groups for the money he needs to hold his job, those individuals and groups will have a much larger voice. Representatives who wish to be responsive to their

constituency first will find it hard to compete at election time against the financial resources of representatives who are responsive first to large donors. Large numbers of Democrats and Republicans have supported campaign finance reform before they were elected and some have supported it after they had the advantages the current system gives to incumbents. However, significant reform remains to be passed.

While campaign finance reform is a critical element, it will not be enough because, as demonstrated by the health debate, campaign contributions are only one way wealth influences the political process. Money is used directly to advertise to the public and to pay for organized opposition to or support of positions. We need to find ways not to limit the voices of those with financial interests but rather to ensure that the voices of those with equally strong concerns but less money are also heard.

C. Attending to the Concerns of Voting Minorities

Ensuring that all Americans have health care is not catering to a special interest. Placing police where the violence is worst is not favoring our central cities over our suburbs. We must learn to draw the line between behaving like a community, without which a nation falls into cynical self-interest, and catering to well-organized and financed special interests.

There are things that government does well and things that it does poorly. There are things that the federal government does better than the states and things that it does worse. But we must resist turning these facts into a rejection of the usefulness of the federal government for all purposes, just as we should reject the notion that whenever there is a serious problem the federal government should handle it.

What is needed here is a new discussion of the role of government and, specifically, of the federal government. In the years beginning in the late 1970s such a discussion—in the think tanks and the universities, in the magazines and talk shows of America—reversed the set of beliefs that underlay “The Great Society.” We have swung too far. It will take the same process of sustained argument to swing us back toward the center.

VI. CONCLUSION

The rope of our democracy is frayed. Once we have repaired the strands, then the rope will be strong enough to address the problems our nation faces. We need to repair all three strands. We need to ensure that there is real debate with depth and accurate information about the major issues facing this country. We need to level the playing field so that the voices of Americans with little money can be heard by our political leaders at the same time as the voices of Americans who have a great deal. We need to renew our commitment to respecting the needs of Americans who comprise a minority of votes—whether because of their class, race, ethnicity, religion, location or other factor. Only then can we end the disillusionment which is undermining public trust and renew participation in the great democratic experiment that is America.

ESSAY

THE POLITICS OF CRIME

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This Essay examines the passage of, and subsequent assault on, the Violent Crime Control and Law Enforcement Act of 1994. After surveying the ongoing partisan battle to control the "crime issue," the authors detail the events surrounding the passage of the Act. Having been part of the Clinton administration, the authors are able to offer the reader a "behind the scenes" glance at President Clinton's action, or inaction, during this debate. In addition, the authors discuss the political tensions caused by particular sections in the Act, including the assault weapons ban and the Racial Justice provision. Finally, the authors suggest six basic lessons about the impact and importance of crime in American politics.

I. AN INTRODUCTION TO CRIME AND POLITICAL LEADERSHIP

Throughout the 1980s and 1990s, the President and Congress have faced constant public pressure to address the problem of crime.¹ The most recent legislative response to this pressure was the Violent Crime Control and Law Enforcement Act of 1994, which allocated over \$30 billion to fight crime on our nation's

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Much of the information contained in this Essay is a result of the authors' personal experiences during the events surrounding the passage of the Violent Crime Control and Law Enforcement Act of 1994.

¹As the *Washington Post* noted in 1992, "In good times and bad, Americans rate crime among their top five concerns. Senators and House members long ago began reading the polls, and since 1980 anticrime legislation has been passed by every Congress." Guy Gugliotta, *Crime Bill a Hostage of Politics*, WASH. POST, Aug. 5, 1992, at A1. Since 1973, over 65% of Americans have consistently believed that the nation should spend more money to halt the rising crime rate. BEN WATTENBERG, VALUES MATTER MOST, 119, 124 (1995) (graphing National Opinion Research Poll).

streets.² This comprehensive bill was the product of several political crosswinds. To understand why this bill, with its diverse elements, became law, one must understand the political factors that shaped it. Indeed, an appreciation of the politics of crime is necessary both to assess the history of crime legislation and to predict its future.

The 1994 crime bill was, on balance, a substantive success. As a result of the bill, more police will be on the streets;³ fewer dangerous semi-automatic weapons will be available;⁴ more violent criminals will serve longer prison terms;⁵ and greater emphasis may be placed on crime prevention.⁶ The bill is by no means perfect, as perfection is rarely the end product of a long and messy legislative process. Nevertheless, it represents a serious and significant effort by the federal government to help local governments fight crime. As such, it was supported by mayors, police, and prosecutors throughout the country.⁷ In comparison with the ineffective anti-crime initiatives of the Bush era, the 1994 crime bill marks a major improvement in federal crime policy.⁸

Despite its real substantive value, the bill was a political failure. Though the bill implemented several popular law enforcement measures such as increased police presence, expanded pris-

² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.) [hereinafter "the 1994 crime bill"].

³ The 1994 bill authorizes \$8.8 billion to assist local communities to hire 100,000 new police officers. The 1994 crime bill, *supra* note 2, Title I.

⁴ The bill bans the manufacture or transfer of 19 semi-automatic assault weapons and copies thereof. The 1994 crime bill, *supra* note 2, Title I, § 110102.

⁵ The bill authorizes \$9.9 billion for prison construction. Fifty percent of the money is to be set aside for states that adopt truth-in-sentencing laws, under which violent offenders must serve at least 85% of their sentence. The 1994 crime bill, *supra* note 2, Title II, § 20102.

⁶ The bill authorizes \$7.9 billion for crime prevention programs including after-school and summer programs for children, drug treatment and rehabilitation, anti-gang programs, and midnight sports leagues. The 1994 crime bill, *supra* note 2, Title III. Under the new Republican leadership, however, Congress has refused to appropriate any such funding.

⁷ See Kathy Lewis, *Crime Package Unveiled*, DALLAS MORNING NEWS, Aug. 12, 1993, at 8A.

⁸ See *infra* text accompanying notes 35-55. Bush's efforts on crime focused on expanding the federal death penalty, changing the scope of the federal exclusionary rule, and restricting habeas corpus appeals. These proposals would have impacted only a tiny percentage of offenders nationwide, and thus would have little if no impact on crime. In contrast, the 1994 crime bill provisions to put more police on the streets and limit the sale of firearms offer real hope for reductions in street crime. See, e.g., *Legislature Should Approve Compromise on Gun Control*, DENVER POST, Mar. 31, 1995, at B-10 (noting that in 1994, guns were denied under the Brady Law to more than 1500 violent criminals in Colorado).

ons, and gun control, few Americans thought the bill would have much effect on crime.⁹ Two months after President Clinton signed the most ambitious and expensive crime legislation in American history, eighty-eight percent of the American people believed that passage of a new crime bill to replace or supplement the 1994 bill should be a top priority for the next Congress.¹⁰ Democrats who drafted and passed the bill were discredited politically on the crime issue.¹¹ In November 1994, just two months after the bill was signed, a new Republican majority was voted into Congress on a platform that included a promise to overturn the 1994 crime bill.¹² By April 1996, legislation repealing most of the 1994 crime bill had passed the House of Representatives with bipartisan support, although it stalled in the Senate.

The political failure of the 1994 crime bill is alarming. In response to popular demand, Congress allocated over \$30 billion to address a compelling public problem, only to find the American people unhappy with their effort. This represents a major failure for America's political institutions. Worse, the bill was targeted for repeal despite the fact that each of the major provisions it incorporated was, on its own, extremely popular.¹³ This Essay takes its direction from this paradox. Why did the voters repudiate a tough and sensible piece of crime legislation that incorporated popular measures?

⁹ Wirthlin group poll, September 6-9, 1994, *available in* LEXIS, Market Library, Rpoll File (9% great deal of impact, 39% some impact, 32% not very much impact, 17% no impact at all, 4% don't know.).

¹⁰ CNN/U.S.A. Today poll, Nov. 28-29, 1994, *available in* LEXIS, Market Library, Rpoll File (88% favor tougher anti-crime legislation, 10% oppose.). *See also* Time/CNN poll, Feb. 28-Mar. 1, 1995, *available in* LEXIS, Market Library, Rpoll File (82% felt that passage of new crime bill should be a high priority, 10% low priority, 5% not a priority, 3% not sure.).

¹¹ CNN/U.S.A. Today poll, Nov. 28-29, 1994, *available in* LEXIS, Market Library, Rpoll File (52% said Republicans do a better job of dealing with crime issue, 29% Democrats, 19% no difference/no opinion). *See also* NBC News/Wall Street Journal poll, Nov. 9, 1994, *available in* LEXIS, Market Library, Rpoll File (38% Republicans in Congress do a better job on crime, 18% Clinton, 40% no difference, 4% not sure.).

¹² *See infra* text accompanying notes 264-280.

¹³ *See, e.g.,* CNN/U.S.A. Today poll, Aug. 19, 1994, *available in* LEXIS, Market Library, Rpoll File (finding 79% favored and 18% opposed providing local communities with federal tax money to hire more police officers.); CBS News poll, Aug. 16-17, 1994, *available in* LEXIS, Market Library, Rpoll File (finding 78% favorable and 19% opposed to a nationwide ban on assault weapons.); Gallup Organization Newsletter, June 3, 1995, *available in* LEXIS, Market Library, Rpoll File (finding 77% favor the death penalty and 13% oppose it.); Wirthlin Quorum Poll, Dec. 5, 1993, *available in* LEXIS, Market Library, Rpoll File (finding that 64% of the American public is willing to spend more on crime prevention, even if their own taxes would increase, and that 18% favor spending more as long as there would be no tax increase.).

In answering this question, this Essay presents a political analysis of the origins and development of the 1994 crime bill, with a focus on the political strategies of the three major institutional players responsible for the bill: the Clinton administration, the Democratic congressional leadership, and the Republican congressional opposition. Our analysis suggests that the crime bill suffered political defeat in 1994 because of the Clinton administration's failure to exercise political leadership, a failure for which Democrats in Congress could not compensate.

The essence of political leadership in our democratic system is the ability to build broad and lasting public support for a limited number of critical priorities. A leader builds support for his priorities by telling timely, compelling, and evocative stories about problems and their solutions. To succeed, such stories must be more convincing than the counter-stories of political opponents. To that end, a good leader must employ narratives that invoke the values and resonate with the emotions of his constituents, inspiring them to support his policies. The successful leader must also remain consistent, repeating his stories until they take root in the public consciousness.¹⁴

The American master of political storytelling was Franklin Roosevelt. Roosevelt had a political story for every crisis he faced. He justified massive government intervention in the marketplace by calling for a "New Deal."¹⁵ He justified the use of radical Keynesian deficit financing as a macro-economic tool by evoking the necessity of "priming the pump."¹⁶ He successfully pressured the Supreme Court to uphold New Deal legislation by complaining about the "nine old men" blocking democratic will.¹⁷ He won passage of the controversial multi-billion dollar lend-lease bill by telling a modest story about a neighbor who lends a friend a garden hose to help battle threatening flames.¹⁸

In more recent times, Ronald Reagan achieved remarkable political success by relying on a similar stock of simple stories. He attacked social spending by telling the story of "welfare

¹⁴ Our account of leadership draws upon and synthesizes three recent accounts of this phenomena. See JAMES MCGREGOR BURNS, *LEADERSHIP* 18 (1978); HOWARD GARDNER, *LEADING MINDS* (1995); GARRY WILLS, *CERTAIN TRUMPETS: THE CALL OF LEADERS* 17 (1994).

¹⁵ KENNETH DAVIS, *FDR: THE NEW YORK YEARS, 1928-1933* 335 (1979).

¹⁶ See Llewellyn Rockwell, Jr., *Ripping Off the Taxpayers*, *WASH. TIMES*, Feb. 4, 1992, at F3.

¹⁷ See KENNETH S. DAVIS, *INTO THE STORM* 12 (1993).

¹⁸ TED MORGAN, *F.D.R., A BIOGRAPHY* 579 (1985).

queens.”¹⁹ He built bipartisan political support for his space defense system by telling a story of world peace guaranteed by “Star Wars.”²⁰ He engineered a major arms build-up by asking us to combat an “Evil Empire.”²¹ He passed lower taxes by arguing that “[g]overnment is the problem, not the solution.”²² In return for such stories, the American people made him the first President to complete two full terms in office since Eisenhower.²³

In contrast to these leaders, President Clinton failed to tell a timely, consistent, and compelling story in 1993 and 1994 about how to reduce crime. Armed with the prestige of the presidency, the power of the bully pulpit, and a strong anti-crime message from his 1992 campaign, President Clinton should have been able to pass and popularize the Democratic Party’s law enforcement legislation. Instead, Clinton abdicated the bully pulpit, choosing, on three key occasions, to ignore both the issue of crime and the bill his party drafted to combat it. Clinton, in short, told no story at all.²⁴

Congressional Democrats worked hard to fill the vacuum left by President Clinton’s inaction. They drafted and passed a solid bill and even managed to craft a good story to sell it: this was a bill that attacked crime on all fronts, combining prevention and punishment with real rather than symbolic initiatives. Unfortunately, they failed to tell that story successfully. Instead of staying “on message,” Democrats allowed internal bickering and back-biting to drive their story out of the news. Later, in the

¹⁹ WATTENBERG, *supra* note 1, at 32.

²⁰ See *Reagan Tape Seeks ‘Star Wars’ Support*, CHI. TRIB., July 14, 1985, at 12; Ira Allen, *Washington News*, UPI, Mar. 7, 1985.

²¹ See Susan Lagcetti, *The Wounds Haven’t Healed*, ATLANTA CONST., Sept 1, 1993, at C1; Jerrold T. Lundquist, *Shrinking Fast and Smart in the Defense Industry*, HARV. BUS. REV., Nov.-Dec. 1992, at 74; John DeMont, *The Price of Peace*, MACLEANS, Dec. 11, 1989, at 44.

²² See WATTENBERG, *supra* note 1, at 32.

²³ Other classic stories in American politics include “Who Lost China?” (1948) and “The Missile Gap” (1960). If leadership and ensuing political power is a function of the ability to tell a powerful story, then failure to tell a good story will result in political defeat. In 1994, President Clinton told a complicated tale about the need for health care reform: insurance reform, “health care alliances,” “managed care.” His opponents, in contrast, presented the story of Harry and Louise, an imaginary suburban couple who possessed serious concerns about the “dangerous” Clinton health care plan. Harry and Louise, more than any other factor, destroyed the political support Clinton needed to pass his plan. See ELIZABETH DREW, ON THE EDGE 308 (1994); see also in this issue Manish C. Shah & Judith M. Rosenberg, Essay, *Health Care Reform in the 103d Congress—A Congressional Analysis*.

²⁴ See *infra* text accompanying notes 169–193, 226–236, and 261–263.

1994 campaign, Democrats again abandoned their comprehensive message, failing to defend the bill as a whole and respond to Republican attacks on particular provisions.²⁵ They were unable to compensate politically for the President's silence.

Though Democrats failed to exercise effective leadership, their intentions were sincere. The Republicans, in contrast, cynically placed short-term political gain before public welfare. Initially, the Republicans worked closely with Democrats to craft the 1994 crime bill. The Republicans then shifted tactics and ruthlessly attacked the same bill they had helped to write. The Republican strategy succeeded at first: the Republican claim that the 1994 crime bill was wasteful "pork" spending contributed to their historic victory in the 1994 congressional elections. The Republican crime message triumphed in the election, however, not because of its intrinsic political power, but because Democrats failed to respond with a strong, compelling defense of their crime legislation. In 1995 and 1996, in contrast, Democrats returned once again to a strong anti-crime message. As a result, Republican efforts in 1995 and 1996 to repeal the crime bill have failed, despite their control of Congress.

II. SETTING THE STAGE: THE POLITICS OF CRIME, 1968–1992

The 1994 crime bill was a product of partisan wars over the crime issue dating back to 1968. The bill represented Democrats' best effort to reclaim the issue after years of watching the Republicans control the debate.

A. Republican Dominance on Crime: 1968–1988

Since 1968, when Richard Nixon ran on a tough "law and order" platform, Republican Presidents and presidential nominees have used the crime issue to put Democrats on the defensive.²⁶ Republicans dominated the crime issue for three reasons.

First, from the late 1960s through the 1990s, the Republican party comprised a unified, narrow, and conservative ideological spectrum of beliefs on crime. The Republican message tapped

²⁵ See *infra* text accompanying notes 274–278.

²⁶ See E.J. Dionne, Jr., *Fearing Republican Edge, Democrats Set Initiative On Crime*, N.Y. TIMES, May 29, 1989, at 24; David Lauter, *Crime Issue Becoming Election Battleground*, L.A. TIMES, June 13, 1988, at 1.

into the fundamental conservatism of the American electorate on criminal justice issues.²⁷ For instance, Nixon centered his political message on the evil of criminals and the need to punish them, ruthlessly arguing that Democratic beliefs about the fundamental importance of civil liberties increased lawlessness in America and that economic roots of crime were “grossly exaggerated” by the Democrats.²⁸ Ronald Reagan embraced this approach as well. As one commentator noted:

Despite his sunniness about America, Ronald Reagan presented a much darker view of criminality, which still holds popular appeal. There are no social solutions to crime, Reagan asserted in 1981, because crime is not a social problem; “it’s a problem of the human heart.” Reagan cited what he viewed as a dual liberal fallacy about crime—the conviction that ameliorating poverty might reduce crime and the assumption that “there is nothing permanent or absolute about man’s nature.”²⁹

The power of this political narrative lay in its gut-level appeal—unlike liberal root-cause arguments, it was not open to refutation by social science because it did not engage the issue on that level. The message also worked because Republicans were consistent, repeating their tough but bleak message without break for over twenty years.³⁰ In contrast, the liberal wing of the Democratic party placed a significant limit on the ability of the party’s center and right to employ conservative crime rhetoric and proposals. As a result, Republicans approached the crime issue comfortably; their political base could more easily tolerate the conservative rhetoric. No matter how much Democrats tried to appear tougher on crime than Republicans, Republicans knew they could always move to the right until the Democrats could no longer follow. To the extent that the public demanded toughness on criminals, Republicans enjoyed a natural advantage in the crime debate.

Republicans also enjoyed a natural advantage on the crime issue at the federal level because of the public’s inherent skep-

²⁷ See, e.g., KATHLYN T. GANBatz, *CRIME IN THE PUBLIC MIND* 1–17 (1995).

²⁸ See 2 STEPHEN E. AMBROSE, *NIXON* 154 (1989). In a memo to President Nixon, Charles Colson discussed the Republicans’ attempt to make “the public believe that Democrat, Liberal permissiveness was the cause of violence and crime.” *THE PRESIDENT: RICHARD NIXON’S SECRET FILES* 167 (Bruce Oudes ed., 1989).

²⁹ Wendy Kaminer, *Federal Offense: The Politics of Crime Control*, ATLANTIC, June 1994, at 102.

³⁰ See *infra* text accompanying notes 35–55 (discussing Bush presidential campaign).

ticism about the federal government's ability to reduce crime. Whether because federalism has traditionally left crime-fighting to states and localities or because of general disillusionment with the effectiveness of programs conceived in Washington, a majority of Americans believe that the federal government cannot have much impact on crime in their communities.³¹ As a result, voters may view Democratic crime programs, which generally stress affirmative steps to stop crime by spending more on police, prevention, and prisons, with skepticism. Republicans, in contrast, tend to argue not that the government must do something, but that it must stop doing something—coddling criminals.³² For voters who believe that federal programs are generally ineffective, this message has more appeal.

Finally, Democrats failed to battle Republicans for the crime issue, trying instead to change the subject. When Richard Nixon campaigned on a law and order theme in 1968 calling for increased hiring of police officers and expanded prison construction, Hubert Humphrey responded: "For every jail Mr. Nixon wants to build I'd like to build a house for a family. And for every policeman he wants to hire I'd like to hire another good teacher."³³ Needless to say, the Democratic message failed to address the American electorate's real fears about crime and the safety of their families.

The end result of these factors was the Republicans' almost total command of the crime issue for most of the last thirty years. As an aide to Speaker Newt Gingrich boasted in 1995, "[i]f [President Clinton] seems to be fighting the Republicans on crime, most people would correctly assume he's wrong. It's been a Republican issue for over 100 years. It's counterintuitive to think that the head of the Democratic Party is tougher."³⁴

³¹ CBS poll, Dec. 20, 1993, available in LEXIS, Market Library, Rpoll File (41% felt that the government in Washington had a significant impact on reducing crime in their community, 54% felt that the government had not had much impact, and 5% didn't know.).

³² As Senator Phil Gramm (R-Tex.) has expounded, "We must stop building prisons like Holiday Inns." Same Howe Verhovek, *Phil Gramm's Offbeat Charms as a Persistent Conservative*, N.Y. TIMES, Dec. 27, 1995, at A1.

³³ 2 AMBROSE, *supra* note 28, at 184.

³⁴ Tony Blankley, Press Secretary to House Speaker Newt Gingrich (R-Ga.), quoted in Katharine Q. Seelye, *Anti-Crime Bill as Political Dispute: President and G.O.P. Define the Issue*, N.Y. TIMES, Feb. 21, 1995, at A16.

B. *The 1988 Presidential Campaign*

Republican dominance of the crime issue peaked in 1988, when George Bush made crime one of the central issues of his campaign. The Bush campaign told an effective but cynical tale about crime and its causes: the war on crime will not be won until liberals stop coddling criminals. Bush provided two major examples of failed liberal ideas on crime. First, he pointed to Michael Dukakis's opposition to the death penalty.³⁵ Second, he drew attention to Dukakis's support for the Massachusetts prison furlough program.³⁶

The Republicans soon discovered that crime was their most effective issue. Bush strategists noted that of the top four issues bringing undecided voters into the Bush camp, three were crime-related: prison furloughs, mandatory sentencing, and the death penalty.³⁷ As a result, Bush made crime the centerpiece of his campaign in the weeks building up to the election. As the *Washington Post* reported in October 1988,

Republican presidential nominee George Bush gave a tough law-and-order speech today. Again. Like producers of a show held over by public demand, his campaign strategists have decided to keep the focus on crime for another week because their polling shows it is the most effective issue to swing undecided voters into their column.³⁸

Bush's crude anti-liberal message worked³⁹ for six reasons. First, it employed a simple and intuitively strong cause-and-effect model of crime. Bush pointed to a clear "problem"—per-

³⁵ See Lee Walczak et al., *Bush No. 1 At Last*, *BUS. WEEK*, Nov. 21, 1988, at 33; *MacNeil/Lehrer NewsHour: Closer to War?* (ABC television broadcast, Nov. 6, 1990) (transcript on file with authors).

³⁶ See Lauter, *supra* note 26, at 1.

³⁷ See David Hoffman & Paul Taylor, *Dukakis Pledges Housing; Bush Vows to Fight Crime; GOP Theme Aimed at Undecided Voters*, *WASH. POST*, Oct. 11, 1988, at A1. The fourth was Dukakis's alleged failure to clean up Boston Harbor.

³⁸ *Id.*

³⁹ See Gallup/Newsweek poll, Aug. 18–19, 1988, *available in* LEXIS, Market Library, Rpoll File (asked which candidate would do the best job of fighting crime, 43% said Bush, 34% said Dukakis.); ABC News/Washington Post poll, Oct. 28–Nov. 1, 1988, *available in* LEXIS, Market Library, Rpoll File (Bush 45%, Dukakis 38%). This lead was magnified in significance, however, because of the critical importance of the issue for the swing voters targeted by both campaigns. At the end of his campaign, Bush had a significant approval rate regarding his stance on crime. See, e.g., American National Election Study, 1988 Post-election, *available in* LEXIS, Market Library, Rpoll File (57% believe "tough on crime" described Bush extremely well or quite well, 36% not too well or not well at all). A CBS News/New York Times exit poll showed crime was the issue motivating 71% of Bush voters. See Marci McDonald, *Bush Country*, *MACLEAN'S*, Nov. 21, 1988, at 34.

missive liberal policies—and proposed a clear solution to that problem—expansion of the death penalty and elimination of liberal parole and prison furlough programs.⁴⁰

Second, most of the liberal policies Bush criticized were extremely unpopular. For example, most Americans support the death penalty.⁴¹ Prison furlough programs, once explained, served as a major obstacle to support for Dukakis.⁴²

Third, Bush's attacks worked because they were accurate; Dukakis was a strong opponent of the death penalty,⁴³ and he had supported the Massachusetts prison furlough program until March 1988.⁴⁴ This core of truth made the attack plausible, and (perhaps more important) insulated Bush from serious press criticism for his harsh and racially inflammatory negative campaigning.⁴⁵

Fourth, the Bush message was effective because it turned a matter of public policy into a question of values. Bush was not simply criticizing Dukakis's approach to law enforcement; he was attacking the weakness of his opponent's values and character. As Bush stated in a speech in Illinois: "the Democratic leadership cannot get tough with criminals because they can't find it in their hearts to get tough with criminals, period."⁴⁶ Similarly, on another occasion he declared "there is something very wrong when there is so much sympathy for criminals and very little left over for the victims."⁴⁷ Dukakis validated Bush's attack when, in a televised debate, he said he would not favor capital punishment even if a defendant raped and murdered his own wife.⁴⁸

Fifth, the Bush message triumphed because Dukakis had no effective counter-message. The problem was captured in a front-page headline in the *Washington Post* in early October 1988, four weeks before the election: "Dukakis Pledges Housing; Bush Vows to Fight Crime; GOP Theme Aimed at Undecided Vot-

⁴⁰ See Hoffman & Taylor, *supra* note 37, at A1.

⁴¹ See Louis Jacobson, *Putting a Price Tag on Death*, NAT'L J., Sept. 17, 1994, at 2180.

⁴² See *Excerpts from the Interview with Dukakis*, N.Y. TIMES, Oct. 9, 1988, at A34; Keith Love, *New Tactics Seek to Parry VP's Blows*, L.A. TIMES, July 8, 1988, at A18.

⁴³ Dukakis vetoed death penalty legislation while governor of Massachusetts. See Christopher B. Daly, *Massachusetts Seen Near Return to Death Penalty*, WASH. POST, Aug. 18, 1991, at A4.

⁴⁴ See Lauter, *supra* note 26, at 1; Gerald Boyd, *Bush Challenges Dukakis to Explain Stand on Crime*, N.Y. TIMES, June 19, 1988, at A20.

⁴⁵ See *infra* notes 52–55 and accompanying text (discussion of Willie Horton).

⁴⁶ Boyd, *supra* note 44, at 20.

⁴⁷ Hoffman & Taylor, *supra* note 37, at A6.

⁴⁸ See WATTENBERG, *supra* note 1, at 42.

ers.”⁴⁹ Dukakis chose not to respond to Bush’s attacks on the crime issue because his staff members grossly underestimated their candidate’s vulnerability on crime, believing that Massachusetts’s low crime statistics would insulate their candidate from effective attack on the issue. As one Dukakis adviser naively crowed, “Let the Republicans try to paint Michael Dukakis as soft on crime. I can’t wait.”⁵⁰ Once Dukakis campaign staffers realized they had to respond to Bush’s attacks, they failed to invoke powerful themes or images in Dukakis’s defense. Instead, they relied on dry statistics to make their case, which was a powerless effort in the face of Bush’s value-laden and emotional approach.⁵¹

Above all, Bush’s crime strategy worked because he discovered the perfect story to bring his attack to life: the Willie Horton saga. Horton, a convicted first-degree murderer serving a life sentence without chance of parole, received a 48-hour pass pursuant to the Massachusetts prison furlough program supported by Governor Dukakis. During that furlough, Horton took a young suburban couple hostage, tortured the man with a knife, and tortured and raped the woman.⁵² Bush relayed powerfully the suburban swing-voter’s worst nightmare:

What did the Democratic Governor of Massachusetts think he was doing when he let convicted first-degree murderers out on weekend passes? Why, even after one of the criminals that he let out brutally raped a woman and stabbed her fiance, why won’t he admit his mistake? Eight months later he was still defending his program and only when the Massachusetts Legislature voted by an overwhelming majority to abolish the program for murderers, did he finally give in. I think that Governor Dukakis owes the people of the United States of America an explanation as to why he supported this outrageous program.⁵³

The Willie Horton story became central to the presidential campaign.⁵⁴ Even today, it remains the most important lasting image of both George Bush’s and Michael Dukakis’s political

⁴⁹Hoffman & Taylor, *supra* note 37, at A1.

⁵⁰Lauter, *supra* note 26, at 1.

⁵¹See Boyd, *supra* note 44, at 20; Lauter, *supra* note 26, at 1.

⁵²For a discussion of Willie Horton, see WATTENBERG, *supra* note 1, at 38–39; Lauter, *supra* note 26, at 1.

⁵³Boyd, *supra* note 44, at 20.

⁵⁴See Lauter, *supra* note 26, at 1.

careers. Bush won the 1988 presidential election handily, winning by 7.8% in the popular vote.⁵⁵

C. Congressional Democrats Regroup: 1989–1992

In the aftermath of the 1988 debacle, congressional Democrats, led by Senator Joseph Biden (D-Del.) and Representative Charles Schumer (D-N.Y.), were determined to take the crime issue back from Republicans.⁵⁶ To that end, from 1989 to 1992, they implemented a long-term political strategy to reposition their party. As Charles Schumer noted, “I felt it was imperative for the Democrats to put their own stamp on crime.”⁵⁷ The Biden-Schumer strategy involved three central elements.

First, Biden and Schumer recognized that Democrats’ basic weakness on the crime issue was their perceived opposition to the death penalty, since capital punishment is the most powerful litmus test used by voters to determine whether a politician is “tough on crime.”⁵⁸ The reality in the 1990s, however, was that a majority of congressional Democrats supported capital punishment and were willing to include it in anti-crime legislation.⁵⁹ Under Biden and Schumer’s leadership, Democratic crime proposals during this period regularly called for expansion of the death penalty to cover more than fifty new offenses.⁶⁰ As Biden grimly joked, Democratic proposals “did everything but hang people for jaywalking.”⁶¹

Second, Biden and Schumer went on the offensive, mounting a strong attack against the Bush administration’s crime plan.⁶² President Bush tried to honor his 1988 campaign promises by calling for “reform” of presumptively liberal and permissive

⁵⁵ See WATTENBERG, *supra* note 1, at 71.

⁵⁶ Dionne, *supra* note 26, at 24. See also Gugliotta, *supra* note 1, at A1 (describing motivation for Congressional Democrats to pass a crime bill before the 1992 presidential elections).

⁵⁷ Gugliotta, *supra* note 1, at A14.

⁵⁸ Ron Brownstein, *Capital Punishment Held Up as Life or Death Campaign Issue*, L.A. TIMES, Aug. 30, 1994, at A5.

⁵⁹ See Clifford Krauss, *House Approves Measure Adding Capital Crimes*, N.Y. TIMES, Oct. 17, 1991, at A21; John E. Yang & Michael Isikoff, *Bush Assails Democratic Anti-Crime Legislation*, WASH. POST, Oct. 17, 1991, at A20.

⁶⁰ See *40% on Death Row Are Black People*, N.Y. TIMES, Sept. 30, 1991, at A12; Richard Wolf, *Crime Package Held Hostage in Conference*, USA TODAY, Nov. 18, 1991, at 4A; Krauss, *supra* note 59, at A21.

⁶¹ Gugliotta, *supra* note 1, at A14.

⁶² See Dionne, *supra* note 26, at 24.

crime policies. He proposed, for instance, an expansion of the federal death penalty, a limitation of habeas corpus appeals, and a narrowing of the federal exclusionary rule.⁶³ Biden and Schumer understood that these ideas had appeal in the 1988 campaign not because they were popular, but because Dukakis had failed to criticize them. Indeed, Biden and Schumer believed that despite Bush's 1988 victory, the President was vulnerable on the crime issue because few Americans believed his proposals would have any impact.⁶⁴ To capitalize on that weakness, Biden and Schumer attacked Bush's ideas as ineffectual and meaningless.⁶⁵ Biden called them "ridiculous,"⁶⁶ while House Majority Leader Richard Gephardt (D-Mo.) likened the President's plan to "fighting crime with bumper stickers."⁶⁷ As Biden and Schumer frequently pointed out, Bush's proposals would affect only federal law enforcement, which covered just three percent of crime nationwide.⁶⁸ The Bush plan would have had no effect, as a result, on the ninety-seven percent of crime enforced at the state and local level. The two legislators accused Bush of merely posturing on the crime issue and being unwilling to fight crime where the action was—on the streets, at the state and local level.⁶⁹

Third, Biden and Schumer proposed their own innovative crime plan, which in comparison with Bush's approach, was "real, not rhetorical."⁷⁰ The Democratic approach can be summarized in a few brief words: more police, fewer guns. To create a vehicle for these two basic ideas, Biden and Schumer drafted what ultimately became the basis for the 1991–92 crime bill, including federal financial support to put more police officers "on the beat" through state and local community policing plans;⁷¹ crea-

⁶³ See William Barr, *Bush's Crime Bill: This Time, Pass It*, N.Y. TIMES, Sept. 24, 1991, at A31 (summarizing and defending President Bush's three-part crime plan).

⁶⁴ While the American voters believed Bush would do a better job on crime than Dukakis, they seem to have recognized from the start that Bush's ideas on crime, such as an expansion of the death penalty, would have little effect on crime rates. See, e.g., Harris poll, Nov. 11–14, 1988, available in LEXIS, Market Library, Rpoll File (only 6% of the population believed it "highly likely" that the crime rate would decrease during Bush's term, while 38% believed it was "highly unlikely" to decrease.).

⁶⁵ See Yang & Isikoff, *supra* note 59, at A20.

⁶⁶ Dionne, *supra* note 26, at 24.

⁶⁷ *No Way To Stop Crime*, ECONOMIST, Oct. 26, 1991, at 27.

⁶⁸ See, e.g., Representative Charles E. Schumer (D-N.Y.), Federal News Service (Press Conference Transcript), July 25, 1991, available in LEXIS, Nexis Library, Archives File.

⁶⁹ See Yang & Isikoff, *supra* note 59, at A20.

⁷⁰ Representative Charles Schumer, *quoted in* Dionne, *supra* note 26, at A24.

⁷¹ See Krauss, *supra* note 59, at A21; Clifford Krauss, *House Approves Anti-Crime Bill With Something for Both Camps*, N.Y. TIMES, Oct. 23, 1991, at A1.

tion of a Police Corps to subsidize the college education of future police officers;⁷² incorporation of the Brady Bill, with its seven-day waiting period for the purchase of a handgun;⁷³ and a proposed ban on the sale of semi-automatic weapons.⁷⁴ The bill's basic message, stressed repeatedly by Democrats, was that these ideas would have a real impact on crime on the streets, unlike President Bush's proposals. As Schumer noted, "It's a bill that really tries to deal with the issue of crime rather than the issue of political posturing."⁷⁵

From a political point of view, the Biden-Schumer crime strategy was incredibly effective. Though Democrats trailed Bush on the crime issue for much of the President's term,⁷⁶ the two parties ranked almost evenly by December 1991.⁷⁷ By early 1992, Democrats had at least as much, if not more, credibility on crime than Republicans.⁷⁸

The Biden-Schumer strategy worked politically for three reasons. First, it sounded tough rather than liberal. Unlike Democrats in the past, Biden and Schumer did not try to change the subject, but instead tried to fight crime. For the first time in recent memory, Democrats won support from a broad array of police unions and associations.⁷⁹

Second, the Democratic bill provided the public with more powerful, value-laden pictures, images and stories than Bush's alternative plan. The Republicans offered abstract legalese: "habeas corpus" and "exclusionary rule" reform. In contrast, Democrats offered "more cops," "community policing," and a "Police Corps." The courageous and respected James Brady, confined to his wheelchair after the 1981 assassination attempt on President

⁷² See *Republicans, Soft on Crime?*, N.Y. TIMES, Nov. 26, 1991, at A20.

⁷³ See Krauss, *supra* note 59.

⁷⁴ See *id.*; Krauss, *House Approves Anti-Crime Bill*, *supra* note 71.

⁷⁵ Yang & Isikoff, *supra* note 59, at A20.

⁷⁶ Republicans were given an advantage over Democrats in several major polls. See, e.g., ABC News/WP poll, Jan. 1990; ABC News/WP poll, Mar. 1991; Time/CNN poll, Apr. 1991; Gallup poll, Sept. 1991; NBC News/WSJ poll, Oct. 1991; Gallup poll, Nov. 1991, all available in LEXIS, Market Library, Rpoll File.

⁷⁷ ABC News/WP poll, Dec. 11-15, 1991, available in LEXIS, Market Library, Rpoll File (Republicans 35%, Democrats 34%); Time/CNN poll, Dec. 17-22, 1991, available in LEXIS, Market Library, Rpoll File (19% Democrats, 17% Republicans, 57% no difference); Times Mirror poll, Jan. 3-7, 1992, available in LEXIS, Market Library, Rpoll File (Republicans 32%, Democrats 32%).

⁷⁸ ABC News/WP poll, Jan. 30-Feb. 2, 1992, available in LEXIS, Market Library, Rpoll File (Democrats 39%, Republicans 35%).

⁷⁹ See Jeffrey Stinson, *House Leaders Appear To Give Up Ghost on Crime Bill*, GANNETT NEWS SERVICE, Nov. 26, 1991; Gugliotta, *supra* note 1, at A1.

Reagan, became a fixture at Democratic press conferences to call for passage of the handgun bill carrying his name.⁸⁰ Moreover, in a fantastic public relations coup, Democrats and handgun control advocates orchestrated a public endorsement of the Brady Bill by former President Ronald Reagan, once a mainstay of the National Rifle Association (NRA).⁸¹

Finally, Biden and Schumer's strategy succeeded because it utilized a range of ambiguous rhetorical resonances, which could be adjusted to accommodate different audiences. To sound conservative, a Democratic politician could stress increased police presence and the death penalty; to sound liberal, the same politician could stress gun control and community policing. This ambiguity proved critical, for it enabled Democratic politicians to advocate tough-sounding ideas without permanently alienating core liberal constituencies.

Nevertheless, the political successes of the congressional Democratic crime strategy did not lead to passage of landmark legislation. Armed with the power of the bully pulpit, veto authority, and a sizeable and unified Republican minority in the Senate, President Bush blocked passage of the 1991-92 legislation. His motives may have been selfish in nature. The President likely did not want Congress to pass a bill because it would take a potentially key issue away from the 1992 election and alienate the NRA, a critical conservative constituency.⁸² Bush vigorously attacked the Democrats' bill, claiming that legislation expanding the death penalty, hiring more police, and building more prisons would "weaken our criminal justice system."⁸³ Biden retorted: "It takes a real leap of [the] imagination to suggest this [bill] is weak on crime."⁸⁴ Although Democrats managed to get their bill through the House,⁸⁵ they fell to defeat at the hands of a Republican filibuster in the Senate.⁸⁶

⁸⁰ See, e.g., David Kelly, STATES NEWS SERVICE, June 22, 1989.

⁸¹ See Nancy Mathis, *Emotional Ceremony Marks President's Signing of Brady Bill*, HOUS. CHRON., Dec. 1, 1993, at A1; Alex Prud'homme, *A Blow to the NRA*, TIME, May 20, 1991, at 26.

⁸² Cf. Richard Wolf, *Crime Package Held Hostage in Conference*, USA TODAY, Nov. 18, 1991, at 4A; J. Jennings Moss, *Foley Asks Bush's Aid in Passing Crime Bill*, WASH. TIMES, Nov. 20, 1991, at A4; Clifford Krauss, *Feud in Capitol Endangers Crime Bill Passage*, N.Y. TIMES, Nov. 21, 1991, at A24; Richard Berke, *Democrats Win On Major Issues in Deal on Crime*, N.Y. TIMES, Nov. 25, 1991, at A1; Jeffrey Stinson, *Biden Defends Crime Bill*, GANNETT NEWS SERVICE, Nov. 25, 1991.

⁸³ Stinson, *Biden Defends Crime Bill*, *supra* note 82.

⁸⁴ *Id.*

⁸⁵ See Krauss, *House Approves Anti-Crime Bill*, *supra* note 71, at A1.

⁸⁶ See Nancy Mathis, *Texas Democrats Revive Crime Bill; But Senate Leaves Meas-*

Biden's and Schumer's experiences from 1989 to 1992 suggest two conclusions. One, Democrats did not have to surrender to Republicans on the crime issue. They could fight, and fight successfully, to neutralize Republican attacks. Two, Congress can rarely trump the direct opposition of the bully pulpit, because the President's ability to set the parameters of public debate is simply too strong. As Senator Orrin Hatch (R-Utah) noted after the Democratic bill went down in defeat in late 1991: "The President has a better pulpit. If Democrats don't compromise, they're going to have a rough time in 1992."⁸⁷ Democrats thereby determined that the only hope for passage of their landmark crime legislation was to place a strong anti-crime candidate in the White House.

D. *Clinton and Crime on the Campaign Trail, 1992*

The political war between President Bush and the Democrats continued during the next presidential campaign. In 1992, Democrats did more than neutralize the Republicans; they delivered a punishing defeat, capturing the crime issue for the first time from the Republicans.

Bill Clinton positioned himself as "tough on crime" from the outset of the 1992 campaign. Initially, Clinton's emphasis on crime accentuated the differences between the moderate Arkansas governor and his strongest potential primary opponent, liberal New York Governor Mario Cuomo, whose prominent opposition to capital punishment⁸⁸ made him vulnerable to attack on the crime issue. As the primary season advanced, however, the Clinton campaign used the crime issue in a more strategic fashion. Clinton and his staff wanted to prevent a repeat of the 1988 Willie Horton debacle that ruined Dukakis. Consequently, Clinton drew public attention to his support for the death penalty and his frequent supervision of executions in Arkansas.⁸⁹

ure, HOUS. CHRON., Nov. 28, 1991, at A2; Clifford Krauss, *Democrats Revive Anti-Crime Bill, Knowing It May Be Killed Again*, N.Y. TIMES, Mar. 5, 1992, at A18.

⁸⁷ Richard Wolf, *Crime Bill: Potent Political Weaponry*, USA TODAY, Dec. 2, 1991, at 4A.

⁸⁸ See Christopher B. Daly, *Massachusetts Seen Near Return to Death Penalty*, WASH. POST, Aug. 18, 1991, at A4 (reporting Cuomo's repeated vetoes of capital punishment legislation as Governor of New York State).

⁸⁹ See WATTENBERG, *supra* note 1, at 42.

In Clinton's hands, however, crime was not simply a defensive issue. He worked hard to make crime a positive issue for his campaign. This offensive strategy operated on many levels. Clinton fought tooth and nail for endorsements from police associations and unions.⁹⁰ He made the fight against crime a central element of his efforts in the South. He ran custom-tailored television commercials in Southern media markets to stress his support for the death penalty, and staged effective crime photo-opportunities in major Southern cities like Atlanta and Houston.⁹¹ He blasted Bush for blocking passage of the 1991-92 crime bill. Above all, Clinton made the central planks of the Biden-Schumer plan—more cops, fewer guns—part of the stump speech and campaign literature he used nationwide.

Like Bush in 1988, Clinton devised a powerful image to symbolize his crime position: a call for the hiring of 100,000 new police officers. The story behind the slogan was simple and intuitively strong: "The simplest and most direct way to restore order in our cities is to put more police on the streets."⁹² The call for "100,000 cops" became one of Clinton's signature campaign promises. To many voters, it symbolized Clinton's status as a "New Democrat," pledging to take real, effective, and measurable steps to make life better for middle-class Americans.

Building upon the promising Biden-Schumer strategy, Clinton's effort to win the political war on crime was a great success. Although his stance on fighting crime was initially seen by voters as a serious weakness,⁹³ Clinton drew even with Bush by summer 1992, and pulled ahead in the fall.⁹⁴ Like Bush's success

⁹⁰ See Ann Devroy & Ruth Marcus, *Police Group Gives Bush Its Blessing; President Fought for Endorsement*, WASH. POST, Oct. 10, 1992, at A1.

⁹¹ See Gwen Ifill, *Debate: Economy, and Brown, Are Focus of a Democratic Round Table*, N.Y. TIMES, Mar. 6, 1992, at A20; Edward Walsh, *Clinton Charges Bush Uses Crime Issue to Divide*, WASH. POST, July 24, 1992, at A16; *Inside Politics* (CNN television broadcast, Mar. 6, 1992).

⁹² 1992 Democratic Party Platform, *quoted in* WATTENBERG, *supra* note 1, at 45.

⁹³ Newsweek poll, Mar. 19-20, 1992, *available in* LEXIS, Market Library, Rpoll File (giving Bush a 41%-35% lead over Clinton on crime); CBS News/NY Times poll, May 6-8, 1992, *available in* LEXIS, Market Library, Rpoll File (giving Bush a 36%-22% lead on "law and order"); ABC News/WP poll, May 8-11, 1992, *available in* LEXIS, Market Library, Rpoll File (giving Bush a 39%-26% lead on crime); ABC news/WP poll, June 3-7, 1992, *available in* LEXIS, Market Library, Rpoll File (giving Bush a 32%-21% lead on crime).

⁹⁴ Gallup/Newsweek poll, July 9-10, 1992, *available in* LEXIS, Market Library, Rpoll File (showing Clinton leading Bush on crime: Bush 24%, Clinton 25%); U.S. News and World Reports/Princeton Survey Research Ass'n poll, Aug. 6-9, 1992, *available in* LEXIS, Market Library, Rpoll File (on "stricter law enforcement," Bush 38%, Clinton 38%); NBC News/Wall Street Journal Poll, *available in* LEXIS, Market

in 1988, Clinton's command of the crime issue in the 1992 election can be attributed to his opponent's incompetence and the power of his message. Perhaps because leading Republican strategist Lee Atwater was no longer on the scene, Bush fumbled the crime issue in 1992.⁹⁵ First, the President put the issue on a back burner, choosing to emphasize taxes and trust instead.⁹⁶ Crime, for example, was completely ignored at the 1992 Republican convention.⁹⁷ On occasions when Bush did respond to Clinton's attack, his speeches lacked emotional force. Instead of invoking a powerful symbol like Willie Horton, Bush spouted arcane Arkansas crime statistics—bloodless attacks that the Clinton campaign easily blunted.⁹⁸ Perhaps more important, Bush's attacks rang false with voters because Clinton favored capital punishment and increased police presence, unlike the liberal Dukakis that Bush defeated four years prior. By the time he was elected president, Clinton had prevailed on the crime issue. He was well-positioned to make crime a key substantive and political success of his administration.

III. THE 1994 CRIME BILL

A. Clinton Abandons Crime in the First 100 Days

At the outset of his transition, President-elect Clinton charged two moderates, Al From and Bruce Reed, to advise him on his domestic policy agenda. From and Reed wrote Clinton a memo in late December 1992 recommending, among other things, that the President make crime a central issue of his presidency. To

Library, Rpoll File, Aug. 10–12, 1992, available in LEXIS, Market Library, Rpoll File (on "dealing with crime," Clinton 33%, Bush 25%); Gallup poll, Aug. 10–12, 1992, available in LEXIS, Market Library, Rpoll File (on "crime and drugs," Clinton 51%, Bush 35%); ABC News/WP poll, Oct. 4, 1992, available in LEXIS, Market Library, Rpoll File (on crime, Clinton 38%, Bush 32%); Times Mirror poll, Oct. 8–11, 1992, available in LEXIS, Market Library, Rpoll File (on "reducing crime," Clinton 31%, Bush 27%); Gallup/USA Today/CNN poll, Oct. 9–11, 1992, available in LEXIS, Market Library, Rpoll File (on crime: Clinton 39%, Bush 34%); Princeton Survey Research Ass'n. poll, Oct. 20–22, 1992, available in LEXIS, Market Library, Rpoll File (on reducing crime: Clinton 35%, Bush 25%).

⁹⁵ On the importance of Atwater's absence, see WATTENBERG, *supra* note 1, at 66.

⁹⁶ *Id.* at 70.

⁹⁷ See *id.* (explaining dominant Republican themes in 1992—crime not a major theme).

⁹⁸ See Paul Bedard, *Bush Seeks Death for Carjack-Killers*, WASH. TIMES, Sept. 29, 1992, at A1; *President Bush Remarks at a Fundraising Event in Boston, Mass.*, REUTERS NEWS SERVICE, Oct. 2, 1992.

further this goal, they advised Clinton to draft and transmit to Congress, within his first 100 days in office, a crime bill to provide for 100,000 new police officers, expansion of the death penalty, and gun control. From and Reed also proposed that Clinton ban the importation of assault pistols by Executive Order, so as to create a tough law-enforcement message from the outset of his term.⁹⁹

Clinton ignored this advice. The White House declined to draft crime legislation, or to press Congress to pass a crime bill during the President's first 100 days. Though the President called for \$100 billion in increased or new funding for sixty-one separate programs and \$60 billion in tax incentives,¹⁰⁰ no funding for the 100,000 new police officers was included in the President's proposed budget. While Executive Orders on abortion counseling, abortions in military hospitals, fetal tissue research, and the RU-486 pill were signed,¹⁰¹ an existing draft of an order banning the importation of assault pistols was shelved. No major speeches or press events on crime themes were delivered. In short, crime dropped off President Clinton's agenda.¹⁰² As journalist Morton Kondracke reported six months after Clinton came into office, "President Clinton has not determined to make crime-fighting one of the cornerstones of his administration. And that's a big mistake."¹⁰³

Three factors contributed to President Clinton's decision to drop the crime issue: politics, personnel, and priorities. Politically, the President concluded that crime had been irrelevant to his victory in the 1992 campaign, and thus was not an essential element of his mandate or important to his political future. In the aftermath of the 1992 election, two different interpretations of the contest competed for support among Democratic advisers, commentators, and administration officials. Many moderates and

⁹⁹Interviews with Senior White House Officials (Jan. 16, 1996 & Jan. 18, 1996). Two of the authors were members of President Clinton's transition team and pledged at that time not to reveal confidential information. As a result, this Essay includes only that information about the transition in the public domain at the time of this writing.

¹⁰⁰See DREW, *supra* note 23, at 72, 73.

¹⁰¹See *id.* at 42.

¹⁰²See generally DREW, *supra* note 23. An interesting measure of the extent to which the crime issue was shelved in the early days of the Clinton Administration is the index to Bob Woodward's book, *The Agenda*, which provides an insider account of the Clinton Administration's first year. The word "crime" appears nowhere in the index. BOB WOODWARD, *THE AGENDA* (1994).

¹⁰³Morton Kondracke, *Hour Is Late, But Crime Bill is Finally Coming*, ROLL CALL, July 8, 1993.

conservatives believed that Clinton won because his centrist proposals on crime, tax cuts, and welfare reform won back critical political support from so-called "Reagan Democrats," who had abandoned the party in 1980, 1984, and 1988.¹⁰⁴ To keep and expand this base, moderates argued that Clinton must make the values-oriented New Democrat issues, such as crime, the centerpiece of his administration.¹⁰⁵

Liberal and populist advisers and analysts adopted a starkly different interpretation of the 1992 campaign. These strategists believed that Clinton won because he emphasized the traditional Democratic message that consultant James Carville posted on a sign in the Little Rock campaign headquarters: "The economy, stupid. And don't forget health care." For liberal advisers, crime and welfare had been mere side shows. Based on this interpretation, these advisers believed Clinton should make "investment" in health care, job training, infrastructure, and children's programs, along with new taxes on fuel and incomes to pay for them, the emphasis of his first 100 days.¹⁰⁶ For whatever reason, both President Clinton and Vice President Al Gore adopted this latter interpretation and believed that increased "investment" was the central purpose of their administration.¹⁰⁷ As a result, New Democrat issues like crime and welfare were placed on hold,¹⁰⁸ while the "investment" budget and health care became the administration's defining issues.¹⁰⁹

¹⁰⁴ See DREW, *supra* note 23, at 129 (relating Al From's comment to Clinton that he would not have been elected if not for his emphasis on welfare, the death penalty, and national service). For a recent statement of the New Democrat/Reagan Democrat interpretation of the 1992 election, see WATTENBERG, *supra* note 1, at 9 ("I think the polling evidence is clear that Clinton won in 1992 largely because he was able to gain the votes of many Reagan Democrats"); *id.* at 75, 135, 400.

¹⁰⁵ See DREW, *supra* note 23, at 235 (relating Gergen's recommendation that Clinton emphasize New Democrat issues like crime, welfare, and national service).

¹⁰⁶ See DREW, *supra* note 23, at 49 (relating consultant Mandy Grunwald's emphasis that voters were very concerned about the economy and health care).

¹⁰⁷ DREW, *supra* note 23, at 86-87, 111.

¹⁰⁸ On crime, see *supra* notes 101-103 and accompanying text. On welfare, see DREW, *supra* note 23, at 265; WATTENBERG, *supra* note 1, at 256.

¹⁰⁹ Though we do not intend to suggest which interpretation of the 1992 election was "correct," a few remarks are in order. First, the "liberal" interpretation of the 1992 campaign is not implausible. Because the 1992 election was a three-way race, core Democratic voters constituted a large part of Clinton's support. To the extent that these voters were motivated by traditionally Democratic positions on health care, increased government spending, and abortion rights, the "liberal" interpretation of the election is accurate. Moreover, the fact that the nation experienced a recession in 1991 and 1992 boosted the importance of economic themes in the 1992 campaign. The New Democratic interpretation, however, possesses greater strength for three reasons. First, New Democratic issues were largely responsible for Clinton's strong showing in the South and West. President Bush then felt pressured to spend a great deal of energy and

As for personnel, no one among Clinton's senior White House staff or Cabinet was a strong advocate for crime legislation. Issues tend to surface on the President's agenda only if advocated by a member of Clinton's inner circle.¹¹⁰ No one pushed crime. This was, in part, a function of ideology. Al From, Will Marshall, and Robert Shapiro, three leading New Democrat domestic policy advisers who had played major roles in Clinton's campaign and transition, were not appointed to positions in the new administration.¹¹¹ Had these advisers been present in the West Wing, crime would probably have been given greater emphasis.¹¹² Instead, Hillary Rodham Clinton and Carol Rasco, an Arkansas aide, were given responsibility for domestic policy and preferred to stress children's issues and health care.¹¹³ At the Office of Management and Budget (OMB), responsibility for crime issues were given to liberals who did not fight to fit the promised anti-crime measures into the President's budget.¹¹⁴ As one senior White House official recalled, "I was constantly fighting with budget people to remind them that 100,000 cops was an important campaign promise."¹¹⁵ In short, crime was ignored

millions of dollars in national Republican strongholds like Texas, Florida, Colorado, and North Carolina, rather than on swing states like California, New Jersey, and Illinois. Second, many observers believe that the New Democratic issues were the key to Clinton's overall strength. As E.J. Dionne, one of the wisest of America's political commentators, noted: "Whenever Bill Clinton got into trouble during his Presidential campaign, he'd change quickly into his 'new Democrat' clothes and start talking tough about crime, welfare reform, 'personal responsibility,' national service, middle-class tax burdens and the evils of 'tax-and-spend.'" Steve Holland, *Clinton Attempts to Reclaim Moderate Center of U.S. Politics*, REUTERS NEWS SERVICE, June 1, 1993.

¹¹⁰For instance, Treasury Secretary Lloyd Bentsen, Budget Director Leon Panetta, and Deputy Budget Director Alice Rivlin all stressed deficit reduction. DREW, *supra* note 23, at 66. Vice President Gore advocated an energy tax. *Id.* at 71. Others advocated increased spending on research and development, an "information highway," and reinventing government. *Id.* at 72, 94. First Lady Hillary Rodham Clinton and children's advocate Marion Wright Edelman called for a child immunization program and full funding for Head Start. *Id.* at 72, 115. Labor Secretary Robert Reich and Education Secretary Richard Riley called for education reform. *Id.* at 134. Senior adviser Ira Magaziner and Hillary Rodham Clinton pushed health care reform. *Id.* at 195, 285. As a result of this issue sponsorship, all of these issues were either incorporated in the budget and stimulus package or became the subject of a major press conference announcing the formation of an Administration task force in the first 100 days.

¹¹¹See WATTENBERG, *supra* note 1, at 248.

¹¹²*Id.* at 238-43, 247-48.

¹¹³DREW, *supra* note 23, at 22.

¹¹⁴At OMB, crime fell within the purview of former Dukakis policy adviser Christopher Edley. Over the next six months, Edley would point out that there was no provision within the President's budget for funding 100,000 new police officers. Interview with senior White House official (Jan. 18, 1996); Interview with Philip Heymann in Cambridge, Mass. (Jan. 16, 1996).

¹¹⁵Interview with senior White House official (Jan. 18, 1996).

because no conservative Democrats were present in the White House to argue that this issue was crucial to the country and to Clinton's political success.¹¹⁶

Moreover, the absence of a strong advocate of crime legislation on the White House staff was exacerbated by the Administration's delay in staffing the Department of Justice.¹¹⁷ Clinton's economic team was assembled on December 10, 1992.¹¹⁸ In contrast, Attorney General Janet Reno was sworn in March 12, 1993—three months later.¹¹⁹ Other senior officials at the Department of Justice, such as Deputy Attorney General Philip Heymann, were not sworn in until May.¹²⁰ As a result, the department with traditional responsibility for law enforcement was unprepared to weigh in on crime issues until long after Clinton's basic agenda had been determined.

In the final analysis, President Clinton decided that, among many competing goals for his presidency, crime was not a top priority. In the face of concerns about economic recovery, health care reform, deficit reduction, and child welfare, among others, Clinton felt that crime was not sufficiently urgent, and would not be a priority that would define his presidency.

Clinton's decision to ignore the crime issue during the first six months of his administration was a tremendous strategic error. As events in the fall of 1993 were to prove, Clinton could have easily passed a tough crime bill with sweeping bipartisan support had he proposed one in his first 100 days. As one senior White House official stated in a recent interview:

If we had done a crime bill at the beginning of the term, it would have passed with bipartisan support, been a great credit to the administration, and set an entirely different tone for the administration. If we had done any of the New

¹¹⁶Only one conservative Democrat, Bruce Reed, was given a top White House post. Over the coming year, Reed would fight what one White House staffer described as an "underground battle" to put crime on the President's agenda. Reed, however, was content to leave the issue to Congress. He preferred to reserve his limited political capital for his own primary interest, the issue of welfare reform. Interview with senior White House official (Jan. 18, 1996).

¹¹⁷Many of the delays were caused by personal difficulties raised during Senate hearings. Webster Hubbell, nominated for Associate Attorney General, belonged to an all-white country club. See DREW, *supra* note 23, at 202-03. Eleanor Acheson, nominated for Assistant Attorney General for policy development, had failed to pay social security taxes on a housekeeper and belonged to an all-white country club as well. *Id.*

¹¹⁸DREW, *supra* note 23, at 27.

¹¹⁹*Id.* at 202.

¹²⁰Interview: Philip Heymann, DALLAS MORNING NEWS, Mar. 20, 1994, at 1J.

Democrat ideas, it would have helped us build a working coalition, so we could do more unpopular stuff later.¹²¹

Instead, Clinton chose to focus on controversial partisan issues like tax hikes and increases in social spending that galvanized Republican opposition and resulted in either stunning political losses¹²² or tight, cliff-hanger victories that called attention to the President's political weakness.¹²³ As a result, Clinton emerged from his first 100 days on the verge of political collapse, with public support at only thirty-six percent, the lowest level for any post-war president at that point in his term.¹²⁴

B. *Writing a Crime Bill: Congress 1993*

Over the course of 1993, to the White House's amazement,¹²⁵ the crime issue exploded and became the American people's preeminent concern.¹²⁶ Returning to a popular theme at a time when his polls were low,¹²⁷ President Clinton held a press conference with leading members of Congress on August 11, 1993, to announce an agreement with House and Senate leaders on broad priorities for a bill: 50,000 new police officers, expansion of the death penalty, a Police Corps, and habeas corpus reform.¹²⁸ At the same time, Clinton promulgated the anti-crime Executive Order suspending the importation of assault pistols, which had been gathering dust since January.¹²⁹

¹²¹ Interview with senior White House official (Jan. 16, 1996).

¹²² DREW, *supra* note 23, at 119 (loss of the stimulus package).

¹²³ DREW, *supra* note 23, at 272 (passage of President's budget by Senate on 50-50 tie, with Gore voting to insure passage); *id.* at 286 (close votes give public impression that Clinton continued to lose). See also WATTENBERG, *supra* note 1, at 260.

¹²⁴ See DREW, *supra* note 23, at 188.

¹²⁵ The White House staff had believed that crime would not be an issue. One aide stated that the Administration was "surprised" by the public concern, calling crime "the sleeper issue of 1993." Interview with senior White House staff member (Jan. 18, 1996).

¹²⁶ See, e.g., John Hanchette, *Poll: Crime Surpassing Economy as a Top Issue*, GANNET NEWS SERVICE, Nov. 12, 1993.

¹²⁷ See ABC News/Wash. Post Poll, Aug. 6-8, 1993, available in LEXIS, Market Library, Rpoll File (46% of people polled approved of President Clinton's performance, while 51% disapproved).

¹²⁸ See Kathy Lewis, *Crime Package Unveiled*, DALLAS MORNING NEWS, Aug. 12, 1993, at 1A.

¹²⁹ See *id.* The Administration's return to the crime issue reflected other developments as well. It was clear that the Administration had to adopt a new strategy, for after seven months in office, Clinton's Presidency was in shambles. To straighten out the White House mess, the White House hired a new, conservative voice: former Nixon and Reagan aide David Gergen.

But Clinton seemed to view the August crime event primarily as a public relations effort.¹³⁰ Not speaking on the issue or sending proposed legislation to Capitol Hill, he waited until November to make a second major statement on crime.¹³¹ As a result, responsibility for drafting and passing a bill fell to the two Congressional Democrats who had been instrumental in repositioning the Democratic party on crime: Senator Biden and Representative Schumer.

1. The Senate Bill

Biden introduced his crime bill in the Senate on September 23, 1993, and made rapid progress.¹³² After a substantial and quick amendment process, which added an assault weapons ban,¹³³ deleted the habeas corpus provisions,¹³⁴ and dramatically increased

¹³⁰Public relations was particularly important at a time when his Presidential ratings slid significantly after recovering in late June. Gallup poll (Aug. 8-10, 1993) (44% approval, 48% disapproval). The main proposal of the August press conference, hiring of 50,000 new police officers at a cost of \$3.4 billion, had wide public support. Harris Poll (Aug. 13-18, 1993) (approval 65%, disapproval 30%).

¹³¹See Gwen Ifill, *Clinton Embraces Crime Measure, Ever So Vaguely*, N.Y. TIMES, Feb. 21, 1994, at A13.

¹³²Because many of the contentious criminal justice issues had been addressed in the 1992 effort, Biden was comfortable with going around the regular committee process in the Senate and taking the bill straight to the floor. Interview with Jeffrey Robinson, former Deputy Assistant Attorney General for Legislative Affairs (Jan. 24, 1996).

¹³³Senator Dianne Feinstein was the driving force behind the assault weapons ban and made it fit with the tricky gun control politics that persist in Washington. The proposal was crafted very carefully to address any fear that it might lead to bans on sporting weapons or any other type of guns, and it specifically exempted a large number of guns. But it was Feinstein's floor performance that solidified the connection between the ban and the basic toughness message. When challenged by Senator Larry Craig (R-Idaho) about her knowledge of firearms, Feinstein recounted how she received firearms training when her husband was a potential target of terrorists himself and became mayor of San Francisco through the assassination of Mayor George Moscone. See Carolyn Lochhead, *Feinstein's Retort Stuns Senate*, S.F. CHRONICLE, Nov. 12, 1993, at A1; Helen Dewar, *Sen. Feinstein Gives Idaho Colleague a Barrelful*, WASH. POST, Nov. 11, 1993, at A16. Craig was chagrined in an exchange widely reported by many media outlets. The provision won both because it was an acceptable proposal that did not push gun control opponents too far into a corner, and because Feinstein used her personal experience to relay the fact that at the center of crime control issues was the gun control question. On the compromises needed to pass the bill, see Glenn F. Bunting, *Feinstein Faces Fight for Diluted Gun Bill*, L.A. TIMES, Nov. 9, 1993, at 14.

¹³⁴Though Biden had meticulously negotiated the habeas corpus provisions with many prosecutors, see Carolyn Skorneck, *Quick Action Expected on New Anti-Crime Legislation*, ASSOCIATED PRESS, Sept. 24, 1993, some still weren't satisfied, claiming that the bill would overturn recent Supreme Court opinions restricting the habeas right, see Marc Sandalow, *Lungren Says Clinton Bill is Bad for Death Penalty*, S.F. CHRON., Oct. 14, 1993, at A8; Naftali Bendavid, *A Kinder, Gentler Alternative*, LEGAL TIMES, Oct. 18, 1993, at 2. On Nov. 17, 1993, the provisions were removed on the Senate floor.

funding for both police and prisons as the result of a bipartisan compromise, the Senate bill passed overwhelmingly, 95 to 4, on November 19, 1993.¹³⁵ The final version of the bill allocated \$22 billion to law enforcement over five years, a sixfold increase in funding, to be financed by the proceeds of the Clinton Administration's reduction in the federal workforce.¹³⁶ Over five years, \$8.9 billion would fund 100,000 new police officers.¹³⁷ In addition, the bill expanded the federal death penalty to more than fifty additional offenses; adopted the popular "three strikes" provision, mandating life imprisonment for the commission of a third felony; and banned the manufacture, sale, or transfer of nineteen kinds of assault weapons.¹³⁸ The bill also authorized \$6 billion to fund regional prisons, local jails, and alternative incarceration boot camps.¹³⁹ Prevention was included, in the form of drug treatment and job training for nonviolent drug offenders, but the focus was clearly on the punitive aspects of the bill.¹⁴⁰ Senator Orrin G. Hatch (R-Utah), ranking Republican on the Judiciary Committee and co-sponsor of the legislation, hailed the bill: "This is the finest anticrime package in history. It has the right combination of tough-on-crime provisions and prevention."¹⁴¹

Biden's success in passing an enormous bill with bipartisan support, in a partisan atmosphere poisoned by the fight over the budget, was remarkable. This surprising development was the product of four factors. First, the initial Biden proposal was politically adroit. It contained a host of tough, popular, and politically tested ideas, such as the addition of 100,000 police officers and expansion of the death penalty. In an atmosphere where the public was demanding decisive action on crime, the Biden bill was virtually a perfect political response, at least in the short term.¹⁴²

¹³⁵ See Clifford Krauss, *Senate Approves Broad Crime Bill; Splits Over Guns*, N.Y. TIMES, Nov. 20, 1993, at 1; Anne Reifenberg, *Brady Bill Dies in Senate; Chamber Passes Anti-Crime Package that Increases Police*, DALLAS MORNING NEWS, Nov. 20, 1993, at 1A.

¹³⁶ At this point in the process, the actual reductions had not been approved. See Krauss, *supra* note 135, at 1; Reifenberg, *supra* note 135, at 1A.

¹³⁷ See Krauss, *supra* note 135, at 1.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Most spending was allocated for paying new street police and for prison construction. Only about \$3 billion would have gone to programs oriented toward prevention. See Krauss, *supra* note 135, at 1.

¹⁴¹ *Id.*

¹⁴² The bill's toughness would soon create political problems with liberals in the Democratic party. See *infra* note 151 and accompanying text.

Second, the quality of Biden's proposal, and the Democratic party's aggressiveness on the issue since 1989, left Republicans on the defensive about crime in 1993. The Republicans' defensive posture was evident in their own proposed crime legislation. Instead of drawing clear distinctions between Republicans and Democrats on crime, the Republican alternative crime bill mimicked popular Democratic proposals, diverging from the Democratic line only in its lower cost and "sound" financing mechanism.¹⁴³ "Unlike previous anti-crime proposals, the Republican plan is paid for through offsetting cuts in other programs," Senate Majority Leader Bob Dole bragged weakly.¹⁴⁴

The Republican willingness to join Democrats in this endeavor came from an understanding of the importance of crime as a political issue, and an unwillingness to relinquish their traditional advantage.¹⁴⁵ Given the popularity of anti-crime legislation, Republicans concluded that it would be better to be participants rather than spectators. Thus, instead of trying to stop the Democratic bill, Republicans worked to increase funding for measures they supported, like prison construction.¹⁴⁶

The Republicans also failed to hold together as a party at certain points in the process. When Democrats, led by Senator Dianne Feinstein (D-Cal.), attempted to add an assault weapons ban to the package (anathema to most Republicans and their frequent ally, the National Rifle Association), Dole failed to mobilize partisan opposition. Ten Republican Senators crossed the aisle to vote with the Democrats in a 56-43 victory.¹⁴⁷

Third, the bill moved rapidly because Biden was willing to compromise. The major bipartisan compromise was announced

¹⁴³The major difference besides the more limited cost of the Republican bill was the emphasis on prison spending and stricter habeas corpus provisions. See Peter Mitchell, *McCullum Speaks Out on Crime*, ORLANDO SENTINEL, Sept. 5, 1993, at A4 (describing Rep. Bill McCullum's (R-Fla.) response to President Clinton's Saturday radio address). But even Senator Hatch realized the similarities soon after the Republican bill's introduction, saying in a joint appearance with Senator Biden on *Face the Nation* that "we've got a lot of provisions that agree on prisons, rural crime, victims' rights, terrorism, anti-terrorism, school safety, and so forth." *Face the Nation* (CBS television broadcast, Aug. 15, 1993).

¹⁴⁴See Kathy Lewis, *supra* note 128, at 1A.

¹⁴⁵See *supra* notes 26-34 and accompanying text.

¹⁴⁶See Lawrence L. Knutson, *Senate Endorses \$22.2 Billion Anti-Crime Plan*, ASSOCIATED PRESS, Nov. 5, 1993.

¹⁴⁷See Carolyn Skorneck, *Senate Votes To Ban Assault-Style Weapons*, S.D. UNION-TRIBUNE, Nov. 18, 1993, at A8. A vote to table Feinstein's amendment failed earlier by one vote. See Carolyn Skorneck, *Feinstein Fights to Save Ban on Assault Guns*, S.F. EXAMINER, Nov. 10, 1993, at A12; Holly Idelson, *Congress Responds to Violence*, CONG. Q. WKLY. REP., Nov. 13, 1993, at 3127.

on November 4, 1993, under which both parties agreed to finance the bill with money saved from federal workforce reductions.¹⁴⁸ This compromise gave the Republicans political cover to abandon their own bill. Namely, they could claim that they had forced Democrats to go along with a sound, deficit-neutral financing system for the plan. This deal also provided additional money for prisons, the primary Republican crime initiative.

Finally, the bill sailed through because its potential opponents of all ideological stripes knew there would be plenty of opportunity for amendments in the conference committee. Opponents of the assault weapons ban were most vocal about their hopes for the conference, with Republican Larry Craig saying during the passage of the initial bill that he would oppose any bill offered from a conference committee with a ban in it.¹⁴⁹ Senator Phil Gramm also insisted upon the inclusion of his proposal of a ten-year mandatory minimum sentence for carrying a gun while committing a violent or drug-related crime.¹⁵⁰ Senate liberals, skeptical of the death penalty provisions in the bill, were less vocal but also knew that their brethren in the House would have a better shot at emphasizing prevention over punishment.¹⁵¹

2. The House Effort

The House also moved crime legislation quickly in the fall of 1993, but with a dramatically different scope. House leaders passed a set of smaller bills that did not succeed in quickly moving to conference because of internal divisions. Liberal Democrats—worried that the Senate bill was too punitive—did not want to enter into conference without a strong House statement that prevention spending was critical to passage of crime legislation.¹⁵² Conservative Democrats and Republicans disliked the assault weapons ban, and were more willing to fight it after

¹⁴⁸ See William J. Eaton, *\$22-Billion Anti-Crime Measure Okayed by Senate*, L.A. TIMES, Nov. 5, 1993, at A1; Clifford Krauss, *Breaking Impasse on Crime Bill, Senate Supports \$22 Billion Plan*, N.Y. TIMES, Nov. 5, 1993, at A24.

¹⁴⁹ See William J. Eaton, *Senate Passes \$22-Billion Bill to Battle Crime*, L.A. TIMES, Nov. 20, 1993, at A1.

¹⁵⁰ *Id.*

¹⁵¹ By the time the Senate passed a bill, House liberals had already scuttled hopes for an omnibus bill there by prompting Judiciary Committee Chairman Jack Brooks (D-Tex.) to break the bill up, largely on grounds that the bill pursued an overly punitive approach. See Naftali Bendavid, *Why Rep. Brooks Guttled the Crime Bill*, LEGAL TIMES, Nov. 1, 1993, at 10.

¹⁵² *Id.*

losing a major gun control battle when the Brady Bill became law later that year.¹⁵³ Because Clinton and his Justice Department failed to offer substantive guidance to House and Senate leaders regarding the specific provisions of the legislation, there had been no real attempt to ensure that the two chambers were headed toward the same destination.¹⁵⁴ The *New York Times* quoted one Senate aide as saying: "The Justice Department's silence has been deafening"; a House aide added: "They've been nowhere—zilch. There has been no leadership."¹⁵⁵

In the absence of administration leadership, the particular provisions of the House- and Senate-passed measures were significantly different. While Biden's bipartisan compromise inflated the cost of his bill to \$22 billion, the House stayed closer to the modest terms of the August White House press conference, with a total cost of \$4.8 billion.¹⁵⁶ Biden's bill included funding for 100,000 police, while the House bill contained funding for only 50,000.¹⁵⁷ Biden's bill authorized a multi-billion dollar prison construction program; the House bill contained no such funding.¹⁵⁸ Biden had passed one comprehensive bill; the House had passed smaller pieces of legislation. Though not large enough to prevent a deal altogether, the gaps that needed bridging between the two bills were significant enough to require White House corrective action. None was forthcoming.¹⁵⁹

Without White House help to move the House toward conference committee, some observers at the White House and on the Hill became anxious about the potential ramifications of the House's lack of progress.¹⁶⁰ The extra time would allow both conservative and liberal members to marshal their forces for a

¹⁵³The Brady Bill, a different gun control provision requiring a five-day waiting period on handgun purchases, had already been separated out from the main bill. It was sent to the President on November 25, 1993, and signed into law November 30 as Public Law 103-159. See also Carolyn Skorneck, *Brady Bill Becomes Law*, ASSOCIATED PRESS, Nov. 30, 1993.

¹⁵⁴Interview with Philip Heymann in Cambridge, Mass. (Jan. 16, 1996). See also Joe Davidson, *Clinton Officials Exert Little Influence on Anticrime Bills in House and Senate*, WALL ST. J., Nov. 16, 1993, at A4.

¹⁵⁵Quoted in Anthony Lewis, *Where is Janet Reno?*, N.Y. TIMES, Nov. 22, 1993, at A11.

¹⁵⁶William J. Eaton, *Panel Backs \$4.8 Billion Anti-Crime Bills*, L.A. TIMES, Oct. 29, 1993, at 14. See also Holly Idelson, *Brooks Puts Six Easier Pieces on Anti-Crime Program*, CONG. Q. WKLY. REP., at 2978.

¹⁵⁷Eaton, *supra* note 156, at 14; Idelson, *supra* note 155, at 2978.

¹⁵⁸See Jeanne Cummings, *House Approves 4 Anti-Crime Bills*, AUSTIN AM.-STATESMAN, Nov. 4, 1993, at A4.

¹⁵⁹See *infra* part II.C. for why there was no White House action.

¹⁶⁰Interview with senior White House official (Jan. 18, 1996).

battle that threatened to get bigger by the day. Also, the longer the Democrats waited to go to conference, the greater the possibility that the bipartisan coalition built in the Senate would collapse. If House Democrats put their bills on hold and returned to committee mark-up, as they had indicated they preferred, the bill would be delayed for months. Instead of conferencing in January and moving for passage by late February, final passage would be delayed until summer. If House Democrats waited that long, Republicans might abandon the effort, and conservative Democrats could join with them to remove the assault weapons ban. Disappointed at the failure of earlier efforts to provide new social spending for cities and worried about the Senate bill's punitive provisions, House liberals would have time to add controversial provisions of their own to the bill, such as limitations on the death penalty.¹⁶¹ This might please their most vocal constituents, but also would make final passage of a crime bill more difficult. The ultimate goal for liberals in the House was an omnibus bill that reflected their priorities;¹⁶² the same could surely be said of the conservatives within the party, and of those on the other side of the aisle. The problem was that the different groups' first-order priorities fundamentally conflicted; some middle ground would need to be construed.

The different approach to the crime bill in the House was largely a function of its wider political spectrum. On issues such as the death penalty and gun control, there were more militant factions within each party who needed to be brought around.¹⁶³ Where majority agreement was within reach on most issues in the Senate,¹⁶⁴ the House's diversity of views did not lend itself

¹⁶¹See, e.g., Rep. John Conyers (D-Mich.) and Rep. Craig A. Washington (D-Tex.), *Billions for Prisons But None for Inner-City Jobs*, Hous. CHRON., Nov. 26, 1993, at B19; *CNN Newsmaker*, Nov. 20, 1993 (interview with Representative Kweisi Mfume (D-Md.), Congressional Black Caucus Chair) ("It's a shame that we could find \$20 billion for a crime bill and we couldn't find \$16 billion for an economic stimulus package to put people to work and to create opportunities . . .")

¹⁶²See Ronald Brownstein & William J. Eaton, *House Liberals' Resistance Slows Action on Crime Bill*, L.A. TIMES, Jan. 13, 1994, at A1.

¹⁶³The resistance of House liberals was clear in their attack on the larger bill initially offered by Brooks and debated in the Judiciary committee before being dismantled. See Bendavid, *supra* note 151, at 10. Brooks and the anti-gun control forces had a clear unwavering agenda as well, one that became clearest at the end of the legislative process. See *infra* note 244 and accompanying text (quoting Brooks).

¹⁶⁴Perhaps this is because of the moderating effect of representing a broader political spectrum on the statewide level. For example, Senator John Breaux (D-La.), a leading member of the Democratic Leadership Council, explained the moderating effect of the broader Senate representation in response to a question about why his voting record became less conservative when he moved from the House to the Senate:

to an easy compromise. Many liberal Democrats opposed the death penalty on grounds of principle; their opposition was driven in part by a belief that death sentences are meted out in a racially biased fashion.¹⁶⁵ Finally, while there were a number of more pragmatic anti-gun control members of the Senate who were willing to allow some measure to go through despite general opposition,¹⁶⁶ anti-gun control House members were more strident.¹⁶⁷

When Congress returned from recess in January, members were faced with the choice of proceeding to conference to resolve these differences, or returning to committee to mark up a new bill. Clinton's intervention was needed to push them into the conference committee and forward a bill to the White House. As Schumer put it, "[w]e'll need presidential leadership. If the president pushes hard, it can be done."¹⁶⁸

C. Clinton's Failure to Intervene, Winter 1993-1994

As Congress considered its options, members of the White House domestic policy staff also concluded that Congress would pass a bill rapidly only if the President intervened in the process. To that end, Clinton advisers recommended two steps. First, the President should put pressure on the House to move directly to conference instead of considering new legislation, and should set a deadline for congressional action. If the President could speed up the House process, he could prevent the unraveling of Biden's

It's a reflection of the fact that I now represent eight districts. My congressional district was more conservative than the state at large. It's one thing to represent one district, but to represent an entire state is different. You have different voters and concerns, and you have a different perspective. You have a larger area to represent and be responsive to.

NICOL C. RAE, SOUTHERN DEMOCRATS 110 (1994) (footnote omitted).

¹⁶⁵ As one Congressional Black Caucus member put it, "[W]hen you have 60 new death penalties, and studies have shown that the major factor in determining who lives and dies at the end of a death-penalty case is race, that's wrong." Rep. Bobby Scott (D-Va.) *quoted in* Naftali Bendavid, *Black Lawmakers Hold Balance on Crime*, LEGAL TIMES, Aug. 22, 1994, at 1.

¹⁶⁶ Notably, NRA stalwart Senator Phil Gramm voted for final passage of the Senate bill despite the assault weapons ban. In contrast to fellow stalwart Senator Larry Craig, Gramm did not mention its removal in conference as a condition for his final approval. *See* Eaton, *supra* note 156, at 14.

¹⁶⁷ *See* Elizabeth Schwinn, *Feinstein's Bull's-Eye on Gun Control*, S.F. EXAMINER, May 8, 1994, at A1 (noting more difficult path for assault weapons ban in House).

¹⁶⁸ Representative Charles Schumer, *quoted in* Penny Bender, *Congress to Begin Session with Fight over Crime*, GANNETT NEWS SERVICE, Jan. 20, 1994, available in LEXIS, News Library, GNS File.

Senate coalition and the addition of possible dealbreakers in the House. Second, the President should simplify the inevitably contentious conference by taking a concrete position on the substantive areas of difference between the House and Senate bills, and by bringing strong internal pressure on both sides to accept his compromise. Advisers believed that as tension grew between the two houses of Congress, the President would have to intervene sooner or later to pass a crime bill anyway. At the time, in December 1993 and January 1994, he possessed the prestige to do so, for his public popularity was finally rebounding after his tough first months in office.¹⁶⁹ The advisers concluded that if the President chose to make crime his top priority, there was a very strong possibility that a bill could be on his desk before winter ended.¹⁷⁰

Clinton rejected this advice. From late 1993 through late summer 1994, Clinton declined to demand that the House abandon its plans for a new markup and move directly to conference and refused either to issue a deadline for Congressional action¹⁷¹ or to offer his own plan to end the substantive conflicts over the bill.¹⁷² As the *New York Times* reported in a major article on crime on February 21, 1994, the President seemed to have "washed his hands of the matter," choosing instead to remain "intentionally vague."¹⁷³ The hands-off policy was stated clearly by White House press secretary Dee Dee Myers: "It is up to Congress to work out all the details."¹⁷⁴

Instead of trying to pass a bill, Clinton decided to make a purely rhetorical gesture. In the 1994 State of the Union Address, the President praised a New York police officer and then endorsed the trendy "three strikes and you're out" concept that had been adopted by the Senate in December.¹⁷⁵ Clinton's political ploy achieved what his advisers wanted: Clinton's crime

¹⁶⁹ See Drew, *supra* note 23, at 375, 414 (In December, a Washington Post/ABC News poll put Clinton's popularity at 58%; an L.A. Times poll at 59%. In January, these numbers climbed to 60% in WSJ/NBC and WP/ABC polls).

¹⁷⁰ Interview with senior White House official (Jan. 18, 1996).

¹⁷¹ Clinton came close on the deadline issue, but then shied away. See David Lauter, *Clinton Qualifies His Support of 3-Strikes Measure*, L.A. TIMES, Feb. 16, 1994, at A1.

¹⁷² See Kenneth J. Cooper, *Administration Unveils Plan*, WASH. POST, Mar. 2, 1994; Ifill, *supra* note 131, at A13; Jeffrey Rosen, *Crime Bill Follies*, NEW REPUBLIC, Mar. 21, 1994; Interview with senior White House official (Jan. 18, 1996).

¹⁷³ See Ifill, *supra* note 131, at A13.

¹⁷⁴ See *id.*

¹⁷⁵ See Jim Clardy, "Three Strikes" A Big Hit Here, WASH. TIMES, Jan. 28, 1994, at C3; Editorial, *Beware the Three-Strike Law*, N.Y. TIMES, Feb. 2, 1994, at A14; DREW, *supra* note 23, at 416-17.

numbers, which had slumped during 1993 during his protracted silence on the issue, took a sharp (though temporary) turn upward.¹⁷⁶ Soon afterward, however, “three strikes” proved an embarrassment. Under pressure from six separate advisers who opposed the idea,¹⁷⁷ Clinton soon called on the Senate to amend its three strikes provision, narrowing its scope to affect fewer defendants.¹⁷⁸

Clinton’s decision not to intervene in the legislative process on crime—and then to intervene maladroitly on the three strikes provision—was a product of many factors. First, no one in Clinton’s immediate circle was interested politically or substantively in emphasizing crime. One White House official recalled being part of “a small band of crime fighters going door to door, arguing that crime matters. We couldn’t understand why no one got it.”¹⁷⁹ Instead, Clinton declared that health care would be the Administration’s top priority,¹⁸⁰ despite polls showing less public concern about health than crime.¹⁸¹

Second, Clinton’s congressional liaison, Howard Paster, resigned in November.¹⁸² Clinton may have been leery of taking on major negotiations with Congress while his congressional relations staff was in transition.

Third, many of Clinton’s aides believed Clinton should avoid discussing the details of the legislation. Sticking to vague “principles,” they believed, made Clinton look more “presidential.”¹⁸³

¹⁷⁶ Wirthlin Quorum poll, December 5–9, 1993, available in LEXIS, Market Library, Rpoll File (6% believed that “tough on crime” was an “excellent” description of Bill Clinton, 25% felt it was “good,” 37% felt that it was only “fair,” and 26% thought it “poor”).

¹⁷⁷ Interview with Senior White House Official (Jan. 16, 1996).

¹⁷⁸ See Lauter, *supra* note 171, at A1.

¹⁷⁹ Interview with Senior White House Official (Feb. 18, 1996).

¹⁸⁰ See DREW, *supra* note 23, at 351, 396.

¹⁸¹ See Newsweek poll, September 28, 1993, available in LEXIS, Market Library, Rpoll File, (43% felt that health care should be a more important issue for Clinton’s attention than crime, 46% felt that it should be less important, and 9% thought the two deserved equal attention.).

¹⁸² See Michael Putzel, *Senior Clinton Aide, Legislative Specialist, Quits, Citing Burnout*, BOSTON GLOBE, Nov. 24, 1993, at 20; DREW, *supra* note 23, at 346.

¹⁸³ See DREW, *supra* note 23, at 222–23, 287 (Stephanopoulos and Greenberg want President to stay away from details, stick to “principle,” on health care). As Clinton’s consultants learned, the down-side to this strategy was that Clinton looked like a weak leader. *Id.* at 261. Much of this approach came from new adviser David Gergen, who had served as Communications Director in the Reagan White House. See, e.g., Owen Ullmann, *Who Has Clinton’s Ear Now*, WASHINGTONIAN, Jan. 1994 (noting Gergen’s strategy for focusing the White House on the big picture only). The problem with this strategy was that it worked best in the only situations that Gergen had experienced in his previous White House tenures—when Congress is controlled by the other party.

Finally, it appears that no one at the Department of Justice wanted to intervene. The Department's reluctance on this point reflected a number of factors. Attorney General Reno was extremely ambivalent about both the Administration's goal of hiring 100,000 police officers and what she believed was the overly punitive character of the Biden approach.¹⁸⁴ Reno's staff at the Department of Justice also believed that Biden was better prepared to conduct difficult political negotiations with the House than either the Department of Justice or the White House staff.¹⁸⁵ As a result, Reno preferred to pursue a hands-off policy, causing one columnist to label her the "disappearing attorney general."¹⁸⁶ By January 1994, Reno was far from central to the crime bill policy-making process.¹⁸⁷

Regardless of the reasons, Clinton's decision not to intervene and demand that the House and Senate move to conference in winter had enormous consequences. Lacking Presidential leadership, the House went back to the drafting board: the new, larger crime bill would not clear the House until late April and would still differ significantly from the Senate bill. Among the most salient differences were greater prevention spending and the lack of an assault weapons ban.¹⁸⁸ Moreover, the new crime bill contained a new, highly controversial provision entitled the Racial Justice Act.¹⁸⁹ This Act was a result of the efforts of liberal House members trying to temper the death penalty provisions they knew were inevitable.¹⁹⁰ Thus, the House and Senate actually moved farther apart as a result of the House's decision not to conference. Worst of all, the five month delay gave Republicans time to reassess their bipartisan strategy.¹⁹¹

With Democrats in control of Congress and the White House, a failure to agree would inevitably be blamed on Democrats.

¹⁸⁴See ROLL CALL, July 8, 1993; WATTENBERG, *supra* note 1, at 273-74 (it took six months for Reno to endorse the 100,000 police idea).

¹⁸⁵See Eleanor Clift & Bob Cohn, *The Contrary Voice of Janet Reno*, NEWSWEEK, Oct. 11, 1993, at 30; Interview with Philip Heymann in Cambridge, Mass. (Jan. 16, 1996).

¹⁸⁶Nat Hentoff, *Justice Blackmun Reconsiders the Death Penalty*, WASH. POST, Dec. 11, 1993, at A23.

¹⁸⁷According to Philip Heymann, Reno's Deputy, no one at the Department of Justice knew that Clinton was going to embrace the "three strikes" proposal in his 1994 State of the Union Address until he delivered the speech. Interview with Philip Heymann in Cambridge, Mass. (Jan. 16, 1996).

¹⁸⁸The assault weapons problem was solved when the House passed a ban by a razor-thin margin on May 5. See *infra* notes 237-244 and accompanying text.

¹⁸⁹See *infra* part III.E.2.b. for further discussion of this provision.

¹⁹⁰Interview with Jeffrey Robinson, former Deputy Assistant Attorney General for Legislative Affairs (Jan. 24, 1996).

¹⁹¹See *infra* part III.D.

There is, of course, no guarantee that if Clinton had intervened, a consensus, bipartisan bill could have been passed in February 1994. Nevertheless, some of his advisers believe that Clinton's influence could have been decisive.¹⁹² Indeed, one White House official believes it was an even greater mistake than the failure to write a bill in the first 100 days. The decision to let Congress go its own way, she stated, was "our greatest lost opportunity."¹⁹³

D. *Republicans Reverse Course*

In the spring and summer of 1994, House Democrats crafted new, expanded legislation with the Senate to form a conference committee beginning in June. During the course of this delay, Republicans reconsidered their bipartisan approach to crime. In the end, they walked away from the bill they had helped craft and pass. A number of factors contributed to this decision.

By January 1994, it was clear to Republican political strategists that Dole's bipartisan approach, despite its strong substantive result, was a political disaster. Public opinion polls showed solid margins for the Democratic party as the party that would do a better job of "reducing the crime rate."¹⁹⁴ As one newspaper reported, "Much to the consternation of Republican strategists, Clinton has taken on the tough-on-crime mantle that traditionally has been worn by the GOP."¹⁹⁵ In short, Republicans were not sharing full credit with Democrats; they were losing ground on a key Republican issue.

Republicans also began to realize that without their support, Democrats might have trouble getting a bill passed. As the omnibus bill moved through the House, rumblings in the liberal wing of the Democratic majority alerted Republicans to the real problems that the Democrats would face if they were forced to rely solely on Democratic votes to move the bill. Republicans realized the potential for gaining votes from liberals who op-

¹⁹² Interview with senior White House official (Jan. 19, 1996).

¹⁹³ Interview with senior White House official (Jan. 18, 1996).

¹⁹⁴ Time/CNN poll, January 17-18, 1994, available in LEXIS, Market Library, Rpoll File (24% Republican, 17% Democrat). But note that this support for Democrats is soft. "No difference" actually "won" the poll with 52% of the survey respondents. Still, after long periods where Democrats were seen as weak when it came to crime, this advantage was a major accomplishment.

¹⁹⁵ David Lauter, *Clinton Qualifies His Support of Three Strikes Effort*, L.A. TIMES, Feb. 16, 1994, at A1.

posed the expanded death penalty provisions and the “three strikes, you’re out” rules, as well as from anti-gun control Democrats. Republicans believed that if they could sink the bill, they would accomplish two things: first, humiliate the President once again with a devastating legislative failure,¹⁹⁶ and second, prevent the actual benefits of the legislation from being realized during the remaining years of his term. Republicans also sensed an opportunity to use the crime issue to take control of the Congress. A leaked letter from the House Subcommittee on Crime’s ranking Republican, Representative James Sensenbrenner (R-Wis.), would later embarrass Republicans by providing clear evidence of their intentions: “If we work together, we can defeat this bill and craft a real crime bill that will give the crime issue back to Republicans for the upcoming elections.”¹⁹⁷ When Dole went along with conservatives seeking to break with the Democrats, one Republican senator said, “[i]t was election fever. They saw sixteen Democrats [senators] with less than fifty percent support and said this was the big chance.”¹⁹⁸

Republicans also realized they could safely oppose President Clinton and the Democrats on the crime issue. The combination of Clinton’s legislative setbacks with embarrassing scandals like Whitewater and the Paula Jones sexual harassment suit had driven Clinton’s polling numbers down.¹⁹⁹ This substantially decreased Clinton’s ability to punish Republicans politically if they walked away from the bill. Republican operative Bill Kristol admitted that Clinton’s drop in popularity drove the Republican decision to abandon the bipartisan effort, noting, “[t]he thing that changed politically was Clinton’s weakness.”²⁰⁰

Finally, presidential politics may have also impacted the decision, for Dole was under strong pressure from the right wing of the party to avoid compromise. The *Washington Post* criticized

¹⁹⁶ According to the *National Journal*, “Republicans saw an opportunity to turn a vote against the bill into a vote of no confidence in Clinton,” with spillover effects into other important struggles like health care reform. William Schneider, *Clinton Tries Governing from the Center*, NAT’L J., Sept. 3, 1994, at 2058.

¹⁹⁷ Kenneth Cooper, *House Backs Expansion of Death Penalty*, WASH. POST, Apr. 15, 1994, at A1. Only days earlier, Rep. Charles Schumer had argued that Republicans were opposing the bill because they feared Democrats had taken command of an issue that had belonged to Republicans. See William J. Eaton, *GOP Threatens to Slow Down House Action on Crime Bills*, L.A. TIMES, Apr. 13, 1994, at A5.

¹⁹⁸ Helen Dewar, *GOP Crime Strategy Fails; Conservatives Pushed, Moderates Pulled Away*, WASH. POST, Aug. 27, 1994, at A1.

¹⁹⁹ Howard Kurtz, *The Teflon Congress: In the Media, Capitol Hill Gets Coddled While Clinton Gets Clobbered*, WASH. POST, Sept. 4, 1994, at C1.

²⁰⁰ *Id.*

Dole for "yield[ing] strategic control to Senator Phil Gramm of Texas, his potential 1996 presidential rival, who prefers to burn the house down."²⁰¹

For all of these reasons, Republicans eventually decided to go for the final blow to Clinton and the Democrats, even if it meant reversing their public position on a popular bill. To that end, they loudly proclaimed that the bill they had drafted had been sabotaged by Democrats in conference and replaced by a weak, liberal effort full of pork.²⁰² As one reporter chronicled, "The crime prevention programs at the center of the crime bill debate, according to a popular Republican account of their genesis, emerged from a Democratic elixir of pork barrel and partisanship cooked up secretly in a House-Senate conference last month."²⁰³

With this story for cover, Senator Hatch walked away from the bill he once lauded but now relabeled "a big, gravy-sucking pig."²⁰⁴ Senator Phil Gramm, who in November had praised it as the "toughest crime bill ever passed in American history," accused Democrats of "coddling criminals" in a bill with "\$5 billion of pure, certifiable pork."²⁰⁵

When the crime bill finally passed out of conference in late summer, it contained \$9 billion in funding for 100,000 new police officers over the next six years, over \$7 billion in funding for prevention programs, and \$10.5 billion for prison construction, with an overall price tag of \$32.4 billion. The Racial Justice Act had been deleted, but the assault weapon ban remained.

E. *The Battle for Final Passage*

The legislative ground looked very different in summer than it had in January. In winter, the crime bill had bipartisan support. Now, despite minimal changes in substance, it was almost a purely Democratic effort. Having failed to pass a health care bill, Democrats badly needed a victory. Republicans were eager to win as well: many felt that a victory would effectively end the Clinton administration. As a result, both parties prepared for a major battle.

²⁰¹ Editorial, *Abuse of Sausage Making*, WASH. POST, Aug. 24, 1994, at A24.

²⁰² Kenneth J. Cooper, *'Pork' Attacked by GOP Predates Current Debate*, WASH. POST, Aug. 18, 1994, at A12.

²⁰³ *Id.*

²⁰⁴ Kurtz, *supra* note 199 at C1.

²⁰⁵ *Id.*

1. The Republican Strategy and Message

In the struggle over final passage, Republican opposition focused on the level of prevention spending, with Dole coining the slogan "too much pork and too little punch."²⁰⁶ Frank Luntz, a maverick Republican consultant advising Gingrich, had concluded from polls that this would be the surest attack on the bill.²⁰⁷ In contrast to strategists who dared not suggest directly opposing the crime bill,²⁰⁸ Luntz circulated a memo on August 9 urging Republican members to vote against the bill because voters "are far more concerned that convicted criminals remain behind bars than teenagers in inner cities learn to ballroom dance and slam dunk from the foul line by the pale moonlight."²⁰⁹ In fact, but for the \$10 million criminal justice center for Chairman Brooks's Texas district, the bill was relatively devoid of "pork." Nevertheless, the Republicans distorted with the label "pork" whatever spending was likely to be concentrated in urban districts where crime was high. Senator Hatch adopted a shrill tone in attacking the bill for establishing "virtual political slush funds": "This bill is not tough on crime. Most of the money will be used to help re-elect the people they want to re-elect."²¹⁰ Epitomizing the lack of reasoned discourse, Senator Alfonse D'Amato (R-N.Y.) resorted to singing an attack to the tune of "Old MacDonald," and displaying a poster-size pig.²¹¹

Republicans also spun the spending as "welfare for criminals,"²¹² criticizing as wasteful prevention programs to create jobs, reduce gang membership and address substance-abuse. Among the harsher attacks was an NRA-funded, full-page advertisement accusing Representative Schumer of diverting needed prison con-

²⁰⁶ *Crime Bill Pays Plenty*, ENGINEERING NEWS-REC., Sept. 5, 1994, at 10.

²⁰⁷ See Michael Weisskopf, *Playing on the Public Pique; Consultant Taps Voter Anger to Help GOP*, WASH. POST, Oct. 27, 1994, at A1.

²⁰⁸ See Ann Devroy, *GOP Taking Joy in Obstructionism; Clinton Agenda Dying on the Hill*, WASH. POST, Oct. 7, 1994, at A1 ("Noting that it was originally thought impossible for a politician to oppose a crime bill in a year that crime is the major national concern, [Republican strategist William] Kristol said that the handful of Republicans who did so found 'the country was more receptive to a conservative message than even I thought.'").

²⁰⁹ See Weisskopf, *supra* note 207, at A1.

²¹⁰ Gaylord Shaw & Charles V. Zehren, *Crime Bill Passes: A Victory for Clinton in Senate*, NEWSDAY, Aug. 26, 1994, at 5.

²¹¹ Adam Clymer, *Decision in the Senate: The Overview*, N.Y. TIMES, Aug. 26, 1994, at A1.

²¹² Leslie Phillips, *GOP: Plan 'Talks Tough, Acts Weak'*, U.S.A. TODAY, Apr. 14, 1994, at 3A (citing Rep. Bob Walker (R-Pa.)).

struction monies to “increase the self-esteem of young criminals and to pay for midnight basketball leagues.”²¹³ Crime bill opponents thus hoped to encourage the public to link the bill to old political mythologies about “welfare queens” and other frauds.

The pork strategy was bolstered by the familiar Republican attacks on gun control, centering on the image of law-abiding citizens being deprived of their means of self-defense against criminals. Republicans were able to capitalize on their traditional alliance with the NRA to garner further opposition to the bill when Judiciary Chairman Jack Brooks attempted to re-open the issue of the assault weapons ban, attacking Representative Schumer who had secured passage of the ban in the House 216 to 214.²¹⁴ Though Brooks ultimately supported the bill with the ban in place,²¹⁵ his maneuvers gave anti-gun control Republicans political cover while buying the NRA more time to foment opposition as final passage was delayed.

These attacks on the funding were quite cynical, given that the same Republicans had supported virtually identical spending in committee and on the floor prior to conference committee.²¹⁶ Moreover, the Republican attack was inherently weak. Polling indicated that Americans strongly supported spending on crime prevention programs.²¹⁷ Thus, Democrats possessed a strong basis to counter the Republican attacks.

2. The Democratic Strategy

a. *The message.* To build public support for passage of the bill, Democrats had crafted a potentially effective message. Schumer tried to walk the middle ground: “Crime has formed an angry

²¹³ Sharon Schmickle, *Parties Seek Credit in 'Nonpartisan' Fight Against Crime*, STAR TRIB., Apr. 25, 1994, at 1A.

²¹⁴ See Katharine Q. Seelye, *Texas Legislator Seeking to Soften Assault-Arms Ban*, N.Y. TIMES, July 21, 1994, at A18.

²¹⁵ See Steve McGonigle, *Conferees Agree on Crime Bill*, DALLAS MORNING NEWS, July 29, 1994, at 1A.

²¹⁶ See Cooper, *supra* note 202, at A12. As the *Washington Post* reported, “[I]f the \$30 billion legislation reeks of ‘pork,’ as Republicans charge, they didn’t wake up and smell the bacon frying until recently.” Kenneth Cooper, *GOP’s Beef with Beleaguered Crime Bill Shifts to “Pork”*, WASH. POST, Aug. 14, 1994, at A17. See also Kurtz, *supra* note 199, at C1 (“Just when it looked like Clinton might win a legislative victory, most GOP members in the House and Senate suddenly invented new objections to a measure they had already voted for.”). Nevertheless, the press largely failed to report completely this hypocrisy, preferring to focus on the partisan slingshots between Clinton and Republicans. *Id.*

²¹⁷ See Wirthlin Quorum Poll, *supra* note 13.

center, which tells ideologues on left and right: do more with punishment and prevention.”²¹⁸ Biden understood the need to have both elements in the bill: “[W]e have to preserve the dual focus [on prevention and punishment] that exists, which is the hallmark of the crime bills both houses passed.”²¹⁹ Clinton had come up with a good slogan for a crime bill with this balance as far back as the 1992 campaign—“tough and smart”²²⁰—but needed to follow through to assure that all provisions of the bill would be politically acceptable. This message was strong for Democrats because both the punitive and preventive approaches had broad support among the American public,²²¹ and because the message, with the right substantive actions backing it up, would satisfy both conservative and liberal Democrats.

Over the course of final passage, Democrats did not deliver this message effectively. Instead, they became immersed in conflicts over the Racial Justice Act and assault weapons, serving to push the Democratic message out of the news. A version of the bill finally limped through Congress, but not before it temporarily died on a procedural motion in the House, necessitating a redesign of the bill and embarrassing the President.

b. *Derailed by the Racial Justice Act.* The Racial Justice Act, added to the House bill in the Judiciary Committee, would have allowed statistical evidence of racial disparities in death sentences to be admitted in particular trials, regardless of whether any particular discrimination was shown.²²² The provision was clearly going to be objectionable to Republicans who were resistant to any issues surrounding race and statistics,²²³ and with moderate Democrats who were less solicitous of claims of discrimination, especially in the area of the death penalty.²²⁴ Conservatives also suggested that the Racial Justice Act was an attempt to thwart the death penalty. As the provision worked its

²¹⁸William J. Eaton, *Rep. Schumer Pulls to Mold Crime Bill*, L.A. TIMES, Apr. 12, 1994, at A5.

²¹⁹*Anti-Crime Conferees Meet*, UPI, June 16, 1994.

²²⁰Clinton Gives Crime Message in Philadelphia, CNN TRANSCRIPTS, Apr. 21, 1992.

²²¹See Gallup Org. Newsletter, *supra* note 13; Wirthlin Quorum Poll, *supra* note 13.

²²²See Dan Carney, *House Crime Bill's Racial Justice Provision Raising Controversy*, Hous. POST, Apr. 19, 1994, at A9.

²²³See *Racial Data Could Play Exclusion Role, House GOP Decries 'Quota for Murderers'*, CHI. TRIB., Apr. 21, 1994, at 7.

²²⁴Twenty Democrats in the Senate voted for a resolution instructing their conferees to exclude the Racial Justice provisions in the final bill. See *infra* note 228 and accompanying text.

way into the House bill, and survived a number of challenges,²²⁵ the congressional leadership and the President had three options—wait it out and hope that the controversy would blow over, fight the provision publicly and seek Republican votes to make up for lost liberal Democrats, or find some area for accommodation.

The choice of strategy was the subject of heated discussion within the administration.²²⁶ Because the fight-it-out option was undesirable, especially considering the Congressional Black Caucus' already skeptical view of Clinton, only the wait and accommodation options were really available. The White House almost by default decided to wait out the debate over the provision in the House, beginning serious work on a deal only after the Act survived a number of challenges in late April.²²⁷

With final passage in the House at the end of April, a fight over the Racial Justice Act in the conference committee was imminent. But even before the conference began, the political heat intensified on the matter. Senator Al D'Amato (R-N.Y.) quickly proposed a Senate resolution instructing Senate conferees not to accept the Racial Justice language. The measure passed with a solid majority, 58-41, with 20 Democrats voting to remove the provision.²²⁸ With conflict coming down the pike, the congressional leadership and the administration had to "thread a needle" to devise something to garner enough moderate votes without alienating too many liberals.²²⁹ As the conference committee sat down to work, the administration got directly involved on the issue, with Attorney General Janet Reno assigned to work out compromise with Rep. William Hughes (D-N.J.).²³⁰

As the conferees continued work on the bill, the racial justice provision proved a huge sticking point. The press was clearly focusing on the fight surrounding the measure, sensing it as a

²²⁵ See William J. Eaton, *Death Penalty Measure Survives House Test*, L.A. TIMES, Apr. 22, 1994, at A18.

²²⁶ Interview with Christopher Edley (Jan. 24, 1996); Interview with Jeffrey Robinson (Jan. 24, 1996).

²²⁷ See Ronald Brownstein, *White House May Dilute Racial Justice Act*, L.A. TIMES, Apr. 27, 1994, at A11.

²²⁸ See Katharine Q. Seelye, *Senate, in 58-41 Vote, Bars Race-Based Death Row Pleas*, N.Y. TIMES, May 12, 1994, at A22.

²²⁹ See Brownstein, *supra* note 227.

²³⁰ See Kenneth J. Cooper & Helen Dewar, *Crime Bill's Price Tag Rises to \$30 Billion, Biden Calls Use of Racial Data in Capital Cases a Sticking Point as Hill Negotiations Begin*, WASH. POST, June 16, 1994, at A14.

major fault line in the coalition for the bill.²³¹ Annoyed by the administration's slights, seeming insincerity, and inability to live up to their high hopes, House liberals and the Congressional Black Caucus continued to push the racial justice provision.²³² The administration seemed to go back and forth on whether such a provision was in any way acceptable, but Biden was quite clear, eventually saying: "We don't have the votes for anything that has 'racial justice' in it, even the word 'racial.'"²³³

An eventual compromise on a racial justice executive order was worked out,²³⁴ but the rifts that had developed over the Act angered many liberal Democrats. When the conference committee bill came up for a procedural vote to set the terms of the floor debate in the House, a number of necessary liberal votes abandoned the President, causing the bill to die temporarily.²³⁵ This death—even though only temporary—was a major political embarrassment for the President, as it changed the story from the undesirable one of disorganized Democrats fighting over an apparently "soft" provision to the unmitigatedly awful one of Clinton's failure to produce a bill and corresponding inability to lead.²³⁶

c. *Assault weapons redux.* The contentious issue of assault weapons also made the political effort to work out House-Senate differences in conference very difficult. On May 5, 1994, the House passed a ban almost identical to the Senate's by a very slim margin.²³⁷ A strong provision was again pushed through the conference, significantly the same despite lobbying by Chairman

²³¹ A Nexis search on the term "racial justice" in July 1994 turns up 415 stories. The same search for August turns up 308.

²³² See Naftali Bendavid, *Black Lawmakers Hold Balance on Crime, Legislative Endgame Reveals Caucus's Power, Divisions*, LEGAL TIMES, Aug. 22, 1994, at 1, 13.

²³³ Senator Joseph Biden, *quoted in* George Embrey, *Stokes Accused 13 Senators of Racial Bias in Stalling Crime Bill*, COLUMBUS DISPATCH, July 23, 1994, at 3A.

²³⁴ See Gayle Pollard Terry, *Kweisi Mfume, The Driving Force Behind the Black Caucus' Increasing Clout*, L.A. TIMES, Aug. 21, 1994, at M3 (interview with Mfume in which he identifies the executive order as a goal of the CBC); *see also* Conyers *Praises Crime Bill*, CONG. PRESS RELEASES, Sept. 13, 1994 (stating that President Clinton had promised an executive order to promote non-discrimination in the imposition of Federal death penalties and a commission to study racial disparity in death penalty sentences).

²³⁵ Conservative Democrats were also withholding their votes, but many of them were not within reach without abandonment of the assault weapons ban.

²³⁶ See, e.g., David Hess, *Crime Bill Dies; House Action Jolts Clinton*, DAYTON DAILY NEWS, Aug. 12, 1994, at 1A.

²³⁷ The vote was 216 to 214. See Kenneth J. Cooper, *House Backs Ban on Assault Guns, Dramatic Late Votes Decide Emotional Issue*, WASH. POST, May 6, 1994, at A1.

Brooks to make alterations at that point. With the provision still in the bill after conference, anti-ban forces regrouped and tried final gambits in the House and Senate.

With difficulty clearly mounting for the administration around the racial justice issue,²³⁸ the anti-ban groups saw this opportunity to move and stepped up pressure in the House.²³⁹ Brooks had made an earlier attempt to attack the bill—late in the House discussions, he openly challenged it, threatening to delay the bill until the ban was weakened, if not removed altogether.²⁴⁰ His agreement to proceed was eventually brokered with the inclusion of an exemption for pawnbrokers from the Brady Law's provisions—undermining the legislation in a significant way, but not totally gutting it.²⁴¹ Brooks and the NRA were not finished, however. After the rule on the bill was defeated on August 11, 1994, they redoubled their efforts to remove the ban from the bill.²⁴² Only Clinton's insistence that it remain enabled it to survive,²⁴³ again illustrating the necessity and power of presidential leadership. When Brooks finally realized that he did not have the votes to stop the bill, he allowed it to proceed and voted for the bill himself. As he later noted, "I tried to kill [the assault-gun ban] every way I knew. I wasn't successful. Let's move on."²⁴⁴

In the Senate, a slightly different endgame would play itself out, under the guise of the only opposition theme left for the Republicans: profligate Democratic social spending as pork barrel payoffs to Democratic constituencies. But behind the publicly expressed reason for opposition was a familiar one for conservative Republicans: the continued presence of the assault weapons ban. As Joe Biden put it, "Make no mistake. This is about

²³⁸ See Kenneth J. Cooper, *House Delays Final Crime Bill Vote to Head off Possible Floor Debate*, WASH. POST, Aug. 3, 1994, at A7 (reporting the views of the Congressional Black Caucus members, including Rep. Bobby Scott).

²³⁹ See Katharine Q. Seelye, *Unusual Alliance in House Unites to Stall the Crime Bill*, N.Y. TIMES, Aug. 4, 1994, at A1.

²⁴⁰ See Katharine Q. Seelye, *Texas Legislator Seeking to Soften Assault-Arms Ban*, N.Y. TIMES, July 22, 1994, at A18.

²⁴¹ See Katharine Q. Seelye, *Assault Weapons Ban Allowed to Stay in Anti-Crime Measure*, N.Y. TIMES, July 28, 1994, at A12.

²⁴² See Steve McGonigle & G. Robert Hillman, *House Crime Bill Stalls on Assault Weapons Ban, But Negotiators Find Consensus on Spending Cuts*, DALLAS MORNING NEWS, Aug. 21, 1994, at 1A; see also Katharine Q. Seelye, *The Man Who Tried for Bacon, In the End Brooks Meets Defeat*, N.Y. TIMES, Aug. 21, 1994, at 34.

²⁴³ See Katharine Q. Seelye, *A New Hurdle as a Deal Nears on a Crime Bill*, N.Y. TIMES, Aug. 21, 1994, at 1.

²⁴⁴ Representative Jack Brooks, quoted in Sandy Grady, *Heroes in the House*, BALTIMORE SUN, Aug. 26, 1994, at 17A.

guns, guns, guns.”²⁴⁵ Accordingly, Phil Gramm attempted a clever parliamentary tactic to revert to an earlier version of the Senate bill without the ban,²⁴⁶ but this effort was rebuffed by the defection of moderate Republicans who wanted a bill passed. Democrats ultimately offered Republicans a chance to vote on cutting prevention programs further, but, sensing defeat, the Republicans backed off and merely voted against the bill.²⁴⁷

d. *Politics and disunity.* There are two explanations for the problems, both within and between the political parties, that stalled the bill. First, the delay in putting the bill together can be traced to the White House’s decision to deemphasize crime. Biden, Schumer, and, to a lesser extent Brooks, were waiting to follow the White House’s lead to craft a bill that met the priorities President Clinton outlined in August. They were not given the help needed, even when they explicitly asked for it.²⁴⁸ This delay allowed the natural fault lines in the House to open and threaten to swallow the bill, while giving the Republicans the opportunity to plan different lines of attack. Second, the President failed to make the hard legislative calls needed to move the bill. It was incredibly unlikely that any racial justice provision could ever have passed in the Senate; Clinton should have informed the provision’s supporters of this fact early on, and then promptly moved to delete it from the bill.²⁴⁹

The White House and congressional Democrats could have avoided these political setbacks had they planned for the possibility that Republicans would ultimately turn against the bill—a real possibility given the Republicans’ belief in their inherent strength on crime issues. Thus, Democrats should have prepared a contingency plan to assure that liberals would not be alienated by even a primarily punitive bill. To solve the problem of liberal skepticism about the bill, and specifically the Congressional Black Caucus’s search for a racial justice provision, the leadership and the administration needed to circulate an internal message that would appeal to both liberal sensibilities and those moderate and conservative Democrats.

²⁴⁵ *Id.* at 17A.

²⁴⁶ See Stephen Green, *GOP Is Poised to Derail Crime Bill in Senate*, S.D. UNION-TRIB., Aug. 24, 1994, at A1.

²⁴⁷ See *MacNeil/Lehrer News Hour*, (PBS television broadcast, Aug. 25, 1994).

²⁴⁸ Bender, *supra* note 168 (quoting Representative Schumer).

²⁴⁹ See Kondracke, *supra* note 103.

This was essentially the Biden/Schumer strategy of walking a fine line with balanced, substantive proposals, allowing a wide spectrum of Democrats to claim that the proposed bill reflected their perspective. Biden and Schumer reapplied this strategy after a primarily punitive Senate bill was used as the starting point of final negotiations, but with a Democratic administration behind those punitive provisions, many liberals were no longer interested in cooperation. With all of the President's political setbacks in their mind, and without a token victory at the outset for a preventive approach, later compromises could not win back most House liberals. The President ought to have backed funding from the outset for prevention programs reflecting his "tough and smart" message. In the end, he was reduced to putting all possible political efforts into rescuing a bill that accurately reflected many public priorities.²⁵⁰ Though the bill became law, the political handling of its passage did not bode well for how it would be viewed in the long-term.

3. The Outcome

Despite the strong Republican attack and the stumbling Democratic response, the crime bill was fairly popular in fall 1994.²⁵¹ Indeed, support for the bill was sufficient to convince some moderate Republicans to bolt from Senator Dole's partisan strategy and vote for final passage.²⁵² Dole subsequently accepted responsibility for the defeat when the bill passed: "I assume that the headlines will read, 'Republicans hand Clinton a victory.' I regret that I failed as a leader to keep our people together."²⁵³

²⁵⁰ See Marc Sandalow, *Clinton Ready to Compromise on Crime Bill*, Aug. 17, 1994, at A1.

²⁵¹ See Gallup/Cnn/U.S.A. Today poll, Aug. 19, 1994, available in LEXIS, Market Library, Rpoll File (46% favored the crime bill that was under consideration in Congress, 29% opposed it, and 25% had no opinion); CBS News Poll, Aug. 18, 1994, available in LEXIS, Market Library, Rpoll File (42% thought Congress should pass the crime bill based on what they had read or heard about it, 28% thought Congress should reject it, 4% felt that Congress should pass it with changes, and 26% didn't know or had no answer); CNN/U.S.A. Today poll, Sept. 7, 1994, available in LEXIS, Market Library, Rpoll File (50% favored the crime bill that was passed, 33% opposed it, and 17% didn't know).

²⁵² See Adam Clymer, *Decision in the Senate: The Overview*, N.Y. TIMES, Aug. 26, 1994, at A1. Voting to waive the point of order objecting to the bill's funding, a vote that also made clear that the bill's supporters had the sixty votes needed to terminate a filibuster, were the following Republicans: Senators John Chafee (R-R.I.), John Danforth (R-Mo.), James Jeffords (R-Vt.), Nancy Kassebaum (R-Kan.), William Roth (R-Del.), and Arlen Specter (R-Pa.).

²⁵³ Senator Robert Dole, quoted in *id.*

Democrats were exuberant about passage of the bill, which appeared to represent victory in the long battle Democrats had waged since 1989 to control the crime issue. In truth, however, passage of the bill was just the first step. After a bill is enacted, its sponsors must insure that the law becomes permanent policy, immune to attack or replacement by future Congresses. To achieve this permanence, Democrats needed to build lasting support from a solid majority of the electorate. Viewed from this perspective, the polls measuring the bill's popularity in fall 1994 contained disturbing news for Democrats. First, popular support for the bill was much weaker than it should have been. The central elements of the bill—100,000 police officers, gun control, prevention, the death penalty—all polled in the 70–80% range.²⁵⁴ The bill itself, however, garnered only 40–50% support.²⁵⁵ In short, the Republican attack, combined with a struggling Democratic sales job, had cost the Democrats much of the public support their bill should have enjoyed—a devastating setback. Worse, polls indicated that a large percentage of the voters remained unconvinced that the bill would have a great effect on crime, and thus remained open to persuasion that it was useless.²⁵⁶ Consequently, Republicans read the polls and understood that the war was not over. Shortly after the Republican defeat, Senator Dole promised that his strategy would be vindicated in November, when the electorate would be educated about the bill's "ludicrous, ridiculous items."²⁵⁷

In large part because of the administration and congressional Democrats' failure to sell the bill to liberals, no convincing message reached the outside world. The message, emphasizing the importance of both a solid law enforcement agenda and prevention programs as part of long-term anti-crime strategy, was smothered despite overwhelming public belief that both elements are necessary to fight crime.²⁵⁸ New Democrats like

²⁵⁴ See polling information *supra* note 13.

²⁵⁵ NBC News/Wall Street Journal poll, May 6, 1994, available in LEXIS, Market Library, Rpoll File (5% felt that the crime bill would be very effective in reducing crime, 10% felt that it would be fairly effective, 34% felt it would be somewhat effective, 10% felt that it would not be effective at all, 38% hadn't heard enough to say, and 3% were not sure).

²⁵⁶ See ABC News Poll, September 8–11, 1994, available in LEXIS, Market Library, Rpoll File (finding 36% of adults believed that the crime bill will reduce crime, 58% believed that it would not).

²⁵⁷ Senator Robert Dole, quoted in Helen Dewar, *GOP Crime Strategy Fails*, WASH. POST, Aug. 27, 1994, at A1.

²⁵⁸ See, e.g., L.A. Times Poll, Jan. 19–22, 1995, available in LEXIS, Market Library, Rpoll File (72% preferred the original bill with crime prevention spending, 20% chose the new bill without crime prevention spending.).

President Clinton had attempted to move beyond the old liberal perspective that social conditions caused crime, making a punitive approach inappropriate. But while emphasizing that a harsh, punitive approach on crime was appropriate, they did not need to abandon an emphasis on the need for crime prevention programs. By not adding this codicil to the toughness mantra early on, the White House and congressional Democrats lost many liberals, allowing other liberals to pursue strategies that undermined the toughness message. Politics is, of course, a place for open and honest debate, but coherent stories are what people base their political choices on, and a major goal of political leaders must be to cobble together a majority for some coherent plan to address a pressing social problem. Without a fairly unified approach, the press's interest in conflict is likely to divert from even an effective message.²⁵⁹

The Democrats' disunity contributed to their inability to expose the weakness of the Republicans' shrill and cynical attack that the crime bill was pork-laden social spending. The Republicans' story worked better primarily because the Democrats failed to offer effectively a competing vision. It also had the advantage of fitting in well with standard lines on the profligacy of Democratic spending. Democrats, on the other hand, had not adequately prepared a response; their answer to the pork charge was merely a weak denial—a Dukakis-like response to an attack on their values.

With a concerted strategy to add the prevention spending to the message as an attempt to be truly comprehensive, the Democratic leadership and the President could have both brought liberals into the fold and assured long-term support of the bill, thus defending it from Republican attacks. The Schumer-led effort to meld the prevention message to the toughness one properly challenged those who think that toughness is the only essential element of crime bills. Because spending on crime enjoys wide public support²⁶⁰ and spending on prevention in particular is popular, the Democratic message had the potential to succeed.

²⁵⁹ See generally JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINES AMERICAN DEMOCRACY* (1996).

²⁶⁰ General Social Survey 1993, Aug. 1993, available in LEXIS, Market Library, Rpoll File (59% felt that we were spending too little on law enforcement.). See also General Social Survey 1993, Aug. 1993, available in LEXIS, Market Library, Rpoll File (71% felt that we were spending too little on fighting the rising crime rate.).

IV. CRIME IN THE 1994 ELECTIONS

By the time Congress sent the crime bill to the President's desk and adjourned, the 1994 campaign was well under way. Strategies reflected voter concern about crime: "Republicans and Democrats, men and women, incumbents and challengers are all touting their tough-on-crime credentials in the 1994 elections."²⁶¹ With a crime bill on his desk, Clinton had another opportunity to employ the bully pulpit on behalf of Democrats. Unfortunately, Clinton again declined to embrace the crime agenda. Though the 1994 crime bill was the Democrats' most significant legislative accomplishment, Clinton's advisers thought crime was unimportant. Instead, they believed that Democrats would prevail in the mid-term elections if the President launched a negative attack on the economics of Newt Gingrich's Contract with America. In short, the "economy, stupid" strategy triumphed over crime once again in the West Wing. The President never ran a single commercial on the crime bill.²⁶² Instead, Clinton painted the Contract with America as a return to "Reaganomics."²⁶³

The Republicans, in contrast, made the 1994 crime bill one of their top issues.²⁶⁴ Even as Dole conceded defeat on the crime bill in August, he was looking ahead to the November elections and promising to make spending in the crime bill an issue: "We will have some examples—they will look good in a thirty-second spot."²⁶⁵ As one reporter noted in August, Republicans were running hard against the crime bill, tying it to their larger themes:

Even before the Senate handed Clinton his 61–38 victory [passing the crime bill] Thursday, Republicans were vowing to prove that the real issue is a runaway government Some Republican strategists asserted that the issue—epitomized by the debate over "pork" in the crime bill—could be

²⁶¹ Howard Kurtz, *In 1994 Political Ads, Crime is the Weapon of Choice*, WASH. POST, Sept. 9, 1994, at A1.

²⁶² Interview with senior White House official (Jan. 18, 1996).

²⁶³ See DREW, *supra* note 23, at 439. The advice the President followed proved to be short-sighted. As both Elizabeth Drew and Ben Wattenberg have noted, Clinton's strategy ignored the reality that Reagan remained popular throughout the country. WATTENBERG, *supra* note 1, at 307 (citing Times Mirror poll from September 9–11, 1994, showing Reagan viewed by American people as contemporary having done the "best job", with 22%, followed by John Kennedy, 19%. Clinton placed seventh, with 6%); DREW, *supra*, note 23, at 439 (Reagan remained popular, especially among younger voters).

²⁶⁴ DREW, *supra*, note 23, at 440; WATTENBERG, *supra*, note 1, at 308.

²⁶⁵ *Id.* Senator Robert Dole, *quoted in President Under Siege From All Sides*, L.A. TIMES, Aug. 27, 1994.

decisive in their battle to regain control of the Senate and to win perhaps two dozen seats in the House.²⁶⁶

The Contract with America called for the repeal of the prevention programs in the crime bill.²⁶⁷ On the Sunday before the election, Dole announced that this repeal would be one of his priorities if he became Majority Leader.²⁶⁸

At the same time, the National Rifle Association was waging a singularly aggressive campaign against supporters of the crime bill. Under new chief lobbyist Tanya Metaksa, a hard-liner who had been forced out of the NRA leadership in the eighties but had fought her way back to the executive offices,²⁶⁹ the NRA abandoned concerns about ensuring access to incumbents and likely victors, instead targeting legislators who had parted ways with them on the assault weapons ban. According to Metaksa, "We are not playing the usual political action committee 'safe' strategy. We are going into races that are by no means sure things. I'm looking to win as many as we possibly can."²⁷⁰ Targeting powerful longtime allies like Speaker Foley and Judiciary Chairman Brooks,²⁷¹ the gun lobby showed unprecedented boldness. More than half of the NRA's contributions during the midterm elections went to Republican candidates challenging Democratic incumbents.²⁷² In the end, the NRA would spend \$1.9 million in congressional campaigns, contributing to the defeat of thirty-two gun control incumbents.²⁷³

In the face of these campaign assaults, Democrats had few accomplishments from the 103d Congress to run on beyond the crime bill; their only other strategy was to tar the Republicans as obstructionist.²⁷⁴ The advantage of the crime bill compro-

²⁶⁶Paul Richter, *GOP's Election Agenda Rests on Risky Tactics*, L.A. TIMES, Aug. 27, 1994, at A1.

²⁶⁷See Eric Pianin, *Some in GOP Don't Buy the "Contract"*, WASH. POST, Sept. 30, 1994, at A10.

²⁶⁸See Ronald Brownstein, *Clinton Faces Cold Realities of Partisanship and Isolation*, L.A. TIMES, Nov. 7, 1994, at A1.

²⁶⁹See John Mintz, *Ideological War Pits NRA Hard-Liners Against More Moderate Staff*, WASH. POST, May 29, 1995, at A4.

²⁷⁰Tanya Metaksa, *quoted in Susan Schmidt, PACs, Still Favoring Democrats, Are Giving More to Republicans*, WASH. POST, Oct. 30, 1994, at A22.

²⁷¹See Kenneth J. Cooper, *Gun Control Backers Are Tuesday's Targets; NRA Shelling Out Big Bucks Across U.S.*, WASH. POST, Nov. 7, 1994, at A11.

²⁷²See Schmidt, *supra* note 270, at A22.

²⁷³See Elsa C. Arnett, *Hard-line Hammer First Woman to Lead the NRA; New President Is Dedicated Opponent of Gun Control Laws*, MORNING NEWS TRIB. (Tacoma, Wash.), Dec. 24, 1995, at E6.

²⁷⁴See Richard L. Berke, *How Bleak Will It Be? Dems Fear the Worst, GOP Counting on Voter Discontent to Make Gains*, ARIZ. REPUBLIC, Sept. 4, 1994, at 1.

mise—that it had something in it for everyone—became a crutch for Democratic incumbents. Rather than trying to defend the bill as a whole, Democrats emphasized those portions of it they believed the public would support,²⁷⁵ primarily the police funding, sentencing enhancements,²⁷⁶ death penalty provisions, and, in certain districts, the assault weapons ban.²⁷⁷ While Republicans were attacking prevention programs, Democrats failed to respond forcefully and make the case for programs of which the public was generally supportive. Instead, Democrats winced and talked about other parts of the bill. In many ways, Democratic use of the crime bill resembled the 1988 Dukakis campaign: a reluctance to counter the Republican message head-on. With little help from the White House, Democrats failed to counter the Republican message in the states.²⁷⁸

On November 7, 1994, Republicans won the greatest landslide in modern history, winning control of the House with a gain of fifty-two seats, control of the Senate with a gain of eight seats, eleven additional governorships, and seventeen formerly Democratic-controlled state legislatures.²⁷⁹ Despite their opposition to

²⁷⁵ See Dan Balz & Helen Dewar, *Disillusioned Public Puts Social Issues at Top of Fall Campaigns; Wary of Government, Many Voters Turn to Right and Place Emphasis on Values*, WASH. POST, Oct. 2, 1994, at A1 (“In congressional campaigns around the country Democrats are running on the newly passed crime bill—or at least such parts of it as three-strikes-and-you’re-out, more police on the streets, and in some cases the ban on assault weapons. Few if any Democrats in tough races are mentioning the prevention programs they fought so vigorously to protect in the final battle with Republicans.”).

²⁷⁶ Senator Edward Kennedy (D-Mass.), a leading liberal, aired advertisements the day after the bill’s passage proclaiming: “He fought successfully for the bill that will put 2,300 new police on Massachusetts streets. And impose life sentences for three-time violent offenders.” Howard Kurtz, *In 1994 Political Ads, Crime Is the Weapon of Choice*, WASH. POST, Sept. 9, 1994, at A1.

²⁷⁷ Senator Dianne Feinstein’s advertisements called her “a strong, sometimes lonely voice for the death penalty in the Democratic Party” who has fought to ban assault weapons and pass the “toughest anti-crime package ever.” *Id.*

²⁷⁸ According to a retrospective look,

Republicans succeeded in imprinting on the public consciousness the image of the crime bill as typical Democratic pork spending on prevention programs like midnight basketball One senior [White House] official acknowledged that the administration is largely to blame for the position in which it finds itself. Republican charges of pork carried the day, and the administration never satisfactorily explained that the bill put police officers on the street and shifted control away from the federal government, as voters appeared to want. “That was never the way the thing was sold or positioned,” the official said. “It’s one of the classic blown opportunities of the first two years.”

Ruth Marcus, *A Humbled White House Now Sees Its Record at Risk*, WASH. POST, Jan. 24, 1995, at A1.

²⁷⁹ See Drew, *supra* note 23, at 440–41.

the 1994 crime bill, not a single Republican incumbent member of Congress was defeated.²⁸⁰

In January 1995, the newly elected Republican majority in the House moved to enact their crime agenda. By January 1996, House Republicans had passed six bills that effectively repealed the 1994 crime bill. Under the House crime bill, Congress would eliminate the funding for 100,000 new police officers and the 1994 crime bill prevention programs, expand prison construction and prohibit federal prison amenities, limit habeas corpus appeals, and restrict the scope of the federal exclusionary rule. Yet as this Essay goes to press, all but the habeas corpus provisions of the House plan are stalled in the Senate.

V. CONCLUSIONS: CRIME IN AMERICAN POLITICS

This Essay has attempted to show the filter that American politics applies to the crime debate. By understanding the dynamics that have shaped the partisan struggles over crime, one can better understand the factors that shape legislative initiatives on crime. Furthermore, by understanding how to utilize politics in the crime debate, one can better understand how to achieve progress in crime legislation.

This history of the politics of crime has shown that, after years of suffering political setbacks from the mishandling of the crime issue, Democrats refashioned their political strategy on crime and, in doing so, were able to advance a comprehensive and varied legislative package with wide public support. Yet this well-conceived strategy was not maintained, muddling the Democratic message on crime and leaving the Democrats' legislative accomplishments in jeopardy. Similarly, Republicans' failure to respond to Democratic initiatives with a reasoned alternative has undermined their role as the political opposition, and stymied their legislative efforts.

For political leaders to be able to address crime at the federal level, they must make more effective use of politics to build support for their efforts. Our analysis of the politics of crime suggests six basic lessons about the impact and importance of crime in American politics.

²⁸⁰ See *id.* at 440.

A. *Crime Is a Constant in Contemporary Politics*

Since 1968, when crime first rose to the top of the list of public concerns, crime has been a major issue in American politics. Though the issue appears at times to decrease in importance, the events of 1993 indicate that as long as the crime rate remains high, the issue can return to importance rapidly. Indeed, if sociologists and criminologists are correct that the crime rate will increase in the next few years as a result of demographic changes,²⁸¹ the crime issue may become even more important in American politics.

B. *Parties Ignore the Crime Issue at Their Peril*

From 1968 to 1988, Republicans controlled the crime issue. They won six out of seven Presidential elections during that time. In 1992, Republicans failed to stress crime, and lost. In 1994 congressional elections, Democrats failed to stress crime, and lost. Political consultants and commentators continue to argue whether economic or social issues like crime are more important to electoral success. Results, however, suggest a simple rule: control of the crime issue is a necessary, though perhaps not sufficient, requirement for political victory in America.

C. *Heightened Political Debate on Crime Has Improved Law Enforcement Policy*

The fight between Democrats and Republicans for control of the crime issue that has persisted since 1989 has made an important contribution to American public life. Democrats seeking to respond to Republican attacks have shifted national law enforcement policy toward substantive efforts like community policing and gun control to combat crime on the streets. In response, Republicans have had to deemphasize old conservative nostrums like habeas corpus reform and debate the merits of the Democratic program. Prior to 1989, the crime debate focused on hollow attacks like the Willie Horton debacle. Now, Republicans and Democrats debate substantive policy differences: the value

²⁸¹ See Ted Gest and Victoria Page, *Crime Time Bomb*, U.S. NEWS & WORLD REPORT, Mar. 25, 1996, at 28.

of expanded police presence, the need for prevention programs, and the importance of gun control. The first major legislative product of that debate, the 1994 crime bill, is a major change from the insignificant crime bills of the past.

D. Democrats Have Constructed a Strong National Message on Crime

During the years since the Dukakis debacle in 1988, Democrats have forged a strong anti-crime story. Democrats stress the need for policies that aid state and local law enforcement efforts. To that end, they advocate federal aid to hire more police officers, gun control, and crime prevention. Combined with support for the death penalty, this message is potent; all four elements poll highly, with three of the elements near eighty percent.

E. Democrats Must Articulate Their Message to Succeed with It

The Democrats lost on crime in the 1994 election not because of an inherently weak message, but because they failed to articulate that message forcefully. President Clinton walked away from the crime issue. Congressional Democrats had trouble working together, and allowed disagreements to push the more important message out of the news. In the future, Democrats need to work toward greater unity, with a President who displays consistent attention to the issue of crime.

F. Democrats Can Win on Crime in 1996, and Protect the Future of the 1994 Crime Bill

The current Republican story on crime, according to Speaker Gingrich, is: "If you have decided on a crime, we're trying to send a signal that we have decided in a very direct way to make you pay."²⁸² This appears to be a fancy and not very compelling way of saying: expanded prison funding. Democrats, in contrast, now stress that the Republicans are trying to eliminate the fund-

²⁸²Reno Says Republican Plan to Tighten Prison Funding Will Hurt Crime Effort, BALTIMORE SUN, Feb. 10, 1995, at 16A.

ing for the 100,000 police officers and prevention programs contained in the 1994 bill. As President Clinton stated: "We don't believe it should be changed in ways that can weaken our commitment to putting 100,000 police on the streets, and that basically spends more money on prisons and less money on police and prevention."²⁸³ Polling indicates that the Democratic message is much stronger.²⁸⁴ Thus, Democrats should be able to use crime to their advantage in the 1996 election if they stand behind and articulate their story.

President Clinton seems to have learned this lesson. On the advice of a new Presidential adviser, Republican consultant Dick Morris, the President did emphasize crime in 1995. The President held high-profile press conferences at the White House in which the President, surrounded by police officers in blue uniforms, attacked the Republican effort to eliminate the funding for the 100,000 new police officers. Clinton also took the unprecedented step of running \$2.6 million worth of campaign commercials in 27 American cities in a non-election year.²⁸⁵ The commercials focused on one issue only: the President's efforts to fight crime.²⁸⁶ This message may prevent Republicans from overturning the 1994 crime bill in the 1996 Congressional session. If Democrats make this message a hallmark of the 1996 campaign, history since 1968 suggests they will be well rewarded at the polls.

²⁸³ Cf. Tim Poor & Marcia Koenig, *House Votes to Ease Search, Evidence Rules*, ST. LOUIS POST DISPATCH, Feb. 9, 1995, at A1.

²⁸⁴ See polling data *supra*, note 13.

²⁸⁵ See WATTENBERG, *supra* note 1.

²⁸⁶ In the commercial, a narrator declared that "Bill Clinton did something no President has ever been able to accomplish. He passed and signed a tough law to ban deadly assault weapons." President Clinton then looked into the camera and said: "Deadly assault weapons off our streets, 100,000 more police on the streets, expand the death penalty. That's how we'll protect America." *Id.*

RESPONSE TO "THE POLITICS OF CRIME"

SENATOR HERB KOHL*

I commend the authors for drafting such a provocative analysis of the politics surrounding the Violent Crime Control and Law Enforcement Act of 1994.¹ Their work offers important lessons about the ongoing dialogue between policymakers and the public. Their efforts will undoubtedly improve this continuing dialogue on the subject of crime.

While the authors have performed a valuable service, their critique underestimates both the accomplishments of the Crime Act and its popular support, while overstating the failures of its drafters. As a substantive matter, the Crime Act is a balanced and effective piece of legislation that is tough on crime, sensible on guns, and smart on prevention. In political terms, polls like the ones cited by the authors will always show that Congress should do more, but most polls indicate strong support for what the Crime Act actually achieved. Moreover, as the Republicans' recent difficulty in eliminating key parts of the Act suggests, much of this legislation retains strong political support. Finally, given this continued support and the weakness of Republican attacks, I agree with the authors' conclusion that the Republican crime message is likely to fail.

The authors measure the success of the Crime Act in almost exclusively political terms without regard to the substance of the legislation. Yet the Act is a powerful combination of proposals that effectively attack the whole crime problem. For example, the Act addresses the need to deter offenders with more police on the street, new death penalty provisions, and billions of dollars in prison grants. The Act also imposes reasonable restrictions on firearm access through the Youth Handgun Safety Act,² which prohibits handgun sales to juveniles and juvenile handgun possession, as well as the assault weapons ban, which blocks the production and sale of the deadliest street weapons. Finally, the

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¹ Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C.) [hereinafter the Crime Act].

² Crime Act §§ 110101-110106 (1994).

Act dedicates twenty percent of its funding—\$6 billion over five years—to numerous innovative programs targeted at preventing crime before it happens. This holistic approach to the crime problem makes sense and deserves praise, particularly in light of post-Crime Act decreases in the crime rate.³

Ignoring the substantive accomplishments of the Crime Act, the authors also overstate the Act's alleged political flaws and the failures of its supporters. For example, the authors argue that, despite President Clinton's successful use of the crime issue during the 1992 campaign, he failed to capitalize on this momentum and drive his own crime bill through Congress in 1993. This failure and the President's support for a variety of crime proposals rather than a single set of ideas are then blamed for limiting President Clinton's ability to rally popular support for his crime bill agenda.

But this critique ignores the political and institutional difficulties that faced President Clinton in 1993 and 1994. First, the President arrived in Washington after years of congressional battles had already forged a number of different bills—all of which had died at the end of the 102d Congress. Therefore, no matter how strongly the public had responded to his message, the newly arrived President Clinton was not free to set the crime bill agenda at the start of the 103d Congress. Second, continuing problems with the appointment and confirmation of an Attorney General prevented the Justice Department from forcefully joining the crime debate until well into 1993. By that time, the Administration was already deeply involved in high-profile, bruising battles over several issues including the budget, health care reform, gays in the military, and the nomination of Lani Guinier. Given President Clinton's late arrival in the debate and the resource drain of that first year in office, it is perhaps too much to expect that the President could have *then* mustered sufficient political capital to constitute a driving force on the crime issue.

While properly crediting Senator Joseph Biden (D-Del.) with assuming leadership on crime legislation, the authors take issue with the way Senator Biden pursued this role, without fully recognizing the difficulties Senate Democrats faced. Specifically, the authors criticize the Democratic proposal for addressing too many issues in an effort to appease a broad spectrum of interest

³ See, e.g., FEDERAL BUREAU OF INVESTIGATION, 1995 UNIFORM CRIME REPORTS (preliminary annual release, May 1996).

groups. They blame this scattershot approach for Americans' perception that Congress was not really fighting crime.

Yet, given the difficult coalition-building challenges facing Senate Democrats throughout 1993 and 1994, it is little wonder that the Crime Act ultimately contained numerous provisions on a wide range of topics. On the habeas corpus issue alone, Senator Biden spent months in precarious negotiations with defense attorneys and prosecutors to reach an acceptable compromise. Without such a compromise, the entire Crime Bill might have died, as it did at the end of the 102d Congress. As the *Legal Times* summarized in late 1993, "Crime Bill Consensus Is Tenuous At Best."⁴ Or, as Congressman Charles Schumer (D-N.Y.) more specifically explained, "[g]un control gets the liberals on board but repels many conservatives. And the death penalty and habeas corpus have the converse effect."⁵

This balancing of various interest groups was not merely a short-term phenomenon born out of the politics of crime. Rather, it was the result of the congressional structure designed by James Madison. While the authors deride politicians for appeasing interest groups who clamored for adoption of their pet proposal, Madison praised the beneficial effect of factions pitted against one another.⁶ This effect is heightened in the Senate, where any senator can offer an amendment on the floor or stall action entirely. The bicameral legislature also increases the pressure to compromise, as Senator Biden and his House Judiciary Committee counterpart, then-Representative Jack Brooks (D-Tex.), discovered as they attempted to craft crime legislation acceptable to both houses of Congress. By design, these inter- and intra-house tensions demand a broad consensus before any sweeping legislative change. Such a consensus often requires the inclusion of numerous legislative proposals that appeal to a range of constituencies.

While the resulting size and complexity of the Crime Bill undoubtedly undermined any effort to create a simple public message on crime, I am more positive than the authors about the ultimate success of the 1994 effort. As I campaigned in the fall of 1994, both during and immediately after passage of the Crime

⁴Naftali Bendavid, *Crime Bill Consensus Is Tenuous At Best*, LEGAL TIMES, Aug. 23, 1993, at 1.

⁵Clifford Kraus, '93 Crime Bill Still Faces '92 Problems, N.Y. TIMES, Sept. 14, 1993, at A22.

⁶See THE FEDERALIST No. 10 (James Madison).

Act, I heard strong support for the Act from a broad spectrum of individuals and organizations—despite my opponent's vocal opposition to it. For example, a poll conducted by my staff in 1995 found that almost eighty-five percent of the Wisconsin law enforcement personnel surveyed supported the Crime Act in its entirety, and almost ninety percent supported retaining significant crime prevention efforts as part of the bill.⁷

This support has continued through 1995—despite the 1994 “revolution.” As the Republicans in Congress have attempted to eliminate much of the Crime Act through enormous block grants, including the 100,000 police-officers program and virtually all crime prevention programs, they have met strong resistance. Unfortunately, by sending money to the states with only vague restrictions, the Republicans are recreating the Law Enforcement Assistance Act⁸—a massive block-grant program that wasted millions of taxpayer dollars on everything from airplanes to tanks during the 1970s. These Republican efforts were largely unsuccessful during the 1996 budget fight, and I share the authors' belief that Republican block-grant proposals are merely general, ideological arguments about federalism, with no underlying crime-control rationale. I am confident that the balanced Democratic approach that puts police on the street, controls the proliferation of guns, and prevents crime before it happens will continue to enjoy strong public support.

⁷ Judiciary Committee Staff of Senator Herb Kohl, Wisconsin Law Enforcement Crime Poll 1–2 (Feb. 1995) (unpublished poll, on file with the *Harvard Journal on Legislation*).

⁸ Pub. L. No. 89-798, 80 Stat. 1506 (1966), *repealed by* Pub. L. No. 93-83, 87 Stat. 207 (1978).

ESSAY

HEALTH CARE REFORM IN THE 103D CONGRESS—A CONGRESSIONAL ANALYSIS

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JUDITH M. ROSENBERG**

The reasons for Congress's failure to pass health care reform legislation are unclear to much of the American public. In this Essay, Mr. Shah and Ms. Rosenberg argue that the conflicting objectives of President Clinton's plan divided liberal Democrats from both moderate Democrats and moderate Republicans. The authors conclude that this factiousness enabled conservative Republicans to capture the health care debate.

On September 22, 1993, President Clinton unveiled the details and goals of his health care reform plan. Referring to his speech as an historic occasion, the President held up a symbolic "health security card" and told the American public that it represented secure health care for all citizens. Reaction to the speech was overwhelmingly favorable. After sixty years of failed bids for reform, it looked as if sweeping health care reform would succeed in Congress.

On September 26, 1994, almost exactly one year after Clinton introduced his health care plan, Senate Majority Leader George Mitchell (D-Me.) pronounced the reform effort dead. It is generally believed that Mitchell had given up a Supreme Court appointment in order to shepherd the legislation through Congress.¹ Despite Mitchell's efforts, few votes were ever taken on the Senate floor and none were taken on the House floor.

This Essay attempts to explain the demise of health care reform legislation by examining the congressional process during the twelve months of the health care debate. The impact of the various major players—the President, liberal Democrats, moderates of both parties, and conservative Republicans—will be considered in turn.

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¹ See Douglas Jehl, *Mitchell Rejects President's Offer of Seat on Court*, N.Y. TIMES, Apr. 13, 1994, at A1. See also Adam Clymer, *The Health Care Debate: The Senate Leader Unveils His Plan for Health Care*, N.Y. TIMES, Aug. 3, 1994, at A1.

In brief, the President miscalculated in proposing a plan for health care reform which aimed to satisfy every conceivable constituent group. The conflicting objectives of these groups translated into a plan with no consistent political vision and that gave each group grounds for complaint.

Factions within the Democratic Party exacerbated the plan's incohesiveness. One wing moved left toward the "universal coverage" pole of the Clinton plan; the other wing migrated right toward the "market reform" pole. By the time it became clear that a strictly Democratic plan could not pass, inadequate time remained to cultivate a successful bipartisan alternative.

The incongruities of the presidential plan prompted sniping from all quarters, Democratic infighting, and a lack of cooperation among moderates, allowing conservative Republicans ample opportunity to influence the discourse of health care reform. Capitalizing on the lack of momentum, the conservative Republican spin on the fractious debate, and their characterization of the unwieldy Clinton proposal as old-style "big government" gained increasing currency. Their successful co-opting of the debate prefigured electoral gains for Republicans in the 104th Congress.

This Essay will examine the actions of each of the major political groups throughout the health care reform process. The President, the Democrats, and the Republicans will be studied in turn to determine the strengths and weaknesses of the tactics used by the different parties.

I. THE PRESIDENT

President Clinton adopted what might be described as a "titanic" strategy for pushing health care reform legislation: spend enough time (six months later than the promised first 100 days); employ enough people (over 500 in secrecy); write enough pages (1342 pages); and the bill will sail through Congress without sinking.²

This maximalist approach extended to the bill's substance as well. The Administration endeavored to placate every lobbying group, their contrasting agendas notwithstanding: providers and payers, business and consumers, and employers and employees.

² See Robert Pear, *Key Voice Is Missing*, N.Y. TIMES, June 27, 1994, at A12.

Likewise, to maximize support across the political spectrum, the plan's drafters sought to merge free market mechanisms with government controls. Conflicting methods were to achieve incommensurable goals. As a result, the Administration's attempt to appear flexible yet decisive, and detail-oriented yet visionary instead seemed confused and enigmatic.³

A. *The Unraveling of Clinton's Approach*

In drafting the health care bill, Clinton and his task force aspired to satisfy too many factions in too many ways. They failed for two reasons. First, the task force brainstormed about the concerns of interest groups rather than conducting actual surveys of constituents, members of Congress, and the interest groups themselves. Second, the plan, formulated to please everyone, ultimately gratified no one.

1. The Brainstorming of the Health Care Task Force

The White House task force on national health care reform was originally established to write legislation for submission to Congress "'within 100 days of [Clinton] taking office,' that is, by April 30."⁴ Instead, as observers jested, the task force devolved into a "huge seminar" to educate its director, Ira Magaziner, a former Rhodes Scholar and business consultant, about health care.⁵ Thus, Hillary Rodham Clinton, chairwoman of the task force, and Magaziner offered little feedback to the interest groups with which they met. As one participant stated, the task force "was a magnificent exercise in pseudo-openness."⁶

After several rounds of meetings with interest groups, Magaziner and his task force attempted to balance the various interests:

³ See Mark A. Peterson, *All Heat and No Light*, 20 J. HEALTH POL. POL'Y & L. 425, 427 (1995) (observing that Clinton's 1342-page document failed the test of explicability in 25 words or less).

⁴ Adam Clymer et al., *What Went Wrong? How the Health Care Campaign Collapsed*, N.Y. TIMES, Aug. 29, 1994, at A1, A12.

⁵ See *id.* As chairwoman, Hillary Rodham Clinton was "in charge of the task force mission, [while] Magaziner [was] in charge of the process by which it assembled and processed vast quantities of information." Dana Priest, *Putting Health Care Under a Microscope: In Clinical Detail, Clinton Task Force Analyzes and Argues Its Way Toward a Reform Plan*, WASH. POST, Apr. 16, 1993, at A1.

⁶ Clymer, *supra* note 4 (statement of Dr. Quentin D. Young, Chair, Physicians for a National Health Program).

“We had to try to bridge the chasm between these groups in drawing up the plan.”⁷ Consequently, their plan promised: (1) universal coverage for the uninsured, but lower costs for business groups and the middle class; (2) the continuation of the private insurance system, but on the condition that insurers offer uniform benefits and work through government-created alliances to control costs; and (3) employer mandates for working Americans, but subsidies to appease small businesses.

Critics noted the “Rube Goldberg-like” nature of the plan’s contradictory goals.⁸ Senator John Breaux (D-La.) mockingly called it a “gumbo” approach to policy-making: “You put in a little of everything, stir it and hope it comes out well.”⁹ Complex and bordering on incomprehensible, the plan generated ridicule from the very groups it was meant to attract.¹⁰

2. Ineffective Deal-making

One group the Administration sought to placate was the 600,000 member National Federation of Independent Business (“NFIB”), a staunch opponent of employer mandates. Although the Administration increased subsidies to business, this deal failed to reduce the NFIB’s attacks and made financing forecasts for the Clinton plan more dubious.¹¹

The Administration also hoped to win favor from the Health Insurance Association of America (“HIAA”) and the American Medical Association (“AMA”) by declining to “limit the number of fee-for-service health plans.”¹² In a similar effort to preempt opposition from the HIAA, the Administration diminished the scope and power of the proposed National Health Board and other health alliances. These overtures were unavailing. The HIAA ran the infamous “Harry and Louise” advertisements that so offended Hillary Clinton as to prompt a personal response from her.¹³

⁷ James Fallows, *A Triumph of Misinformation: Misinformation Concerning Pres. Clinton’s Health Care Reform Proposal*, ATLANTIC MONTHLY, Jan. 1995, at 26 (citing Magaziner).

⁸ See Robin Toner, *Political Memo: Streetwise Politicians Put to Use in Quest for Health Overhaul*, N.Y. TIMES, Sept. 19, 1993, at A1, A32.

⁹ Alissa J. Rubin & Janet Hook, *Clinton Sets Health Agenda: Security for Everyone*, 51 CONG. Q. WKLY. REP. 2551, 2554 (1993).

¹⁰ See Alissa J. Rubin & Ceci Connolly, *Clinton Delivers Health Bill, All 1,342 Pages of It*, 51 CONG. Q. WKLY. REP. 2968, 2969 (1993).

¹¹ See *id.*

¹² See *id.*

¹³ See Adam Clymer, *Hillary Clinton Accuses Insurers of Lying About Health Proposal*, N.Y. TIMES, Nov. 2, 1994, at A1.

The Administration's souring relations with the AMA were particularly disappointing. In 1990, the AMA had endorsed an employer mandate as a means of achieving universal coverage, and President Clinton thereafter regarded the Association as a potential ally in the campaign for such coverage. Secretary of Health and Human Services Donna Shalala expressed surprise over the AMA's opposition: "Your [the AMA's] goals and principles are remarkably similar to our own. In fact, we stole them from you."¹⁴ The AMA's objections to the plan nevertheless overshadowed the putative common ground. In a letter to almost 700,000 doctors, the AMA advised, "'We are troubled by the degree of centralized regulation' in the Clinton plan. [It] threaten[s] to separate the heart from the soul of American medicine by 'forcing a bureaucrat or an accountant to stand between patient and physician.'"¹⁵ Even though the AMA still supported universal coverage, by December 1993 it "urged Congress to consider alternatives to Mr. Clinton's proposed employer mandate."¹⁶

The President also failed to anticipate the needs of legislators. To appease "deficit hawks" and moderate Democrats, the Clinton plan capped assistance to the poor and to small businesses. Liberal Democrats, like Representative Pete Stark (D-Cal.), who favored more, not less, assistance for these groups, were outspoken in their anger: "[t]hat ain't the kind of Democratic bill I [would] expect."¹⁷ As Burdett Loomis, a political scientist, warned, "[D]eals can help you get the last few votes, but [they] can't help you get the first big chunk."¹⁸

Universal coverage did not even pacify the liberal bloc supporting a "single-payer" alternative bill—a bill that would require payroll taxes and the dismantling of the private insurance system. Representative Jim McDermott (D-Wash.), the original proponent of the single-payer bill, was quick to criticize Clinton's proposal. Although Magaziner explained the alliances in Clinton's plan as "brokering agents," McDermott referred to them as "monstrous" and feared that they would become too "powerful."¹⁹

¹⁴Robert Pear, *Clinton's Health Plan: AMA Rebels Over Health Plan in Major Challenge to President*, N.Y. TIMES, Sept. 30, 1993, at A1, A22.

¹⁵*Id.*

¹⁶Robert Pear, *10 Doctors' Groups Endorse Clinton's Health Plan*, N.Y. TIMES, Dec. 17, 1993, at A26.

¹⁷Rubin & Connolly, *supra* note 10, at 2969.

¹⁸*Id.*

¹⁹See Alissa J. Rubin, *The Health Alliance: A Broker Between Consumers, Doctors*, 51 CONG. Q. WKLY. REP. 2970, 2970 (1993).

Finally, President Clinton's deal-making with the American public was flawed. In the President's September 1993 introductory speech, he failed to convey the twin goals of his plan—health care security and reduced costs—in a straight-forward manner. One aide had recommended concealing the plan's conflicting goals: "We must establish . . . that we are reshaping the health system to serve the ordinary people."²⁰ Accordingly, Clinton stressed the "security" aspects of his plan in an attempt to win over middle-class Americans, most of whom liked their medical care but feared losing it in times of illness or unemployment. Clinton hoped to parlay this insecurity into support for universal coverage. But by intentionally not specifying how universal coverage would be financed, he incurred suspicions that tax increases were in store. One poll revealed that eighty percent of Americans believed that health care would cost more than the President said it would; fifty-four percent thought it would cost much more.²¹

An internal memo from consultants to the President encouraged the Administration's lopsided presentation of its goals. The consultants found that people remembered the promise that health care would "always be there"²² far better than they recalled the cost-cutting aspects of the plan. They therefore concluded that the plan's "dominant goal should be health security: that people will have health insurance and they will never lose it, never."²³

In stressing different goals of his plan at different times (e.g., security to the public, cost-cutting to the deficit hawks and big business), Clinton failed to demonstrate that the objectives could be harmonized. Commentators such as Hugh Heclo noted the seeming paradox that cost controls were necessary to make universal coverage affordable, and controlling the overall cost of health care was impossible without universal coverage.²⁴ Clinton

²⁰National Archives, Walter Zelman Files, Talking About Health Care (unpublished manuscript), cited in THEDA SKOCPOL, *BOOMERANG: CLINTON'S HEALTH SECURITY EFFORT AND THE TURN AGAINST GOVERNMENT IN U.S. POLITICS* (forthcoming 1996) (manuscript at chapter entitled "Marketing an Ambivalent Message," on file with the *Harvard Journal on Legislation*).

²¹See Robert J. Blendon et al., *What Happened to Americans' Support of the Clinton Plan?*, HEALTH AFF., Summer 1995, at 16.

²²Interview with Ira Magaziner, Sr. Domestic Policy Adviser (May 17, 1995), cited in SKOCPOL, *supra* note 20.

²³Memorandum from Stan Greenberg to Ira Magaziner (Sept. 14, 1993) cited in SKOCPOL, *supra* note 20.

²⁴See Hugh Heclo, *The Clinton Health Plan: Historical Perspective*, HEALTH AFF., Spring 1995, at 86, 93.

did not clearly explain how these goals were integrated, viz., how in the long-term, complete government control through universal coverage was designed to halt escalating medical pricing by setting ceilings on cost. Because Clinton did not adequately articulate how his goals fit together over time, he was easily misunderstood and hence attacked by many constituent groups.

B. *Flexible Goals or a Rigid Process*

Initially, Clinton seemed focused on broad health care principles, rather than on details or specific measures by which to achieve them. In delivering his plan to Congress, Clinton stressed his flexibility, articulating six principles in lieu of methodology: security, simplicity, savings, choice, quality, and responsibility.²⁵ He thought that this would facilitate bipartisanship, which he called "absolutely central to moving us forward."²⁶ Magaziner also insisted, "We don't believe that we have all the answers We're not coming down the mountain with the tablets."²⁷ Clinton then reversed himself, emphasizing how the wide goals of the plan were inextricable from an elaborate framework of implementation. Not surprisingly, his mixed message hurt the plan politically. His initial flexibility permitted the emergence of intra-party criticism of the plan's procedural strategy. Democrats, responding to his initial flexibility, felt free to carp about details. As Clinton became wedded to a particular comprehensive approach, however, he alienated members of his party and created a bigger target for Republicans, since the sheer size of the bill linked the President to a very specific plan for the duration of the health care reform debate. This not only tied the fate of the plan to the popularity ratings of the President, but also gave his opponents an additional incentive to defeat health care.

1. The Problems with Flexibility

Ironically, by announcing his pliancy Clinton may have alienated key groups which had already committed to support his

²⁵ See Rubin & Hook, *supra* note 9, at 2551.

²⁶ See Rubin & Connolly, *supra* note 10, at 2968.

²⁷ Alissa J. Rubin, *Clinton's Health Plan Envisions Reorganized Marketplace*, 51 CONG. Q. WKLY. REP. 2458, 2458 (1993).

plan. These groups dreaded Clinton's notorious penchant for waffling, and reasoned in hindsight that they might have been better off holding out for greater concessions. Other groups, still negotiating the terms of their support, now had incentive to delay striking a bargain for as long as possible.

Furthermore, Clinton's flexibility may have encouraged leaders within his own party to challenge aspects of his plan. In particular, committee chairs were not shy about scrapping large portions of the plan and rewriting it from scratch. Representative Stark, chair of the Ways and Means Health Subcommittee, was particularly bold. Claiming that the Clinton plan was "complex and convoluted," Stark planned to go through the bill with other House members "a section at a time and just redo it."²⁸ Stark then revamped its entire framework, replacing the alliance structure with his own brainchild: Medicare Part C. This restructuring not only created confusion as to the meaning of "health care reform," but also made the Democrats appear fragmented.

Another key player, Senator Daniel Patrick Moynihan (D-N.Y.), chair of the Senate Finance Committee, was less than enthusiastic about the structure of the Clinton plan. Moynihan referred to the numbers used in the Clinton plan as "fantasy" figures.²⁹ Rather than begin with a draft bill of the President's health care plan, Moynihan encouraged his committee to create its own "bipartisan" plan. By July, the Finance plan bore little likeness to Clinton's original health proposal.

Finally, President Clinton's affinity for flexibility conflicted with his unrelenting commitment to universal coverage. In his State of the Union address on January 25, 1994, Clinton dramatically waved his pen and stated:

I want to make this very clear If you send me legislation that does not guarantee every American private health insurance that can never be taken away, you will force me to take this pen, veto the legislation, and we'll come right back here and start all over again.³⁰

Clinton reiterated this threat on June 20, when he said he would veto any bill without universal coverage. Such admonitions, however, conflicted with Clinton's assurances of flexibility. As the

²⁸ Rubin & Connolly, *supra* note 10, at 2969.

²⁹ Clymer et al., *supra* note 4, at A1, A12.

³⁰ Gwen Ifill, *Clinton Vows Fight for His Health Plan: State of Union Message Has Veto Threat*, N.Y. TIMES, Jan. 26, 1994, at A1.

health care debate unfolded, it became clear that Clinton's ultimate goal was in fact *not* universal coverage, but reforming the health care system, whatever the price.

This is evident in Clinton's passivity during the health care end-game, between July and September of 1994. The Senate debated a host of competing proposals, none of which aspired to universal coverage. Clinton refrained from issuing public critiques. Instead, realizing by September 1994 that universal coverage was unreachable, he urged congressional leaders to "do what it takes" to pass health care. By that time, however, it was too late, and Congress suspended its efforts shortly thereafter.

2. The Problems with Constancy

Clinton complicated matters by gradually committing himself to the details of his plan, and by the appointment of his wife to a high profile task force. These moves strongly identified him, personally, with the plan. Polling data demonstrate how closely linked Clinton and health care reform were in the public mind. A large majority of polled citizens answered "no" when asked in February, 1994 whether they had heard of plans that were better than Clinton's.³¹ In August, a majority of those polled believed that other Democratic plans in Congress were the same as the Clinton bill.³²

As the Clinton plan began to absorb criticism from the left and the right, Clinton recognized the need to disengage his plan from the congressional effort in order to ensure that something would pass. As a February 1994 *New York Times* article explains, Clinton conceived a "two-track" approach.³³ The President and

³¹ CBS News Poll, Feb. 21, 1994, *available in* LEXIS, Market Library, Rpoll File (Eighty-three percent of those questioned had not heard of a plan better than the Clinton plan.). *See also* Time/CNN/Yankelovich Partners Inc. Poll, Mar. 7, 1994, *available in* LEXIS, Market Library, Rpoll File (Sixty-two percent did not think there were other health care reforms introduced in Congress that were better than the Clinton plan.); New York Times Poll, Mar. 15, 1994, *available in* LEXIS, Market Library, Rpoll File (Forty-four percent of those questioned did not understand other health care plans as well as the Clinton plan.).

³² Gallup/CNN/USA Poll, Aug. 9, 1994, *available in* LEXIS, Market Library, Rpoll File (Fifty-nine percent of those questioned thought Democratic plans were about the same. Twenty percent thought they were significantly different. Nineteen percent did not know about separate plans and two percent gave no answer. Nevertheless, when the different plans were described without naming them, 62% were favorably impressed with the Clinton plan, while 48% were impressed with a Mitchell alternative.).

³³ Robin Toner, *Shift in Health Strategy: Give Details to Congress*, N.Y. TIMES, Feb. 13, 1994, at 26.

First Lady would continue their public campaign for universal health care insurance and systemic restructuring, goals still popular in the polls, and let the congressional committees draft a bill that could pass.

Finally, the sea of small print in Clinton's bill provided Republicans with a mass of controversial provisions to attack even after the Clinton bill ceased to be a viable option. In July 1994, long after the bill's replacement by congressional plans, Representative Richard Armev (R-Tex.) continued to characterize the "Clinton" plan as a "government takeover."³⁴ Articles and editorials in the *Washington Times* throughout the summer referred not to health care, but to "ClintonCare."³⁵

In tethering his name and prestige so closely with health care reform, Clinton may have expedited its defeat. As one commentator notes, "Health care reform was to be . . . a personal political victory for the president, pointing toward 1996."³⁶ For precisely this reason, "Republican strategists needed no encouragement to try to turn that partisan challenge into a personal defeat."³⁷

II. THE DEMOCRATS

Clinton and the Democratic leadership failed to rally support for a single plan in part because no one canvassed Democratic members of Congress at the outset to determine their preferences in health care legislation and gain their commitments. Party consensus for a plan could have been built privately, without the public bickering. Instead, both liberal and moderate Democrats defected from the Clinton plan, and party discipline broke down.

³⁴ 140 CONG. REC. H5644 (daily ed. July 13, 1994) (statement of Rep. Armev). Armev trotted out a health care flowchart that depicted the number of agencies prospectively involved in health care under the Clinton plan, and quoted Ira Magaziner by name. *Id.*

³⁵ See, e.g., Haley Barbour, *The Defeat of ClintonCare*, WASH. TIMES, Sept. 22, 1994, at A19; Deroy Murdock, *British Health, Not Exactly an Inspiration*, WASH. TIMES, Aug. 19, 1994, at A21; J. Jennings Moss, *Democrats Courting Middle Class Again*, WASH. TIMES, July 20, 1994, at A20.

³⁶ See Hugh Hevlo, *The Clinton Health Plan: Historical Perspective*, HEALTH AFF., Spring 1995, at 97.

³⁷ *Id.*

A. *Tension Between Moderate and Liberal Democrats*

Clinton's bill immediately faced Democratic opposition from both wings of the party. On the right stood moderate Democrats such as Representative Jim Cooper (D-Tenn.) and Senator John Breaux. They rejected the plan's employer mandate as undue government interference with the free market. Moderate Democrats also never warmed to the President's promise of universal coverage. Their fear of raising the deficit was too great.³⁸

They made their reservations clear early on in the debate. Cooper and fifty co-sponsors presented their own plan on October 6, 1993, before Clinton had even released his to Congress. The Cooper Plan was promoted as "pure" managed competition, without employer mandates or universal coverage. Cooper implied that he, not Clinton, was the authentic "New Democrat." He claimed that "[t]he administration started with managed competition and went to the left; the Republicans took managed competition and went to the right . . . our bill is squarely in the middle."³⁹

Cooper posed a serious challenge to the President precisely because his plan contained the same market reform measures as Clinton's, without the additional social programs and mandates that underwrote universal coverage. The upshot of Cooper's plan was a rebuttal to Clinton's declaration of his own approach as "centrist."⁴⁰

Democratic opposition to Clinton's plan emerged from the left prior to Clinton's health care reform speech on September 22, 1993. Led by Representative McDermott, ninety-two House Democrats had already mobilized behind a Canadian-style, single-payer bill.⁴¹ These Democrats doubted that the managed competition bill could meet the needs of the poor, and they were

³⁸ See, e.g., the statement of Sen. Sam Nunn (D-Ga.) who in September 1993 expressed concern about the financing of the Clinton plan. Nunn told *Meet the Press*, "[I]t's one thing to cut back on reducing the deficit; it's another thing altogether to spend the money up front that has not yet been saved. And then if you don't save it in the numbers that we are projecting, then you've got a really bad fiscal situation." *Sen. Nunn to Work With Cooper on Health Reform*, NAT'L J. CONG. DAILY, Sept. 27, 1993, available in LEXIS, Legis Library, Cngdly File.

³⁹ Alissa J. Rubin, *Cooper-Grandy Fills a Void*, 51 CONG. Q. WKLY. REP. 2738, 2738 (1993).

⁴⁰ SKOCPOŁ, *supra* note 20.

⁴¹ Julie Kosterlitz, *The Left Has its Own Prescription*, 14 NAT'L J. 845, 845 (1993). Under a single-payer system, the government provides universal national coverage, collecting all revenues and paying all bills.

critical of compromises already made by the task force, such as limits on new taxes, cuts in Medicaid and Medicare, reliance on managed care, and the preservation of the private insurance system.

1. Moderate Democrats

a. *More market competition, less management by government.* Throughout the health care debate, moderate Democrats criticized key elements in the Clinton plan. The employer mandate topped the list of objectionable provisions, and became increasingly unacceptable as debate progressed from committees to the Senate floor.

In the House Ways and Means Committee, Representative Michael Andrews (D-Tex.) assailed the idea of employer mandates at once.⁴² A Republican amendment to excise mandates from the bill won the votes of two moderate Democrats.⁴³ Three Democratic opponents of mandates voted against the final Ways and Means bill: Representatives Peter Hoagland (D-Neb.), Bill Brewster (D-Okla.), and Michael Andrews.⁴⁴

Likewise, in the House Commerce Committee, Chair John Dingell (D-Mich.) failed to muster enough moderate Democratic votes to report out a bill with universal coverage. At least two of the Democratic committee members, Representatives Cooper and Jim Slattery (D-Kan.), emphatically opposed mandates.⁴⁵ Dingell viewed mandates as crucial to universal coverage, a point on which he refused to compromise.⁴⁶ With neither side willing to give ground, the Commerce Committee announced on June 28, 1994 that it would not report out a bill, despite its majority of ten Democrats.⁴⁷

In a third committee with major jurisdiction over health care reform—Senate Finance—the mandate was elided early.⁴⁸ Senate

⁴² See Alissa J. Rubin, *Clinton's Main Tenets Drive New Movement on Health*, 52 CONG. Q. WKLY. REP. 737, 740 (1994).

⁴³ See David S. Cloud, *Democrats Band Together to Repel Assault on Employer Mandate*, 52 CONG. Q. WKLY. REP. 1615, 1619 (1994).

⁴⁴ David S. Cloud, *Gibbons' Patched-Together Health Bill Now Faces Test on the Floor*, 52 CONG. Q. WKLY. REP. 1793, 1795 (1994).

⁴⁵ See Beth Donovan, *A Disappointed Dingell*, 52 CONG. Q. WKLY. REP. 1796 (1994); Alissa J. Rubin, *Moderate Democrats Shun Mandates on Employers*, 52 CONG. Q. WKLY. REP. 1067 (1994).

⁴⁶ See Donovan, *supra* note 45.

⁴⁷ See *id.*

⁴⁸ See Alissa J. Rubin et al., *Rostenkowski Sets Markup to Get Panel on Track*, 52

Finance Democrats like Breaux roundly opposed the employer mandate.⁴⁹ Others had already cosponsored plans without one. For example, Senator David Boren (D-Okla.) had cosponsored the Chafee bill,⁵⁰ which included an individual mandate, requiring all individuals to purchase health care, rather than an employer mandate. The Senate Finance Committee passed a bill without the employer mandate, replacing it with an artful avoidance device called the “soft trigger.” This was jargon describing what would happen if health care coverage did not reach a specified level by a specified date. The Senate Finance bill aspired to ninety-five percent insurance coverage by the year 2002, but Congress was not required to take substantive action if this were not achieved. Rather, Congress was to vote up or down on recommendations by a nonpartisan commission on methods for expanding coverage. Thus, the soft trigger was not a promise of expanded coverage, but only a promise of colloquy. Worse yet, it was almost certain that the Finance bill did not contain the kind of subsidies necessary to reach the soft trigger goal of ninety-five percent coverage. As a result, some decried it as a cynical move: professing sympathy for the uninsured, without allocating adequate resources or making a future commitment to do so.⁵¹

After the bulk of the health care bills were reported out of committee in late June, opposition to the mandate grew. By mid-July 1994, between fifty and eighty-five House Democrats resisted a Clinton-style plan, largely because of the employer mandate.⁵² By early August, House Democratic Leader Richard Gephardt (D-Mo.) counted 140 to 150 votes in favor of the mandate, far short of the 218 necessary to pass health care.⁵³ In

CONG. Q. WKLY. REP. 1216, 1216 (1994) (“Lawmakers have long said that the pivotal decisions—which could make the bill more moderate and lead to its passage—will be made in the Senate Finance Committee and in the House Committees on Ways and Means and on Energy and Commerce.”).

⁴⁹ See Alissa J. Rubin, *Moderate Democrats Shun Mandate on Employers*, 52 CONG. Q. WKLY. REP. 1067, 1067 (1994).

⁵⁰ Proposed by Sen. John Chafee (R-R.I.). See Alissa J. Rubin & Beth Donovan, *At Every Turn, Clinton Plan Running Into Roadblocks*, 52 CONG. Q. WKLY. REP. 1124, 1128 (1994).

⁵¹ See Alissa J. Rubin, *Big Decisions Now on Shoulders Of House, Senate Leaders*, 52 CONG. Q. WKLY. REP. 1866, 1867 (1994).

⁵² Beth Donovan, *Leaders Signal Readiness to Deal on Employer Mandates*, 52 CONG. Q. WKLY. REP. 1927, 1929 (1994).

⁵³ See Alissa J. Rubin & Beth Donovan, *With Outcome Still Uncertain, Members Face Critical Vote*, 52 CONG. Q. WKLY. REP. 2201, 2208 (1994).

the Senate, Majority Leader Mitchell counted only forty-one of fifty-six Democrats in favor of the mandate.⁵⁴

b. *Pressure, politics, and policy—why moderate democrats opposed the Clinton plan.* The employer mandate was one of the few aspects of the reform plan that Americans consistently supported. At least fifty-three percent favored it throughout the health care debate.⁵⁵ The failure of so many Democrats in Congress to support it is, therefore, puzzling.

One explanation is that small businesses intransigently lobbied Democrats. The NFIB led the campaign. As one commentator said, "Few groups . . . wreaked more havoc on the Clinton plan."⁵⁶ Big business, for its part, never opposed the employer mandate outright, but never vocalized support for it, either. In fact, the Business Roundtable, a lobbying group for Fortune 500 companies, switched support from the Clinton plan to the mandate-less Cooper plan in February 1994.⁵⁷

Another explanation is the disaggregative nature of America's electoral system, which creates discrepancies between politics and public opinion. When a specific constituency registers opposition to a measure to its legislator, overall public opinion becomes irrelevant.⁵⁸

Democrats also feared appearing interventionist, since the mandate could be construed as a health care tax on business.⁵⁹ Demo-

⁵⁴ See Ceci Connolly, *Mitchell's Arm-Twisting Efforts Focus on 10 'Undecided' Democrats*, 52 CONG. Q. WKLY. REP. 2202 (1994).

⁵⁵ Times Mirror Poll, Sept. 21, 1994, available in LEXIS, Market Library, Rpoll File (When asked in July 1994, whether they strongly favor or favor employer mandates, 27% strongly favored the mandate and 35% favored it.). See also Time/CNN/Yankelovich Partners, Inc. Poll, Mar. 1994, available in LEXIS, Market Library, Rpoll File (In February of 1994, 53% favored requiring employers to pay the costs of health care coverage.); NBC News/Wall Street Journal Poll, Dec. 1993, available in LEXIS, Market Library, Rpoll File (In December of 1993, polls found that 65% of Americans were in favor of requiring all businesses to pay at least 80% of the coverage for their employees and giving small firms some government funds to subsidize the coverage.).

⁵⁶ CENTER FOR PUBLIC INTEGRITY, WELL HEALED: INSIDE LOBBYING FOR HEALTH CARE REFORM 1994, cited in SKOCPOL, *supra* note 20, at chapter entitled "Democrats in Disarray." See also Rubin, *supra* note 49 (Mark Isakowitz, a lobbyist for NFIB, said, "What gets me in the door . . . is the fact that members of Congress know we represent up to 2,000 small-business owners in their district.").

⁵⁷ John Ong, chief executive officer of B.F. Goodrich Co. and chairman of the Business Roundtable, told reporters that the Cooper plan "is built around market mechanisms as opposed to regulation." Dana Priest & Anna Devroy, *Business Leaders Split with Clinton*, WASH. POST, Feb. 4, 1994, at A1.

⁵⁸ See Sven Steinmo & Jon Watts, *It's the Institutions, Stupid! Why Comprehensive National Health Insurance Always Fails in America*, 20 J. HEALTH POL. POL'Y & L. 329, 342-43 (1995).

⁵⁹ See CONG. BUDGET OFFICE, 103D CONG., 2D SESS., ANALYSIS OF THE ADMINISTRA-

crats sensitive to the "tax and spend" image rejected the mandate, just as they would have resisted an additional payroll tax in order to finance health reform.

Many Democrats opposed the employer mandate in light of tough re-election campaigns in conservative states. At the time Andrews voted against the Ways and Means mandate, he was in the midst of a Senate primary race in Texas. Hoagland, who also voted against the Ways and Means bill, faced a tight race in his state of Nebraska.⁶⁰ Representative Slattery rebuffed compromises offered him by House Commerce Committee Chairman Dingell, in anticipation of running in the gubernatorial primary slated for August 1994. Rural areas in Slattery's home state of Kansas are dominated by small businesses.⁶¹ Cooper, who sponsored a plan, also refused to support the Clinton bill, as he contemplated a difficult Senate election race in Tennessee.⁶²

Finally, House Democratic opposition to the mandate may have been in reaction to Senate health bills that required less of employers. Once Democrats recognized that a final bill would probably not include the employer mandate, they hedged their support for this controversial measure. In addition, House Democrats remembered the bruising they received during the budget debate in early 1993. They had braved the political risk of voting in favor of the unpopular BTU tax at Clinton's behest, only to see Clinton withdraw his support for the measure when the Senate stripped the tax from the overall bill. House Democrats were loath to find themselves in a similar bind with the employer mandate.⁶³

TION'S HEALTH PROPOSAL, 8-11 (Comm. Print 1994). The CBO barely refrained from labeling the Clinton mandate a "tax."

⁶⁰David S. Cloud, *Gibbons' Patched Together Health Bill Now Faces Test on the Floor*, 52 CONG. Q. WKLY. REP. 1793, 1795 (1994).

⁶¹Beth Donovan & Elizabeth A. Palmer, *A Health Care Holdout*, 52 CONG. Q. WKLY. REP. 1005, 1007 (1994). According to one author, Slattery told the Clinton administration that he would have changed his vote on the mandate if he had not been running for governor. In the end, however, Slattery was overwhelmingly defeated in the November 1994 election. See SKOCPOL, *supra* note 20, at chapter entitled "Democrats In Disarray," citing ALLEN SCHICK, *How a Bill Didn't Become a Law, in HOW CONGRESS SHAPES HEALTH POLICY* (1995).

⁶²Beth Donovan, *A Disappointed Dingell*, 52 CONG. Q. WKLY. REP. 1796, 1796 (1994). Cooper was defeated in his bid for the Senate by conservative Republican Fred Thompson. See David E. Rosenbaum, *G.O.P. Unleashes Its New Weapon: Winning Candidates*, N.Y. TIMES, Nov. 13, 1994, at D4.

⁶³Rep. Karen Shepherd (D-Utah) expressed this reticence, learned from her experience of the BTU vote: "I won't do that again. The Senate has to make the primary decision about the financing system." Alissa J. Rubin, *Deadline Pressure Forces Talk of Compromise*, 52 CONG. Q. WKLY. REP. 1611, 1614 (1994).

2. Liberal Democrats

a. *Single payer and universal coverage.* Instead of working together to pass a uniform version of health care reform, the two wings of the Democratic Party were divided. As moderate Democrats critiqued the employer mandate, liberal Democrats tried to check the rightward drift of health reform.

In an April 14 letter to President Clinton, 112 "single-payer" Democrats declared that their support for any bill was conditional upon the creation of an option for states to choose single-payer systems. McDermott warned that it was a "very dangerous assumption" for moderate Democrats to believe that single-payer supporters would "come along no matter what."⁶⁴ One aide observed of the single payers, "This group is sick to death about how the White House is trying to appease Jim Cooper and the Business Roundtable and the Republicans, none of whom are going to give them a vote."⁶⁵

Later, McDermott, along with seven other Ways and Means Democrats, sent the Committee Chair a letter demanding that the bill include long-term care for the elderly. Other Democrats insisted that the bill include coverage of prescription drugs and mental illness.⁶⁶ Finally, in late June, McDermott alerted House Speaker Tom Foley (D-Wash.) that single-payer Democrats would support no bill that did not guarantee cost control of health insurance for individuals.⁶⁷ Indeed, McDermott voted against the final bill of the Ways and Means Committee, in protest over the numerous concessions to insurers, doctors, pharmaceutical companies and large employers.⁶⁸

Liberal Democrats were staunchly committed to universal coverage. According to McDermott, "We're probably the group that believes the strongest . . . in [Clinton] drawing the line and saying, 'No universal coverage, no bill!'"⁶⁹ Anticipating such a stance from the liberal contingent, Clinton had worked universal

⁶⁴ Alissa J. Rubin & Beth Donovan with Keith Glover, *Centrist Mood Won't Stop Work on Liberal Plans*, 52 CONG. Q. WKLY. REP. 891, 891 (1994).

⁶⁵ *Single Payer Health Plan Backers Declare Autonomy*, NAT'L J. CONG. DAILY, Feb. 25, 1994, at 1.

⁶⁶ David S. Cloud, *Ways and Means Relying on Chairman to Forge a Deal that Can Pass*, 52 CONG. Q. WKLY. REP. 1301, 1301 (1994).

⁶⁷ Cloud, *supra* note 60, at 1795.

⁶⁸ *Id.*

⁶⁹ Robin Toner, *The Health Care Debate: Behind the Scenes; Posturing and Principle: Tactics in the 11th Hour*, N.Y. TIMES, July 19, 1994, at A14.

coverage into his original bill in order to win those votes. The moderate Democratic proposals to dismantle the employer mandate and thereby imperil universal coverage posed a direct challenge to the liberal Democrats.

b. *The failure of liberal Democrats to compromise.* It is not clear whether liberal Democrats truly meant to abandon health care if their demands were not met. Liberal Democrats held, on principle, that health care reform should extend to every American. They may also have supported universal coverage for tactical reasons, such as playing “bad cop” to Clinton’s managed competition bill, which they already viewed as a compromise. On July 19, 1994, a strategist for the House Democratic leadership indicated the efficacy of such a strategy, noting, “The main thing that’s preventing everyone from slipping into a moderate or conservative package at this point is the fear that these people won’t go along.”⁷⁰

In reality, most liberal Democrats arguably would not have abandoned health care even without universal coverage. For example, early in the committee process, McDermott voted for a compromise measure to allow insurers to experience-rate firms with more than 100 workers. The provision would raise health insurance costs for firms disproportionately burdened by chronically ill workers. McDermott’s vote clashed with his previous announcements that health care had to be “affordable” for every American and comport with general notions of equity.⁷¹ Likewise, when McDermott voted against the final Ways and Means bill, he knew it would pass without his vote. Thus, McDermott’s “nay” may have been largely symbolic.

In the Senate, liberal Democrats on the Finance Committee committed to universal coverage voted against the final bill. Senators Bill Bradley (D-N.J.), John Rockefeller (D-W.Va.), and Tom Daschle (D-S.D.) criticized various aspects of it.⁷² Senator Daschle complained, “It couldn’t get much worse.”⁷³ However,

⁷⁰ *Id.*

⁷¹ David S. Cloud, *Panel Democrats Hold Together Despite Wrangles Over Benefits*, 52 CONG. Q. WKLY. REP. 1708, 1709 (1994).

⁷² Bradley distanced himself from the plan because of its failure to impose requirements that employers and individuals buy insurance. Alissa J. Rubin, *Moderates on Senate Finance Panel Offer a ‘95 Percent’ Solution*, 52 CONG. Q. WKLY. REP. 1707, 1707 (1994).

⁷³ Alissa J. Rubin, *Senate Finance Panel Deals Blow to Universal Coverage Proposal*, 52 CONG. Q. WKLY. REP. 1798, 1800 (1994).

these Democrats turned supportive once it became apparent in late July and early August that only a limited bill would pass the Senate. In mid-August, Daschle grudgingly endorsed the "mainstream" bill—a bill with no employer mandate, no guarantee of universal coverage, and large Medicare and Medicaid cuts—rationalizing that it might "break the logjam" on health care.⁷⁴ Likewise, Rockefeller, opposed to any bill without the employer mandate,⁷⁵ and Senator Edward Kennedy (D-Mass.), an original sponsor of the Clinton plan, announced their willingness to forego universal coverage in order to get a "down payment on health care."

Not all liberal Democrats took the position that some health care was better than none at all. Bradley abandoned his support for the mainstream bill when he felt its cost control mechanisms would render health care prohibitively expensive for the average American. Senator Paul Wellstone (D-Minn.) criticized the bill on similar grounds. In September of 1994, as the health care process lost momentum, more liberal Democrats expressed their dissatisfaction. Representative Henry Waxman (D-Cal.), an original proponent of the Clinton bill, refused to support a moderate plan that, in his opinion, would do more harm than good.⁷⁶ Even Moynihan, a champion of bipartisanship on the issue and an enthusiast of the compromise Senate Finance bill, criticized the final mainstream bill for provisions deleterious to the New York State health care system.⁷⁷ Senator Tom Harkin (D-Iowa) suggested the mainstream bill be withdrawn and replaced with a simpler bill more generous to poor women and children.⁷⁸

These voices of discontent were raised only relatively late in the health care debate, once the proposals had drifted to the right. The final "mainstream coalition" bill in the Senate included large cuts in Medicare, excluded long-term care coverage, and projected a coverage rate of only ninety-two percent. The

⁷⁴ Alissa J. Rubin & David S. Cloud, *Doubt Surfaces on Bill Passage as Senate Struggle Continues*, 52 CONG. Q. WKLY. REP. 2458, 2459 (1994).

⁷⁵ Rubin & Donovan, *supra* note 53, at 2204 (When asked whether he would vote for a bill that boosted coverage more slowly than the Mitchell bill or that bypassed the mandate altogether, Sen. Rockefeller said flatly: "No.").

⁷⁶ David S. Cloud, *Support Erodes as Key Backers Voice Little Hope for Passage*, 52 CONG. Q. WKLY. REP. 2571, 2571 (1994).

⁷⁷ See 140 CONG. REC. S12,937 (daily ed. Sept. 12, 1994) (statement of Sen. Moynihan).

⁷⁸ Cloud, *supra* note 76, at 2572.

bill met so few of the goals of the liberal Democrats that their opposition to it was inexorable.⁷⁹

Nevertheless, if liberal Democrats believed they could stem the rightward movement of health care by taking rigid positions early on, they were mistaken.⁸⁰ The timing of health care made such posturing ineffective. Although Clinton made his health care speech in September 1993, genuine consideration of health care reform did not begin until March 1994, when the first subcommittee initiated debate. President Clinton and the Democrats understood that the House's complex committee process made it unlikely that a bill would reach the floor before June. In fact, most committees did not finish their bills until the end of June, with the last completing its work in early July. Such tight scheduling meant that health care would descend upon the floor of Congress precisely during the summer before an election year and debate would be, predictably, more partisan than usual. Given the atmosphere, bills emerging from committee with a strongly left bias would not promote a more balanced final product. Rather, they would give incentives to Republicans and moderate Democrats to emphasize and perpetuate the gap between their "moderate" positions and the liberal Democrats' alternatives. In the pre-election jockeying and posturing, only an accommodating committee bill could obviate the tendency toward polarization on the floor.

B. *Could Liberal and Moderate Democrats Have Reconciled?*

While it remains unclear whether Democrats could have settled their intra-party differences, hindsight reveals that mechanisms to foster unity were available but not exploited. Moreover, Democrats of both wings proposed compromises only after the window of opportunity for health care reform had closed.

⁷⁹ See, e.g., 140 CONG. REC. S12,313 (1994) (statement of Sen. Howard Metzenbaum (D-Ohio) that the mainstream proposal was the "Jamestream" proposal. He opined that it was "callow and heartless" for the bill to prioritize the goal of deficit reduction over that of health insurance for all Americans.).

⁸⁰ Evidence of such positioning existed in the House Education and Labor Committee. The House Education and Labor Committee not only reported out a single-payer bill, but also voted to approve a version of the Clinton bill even more generous than the original. These Democrats argued that though their proposal would not be accepted by the full Congress, conservative amendments could be added when the bill reached the floor. See Elizabeth A. Palmer, *First House Panel Finishes Work, Gains Leverage by Its Action*, 52 CONG. Q. WKLY. REP. 1710, 1710 (1994).

The variety of health reform plans crafted in the 103d Congress indicates the richness of options from which Democrats might have formulated a common proposal. Aside from the Clinton plan, the Chafee and Cooper plans would have imposed significant market reforms on the health care system, though neither included universal coverage or a mandate. The Ways and Means bill phased in the employer mandate, exempted small businesses, and left the issue of cost controls to a future commission.⁸¹ The Senate Finance Committee bill similarly avoided an employer mandate by leaving the issue for future consideration.⁸² Mitchell's original compromise bill, the first bill considered on the Senate floor, did include an employer mandate, but lowered it from eighty percent to fifty percent. After the Mitchell bill failed, the so-called "mainstream bill" included no employer mandate, reached ninety-two percent coverage, and proposed significant reforms to the insurance system.

Liberal Democrats in committees, however, drafted bills between March and June of 1994 that could not pass in Congress. Except for the Senate Finance Committee bill, all of the bills to emerge from committee included both the employer mandate and universal coverage. Likewise, the Democratic leadership did not do much to cultivate party unity. When Senate Finance abandoned the employer mandate and universal coverage, President Clinton reiterated his threat to veto any bill without universal coverage.⁸³ Similarly, House Majority Leader Gephardt exhorted Democrats to view health reform in the context of the party's historical commitment to social programs.⁸⁴

Liberal Democrats did not adequately address moderate Democratic unease over the mandate until the window of opportunity for health care reform had all but closed.⁸⁵ Compromise had to

⁸¹ David S. Cloud, *Highlights of the Gibbons Bill*, 52 CONG. Q. WKLY. REP. 1797, 1797 (1994).

⁸² Alissa J. Rubin, *Senate Finance Panel Deals Blow to Universal Coverage Proposal*, 52 CONG. Q. WKLY. REP. 1798, 1798 (1994).

⁸³ See Beth Donovan, *Betting Big on Public Backing, Clinton Stands Firm on Veto*, 52 CONG. Q. WKLY. REP. 1703, 1703 (1994).

⁸⁴ Alissa J. Rubin, *Leaders Using Fervent Approach to Convert Wavering Members*, 52 CONG. Q. WKLY. REP. 2142, 2142 (1994). See also SKOCPOL, *supra* note 20. Skocpol posits that the Democratic leadership pursued compromise only at the last minute; too late to overcome the disparities rending the party. *Id.*, citing Robin Toner, *Images and Action Weighted at Democrats' Retreat*, N.Y. TIMES, Jan. 29, 1994, at A9.

⁸⁵ See Alissa J. Rubin, *Congress Moves to Middle on Overhaul Bills*, 52 CONG. Q. WKLY. REP. 886 (1994). In order to reach a middle ground plan, Democrats would have had to act much earlier. As Robert J. Blendon, a professor at the Harvard School of Public Health, said, "We don't have a national consensus on where we want to go . . .

occur before mid-July. By late August, Democrats began to prepare for upcoming elections, which made the season an inauspicious time to toil at compromise. In addition, the session was scheduled to terminate unusually early, on October 7, 1994. Nevertheless, Mitchell proposed a number of compromise bills. His first featured a fifty percent mandate, while his last included no mandate whatsoever. In any event, bills such as Mitchell's or the "mainstream bill" were too complex to be worked through in the short time remaining. Will Marshall of the Progressive Policy Institute observed, "We're trying to find the center at the worst possible time, when partisan tempers are flaring."⁸⁶

The sloppy reaching by Democrats toward a legislative middle-ground did not inspire public confidence. Substantial polling data suggest that the longer the health care debate wore on, the greater the public distrust.⁸⁷ Whereas fifty-nine percent of the public favored the Clinton plan early on, only forty-four percent favored it by June of 1994.⁸⁸

Moreover, those polled in late June and July were not adamant that health care reform pass immediately. Most thought Congress could wait to pass the whole health reform package the following year, or within the next three years.⁸⁹ By July 27, sixty-one percent of the public preferred that health care be passed the following year.⁹⁰ Republicans, naturally, had encouraged the belief that the health care debate was too involved to be resolved in one summer and that it should be put off until the following Congress. Approval of Clinton's handling of the

I don't see how the Congress can enact a broad vision." *Id.* Though satisfied with their current health care, most of the public thought the system needed overhaul. Said Senator Joseph Lieberman (D-Conn.), "Increasingly, the majority are inclined to have us do something . . . but they don't want us to jeopardize the good things they have in their current coverage. That moves us toward reform, not revolution." *Id.*

⁸⁶Alissa J. Rubin, *Uncertainty, Deep Divisions Cloud Opening of Debate*, 52 CONG. Q. WKLY. REP. 2344, 2344 (1994).

⁸⁷Arthur Schlesinger, Jr. has noted that Americans are averse to devoting protracted attention to any one issue. See ARTHUR M. SCHLESINGER, *THE CYCLES OF AMERICAN HISTORY* 28 (1986) (arguing that the American public cycles between protecting private interests and supporting public interests).

⁸⁸Lawrence R. Jacobs & Robert Y. Shapiro, *Don't Blame the Public for Failed Health Care Reform*, 20 J. HEALTH POL. POL'Y, & L. 411, 418 (1995). The Gallup organization asked the following: "From everything you have heard or read about the plan so far, do you favor or oppose President Clinton's plan to reform health care?"

⁸⁹See Richard Benedetto & Richard Wolf, *Health Plan Support: New Low for President*, USA TODAY, July 19, 1994, at 2A.

⁹⁰NBC/Wall Street Journal Poll, July 27, 1994, available in LEXIS, Market Library, Rpoll file (When asked, "Do you think Congress should pass a health care reform bill this year (1994), or continue to debate the issue and act next year?" 34% answered "this year," 61% answered "next year," and 5% were not sure.).

issue dissipated as the health care debate continued. Between September 1993 and July 1994, his negative ratings jumped from thirty percent to fifty-two percent.⁹¹ These figures lend credence to the hypothesis that in the world of health care, delay incurs defeat.⁹²

Compromise between moderate and liberal Democrats may well have been impossible given that liberal Democrats seemed ideologically wedded to universal coverage. As one liberal Democrat noted, "If this nation attempts to do health care reform on the cheap, we will be back here in a decade or two trying to fix it."⁹³ Bills offered by the Senate and by Majority Leader Mitchell required serious sacrifice from liberals.⁹⁴ For example, the Senate Finance Committee bill forced single-payer Democrats to relinquish the option of allowing states to set up single-payer systems. This was one of the key demands made by single-payer Democrats.

Nevertheless, Democrats should have realized early on that the final bill would have to be substantially more limited than the Clinton bill. If Democrats opposed a limited bill, then they should have stopped compromising when it became apparent that the Senate would only consider less ambitious bills. Instead, Democrats fruitlessly pursued an elusive compromise, wasting valuable time.

III. THE REPUBLICANS

Failing to crystallize intra-party unity, the Democrats might have attempted bipartisan health care reform with moderate Re-

⁹¹ See Princeton Survey Research Associate/Newsweek/ CBS News Poll, Sept. 28, 1993, available in LEXIS, Market Library, Rpoll file; NBC News/Wall Street Journal Poll, July 27, 1994, available in LEXIS, Market Library, Rpoll file.

⁹² Cf. Daniel Yankelovich, *The Debate that Wasn't: The Public and the Clinton Plan*, HEALTH AFF., Spring 1995, at 7. Yankelovich argues that Americans were never really in favor of the Clinton plan. While Americans may have supported universal coverage in a vacuum, they did not expect to have to make large sacrifices to achieve that coverage. Yankelovich bases his conclusion largely on a Gallup poll which found that 77% of Americans believed that the way to cut costs in health care was to "cut the waste, high profits, and fraud in medicine." *Id.* at 13. Yankelovich argues that while Americans may have been "breathtaking" in their lack of realism, the message they clearly sent was that someone else should pay for health reform. *Id.* at 13.

⁹³ Beth Donovan & Elizabeth A. Palmer, *Panels Cutting Through Clutter to Get to Heart of Debate*, 52 CONG. Q. WKLY. REP. 1005, 1007 (1994).

⁹⁴ See Alissa J. Rubin, *Big Decisions Now on Shoulders of House, Senate Leaders*, 52 CONG. Q. WKLY. REP. 1866 (1994).

publicans. By the time Democrats seriously realized this option, however, it was hardly viable.

A. *Moderate Republicans*

1. Opportunities for Cooperation

A number of Republicans preferred bipartisan health reform throughout the debate. Senator Chafee, in particular, was constant in his support of inter-party health care reform efforts.⁹⁵ Chafee sponsored a bipartisan plan to reshape the insurance market, though without providing universal coverage. Chafee's original bill, introduced in the fall of 1993, showed how far moderate Republicans were willing to compromise. The bill called for universal coverage, using an individual rather than employer mandate. It also called for many of the changes in the insurance market advocated in the Clinton plan. Nineteen Senate Republicans sponsored the Chafee bill.

Other Republicans were also amenable to bipartisanship. Many of these Republicans sat, along with Chafee, on the Senate Finance Committee. Chairman Moynihan urged them to draft a compromise bill, and beginning in March, Senate Finance Committee members of both parties met weekly for that purpose. Senate Finance was the only congressional committee in which Republicans voted in substantial numbers in favor of the final bill. In contrast, Republicans in the Senate Labor Committee, such as Senators Nancy Landon Kassebaum (R-Kan.) and David Durenberger (R-Minn.), were given no opportunity to participate in the bill-drafting process. Chairman Kennedy presented a version of the Clinton bill, amended with a few compromises that Kennedy thought would win the votes of moderate Republicans. Republicans proved reluctant to vote for the bill. Senator Kassebaum eventually refused to vote for any plan containing the employer mandate.⁹⁶

⁹⁵ "Those who take the attitude 'Don't cooperate with the Democrats' are riding the wrong horse. If helping our team means to trash moving forward on one of the biggest challenges we face this year, then I'm not with the team." Ceci Connolly, *Health Care Becomes the Key to Chafee's Political Future*, 52 CONG. Q. WKLY. REP. 1925, 1925 (1994) (quoting Sen. Chafee).

⁹⁶ See Beth Donovan, *Senate Labor First Out of Gate With Approval of Overhaul Bill*, 52 CONG. Q. WKLY. REP. 1522, 1522 (1994).

Some Republicans in the House also favored compromise. Representative Fred Grandy (R-Iowa) worked closely with moderate Democratic Representatives Cooper and Andrews to produce a bipartisan bill similar to the mainstream bill. Fifty-two Democrats sent a letter to Gephardt requesting that he introduce this plan on the floor of the House. Gephardt remained loyal to the President, however, and attempted to focus Democrats' attention on Clinton's proposal.

Such examples show that there were indeed Republicans in both the House and Senate who did not believe in defeating Democrats at any cost, and who were willing to work with Democrats to fashion a plan both parties could accept. Compromise, however, had to happen early in the process. As the health care debate dragged into the summer, moderate Republican support began to falter.

2. Timing over Substance

Moderate Republicans abandoned bipartisanship at a late stage. By mid-July, early co-sponsors of the Chafee plan withdrew their support.⁹⁷ Senator Kassebaum, initially a key moderate,⁹⁸ abandoned the bipartisan effort entirely.⁹⁹ When Senator Mitchell came out with a compromise proposal in early August, Kassebaum criticized it as an "unfortunate accumulation of missed opportunities."¹⁰⁰ Senator Mark Hatfield (R-Or.) echoed this sentiment, declaring that the "window may well have closed on the opportunity for bipartisan reform of our health care system this year."¹⁰¹

⁹⁷ Connolly, *supra* note 95, at 1926.

⁹⁸ See Beth Donovan, *Panel Strikes Surprising Accord With Benefits, Cost of Counsel*, 52 CONG. Q. WKLY. REP. 1299, 1300 (1994). Kassebaum lived up to this notion early on. For example, on May 19 she supported a bipartisan amendment that would modify the benefits package in the Clinton plan. Her support may have helped the amendment to pass the committee by a vote of 17-0. See Beth Donovan & Alissa J. Rubin, *Bipartisan Deal on Benefits Gives Boost to Overhaul*, 52 CONG. Q. WKLY. REP. 1298, 1298 (1994). A week later, Kassebaum praised Jeff Bingaman's proposal to exempt companies with fewer than 75 workers from the mandate, although she said she wanted a "market-based" reform. Beth Donovan, *Amendments Entangle Labor Panel, Slowing Its Momentum*, 52 CONG. Q. WKLY. REP. 1390, 1390 (1994).

⁹⁹ Kassebaum decried the Kennedy proposal's lack of a "middle ground." She offered an amendment to remove the mandate from the plan. The amendment was rejected by a 7-10 vote. See Beth Donovan, *Senate Labor First Out of Gate with Approval of Overhaul Bill*, 52 CONG. Q. WKLY. REP. 1522, 1524 (1994).

¹⁰⁰ Ceci Connolly, *Senators Begin First Round with Pokes and Jabs*, 52 CONG. Q. WKLY. REP. 2345, 2346 (1994).

¹⁰¹ Alissa J. Rubin & David S. Cloud, *Doubt Surfaces on Bill Passage as Senate Struggle Continues*, 52 CONG. Q. WKLY. REP. 2458, 2458 (1994).

Compromise encompassing moderate Republicans would have had to come before August 1994, perhaps earlier. In addition, for Democrats to have supported a compromise bill, the President and Democratic leadership would have had to endorse it. Unfortunately, compromise bills did not receive high level support until too late. For example, President Clinton never fully backed Mitchell's compromise measures until September 13, 1994, when he met with congressional leaders and urged them to pass a less ambitious bill.¹⁰² Even if the chance for bipartisanship was originally forfeited by design, by a party and President unwilling to make sacrifices, party discord had rendered the Democrats unable to coordinate joint efforts.

B. *Conservative Republicans*

Conservative Republicans exploited Democratic disarray on health care, animated by a "hard-edged, total and sincerely ideological opposition [to health care reform] from the radical right wing of the Republican party."¹⁰³ This group included Republicans such as Representative Newt Gingrich (R-Ga.), Senator Phil Gramm (R-Tex.), and ringmaster strategist William Kristol, whose advice to Republican members of Congress at the time is well-documented.¹⁰⁴

These Republicans proclaimed their ideological duty to oppose Clinton's plan, which they thought would create its own tax-and-spend bureaucracy. Kristol derided the plan as a "misguided answer to a misconceived problem."¹⁰⁵

Conservative Republicans also aimed to prevent the Democrats from reaping the political rewards of the mere passage of health care reform. Kristol advised, "Republicans should hold off on health care negotiations until Mr. Clinton eats his words

¹⁰²David S. Cloud, *Support Erodes as Key Backers Voice Little Hope for Passage*, 52 CONG. Q. WKLY. REP. 2571, 2571 (1994).

¹⁰³SKOCPOL, *supra* note 20.

¹⁰⁴Kristol has been credited with being the mastermind behind the Republican "capture" of the health care debate. As chairman of the Project for a Republican Future, Kristol issued memoranda to Republican leaders presenting a unified strategy to benefit Republicans at the expense of the Democrats and reform. See Adam Clymer, *GOP Stance on Health Turns to No-Crisis View*, N.Y. TIMES, Jan. 27, 1994, at A16. See also Robin Toner, *The Right Thinkers: Some Voices in the New Political Conversation*, N.Y. TIMES, Nov. 22, 1994, at B7.

¹⁰⁵Memorandum from William Kristol, Chairman, Project for the Republican Future, to Republican Leaders, at i (Feb. 10, 1994) (on file with the *Harvard Journal on Legislation*).

[on supporting universal health coverage].”¹⁰⁶ To embarrass the President, and with an eye to the upcoming November election, conservative Republicans harped on the “big government” aspects of the plan.

1. Capturing the Health Care Reform Debate

The Republicans used three strategies to coopt the debate. First, they attempted to discredit the Clinton plan as a throwback to old caricatures of big-spending, fiscally irresponsible Democratic policy. Second, they presented modest incremental reforms of their own that had little chance of doing anything except bogging down the debate. Third, they attempted to convince the public that decisions on health care reform should be left to the next Congress.

a. *Health care reform as a return to big government.* Kristol counseled Republicans to appeal to the “enlightened self-interest of middle-class America,”¹⁰⁷ mainly by playing on the public’s fears of Clinton as an old-school tax-and-spender. Republicans also fanned fears that the Clinton plan would eliminate choice and reduce the quality of health care.

Accordingly, Gingrich attacked the plan “over costs and big-government inefficiency.”¹⁰⁸ The October 13, *Wall Street Journal* printed a philippic by Representative Arney called “Your Future Health Plan,” in which the Congressman wrote, “The Clinton health plan would create 59 new federal programs or bureaucracies, expand 20 others, impose 79 new federal mandates and make major changes in the tax code [T]he Clinton plan is a bureaucratic nightmare that will ultimately result in higher taxes, reduced efficiency, restricted choice, longer lines, and a much, much bigger federal government.”¹⁰⁹ The article contained both a flow chart and a glossary.

¹⁰⁶Memorandum from William Kristol, Chairman, Project for the Republican Future, to Republican Leaders, at 2 (June 7, 1994) (on file with the *Harvard Journal on Legislation*).

¹⁰⁷Memorandum from William Kristol, Chairman, Project for the Republican Future, to Republican Leaders, at 2 (Dec. 2, 1993) (on file with the *Harvard Journal on Legislation*).

¹⁰⁸Adam Clymer, *The Clinton Plan is Alive on Arrival*, N.Y. TIMES, Oct. 3, 1993, at E3.

¹⁰⁹Richard K. Arney, *Your Future Health Plan*, WALL ST. J., Oct. 13, 1993, at A22.

Republicans stressed that in addition to necessitating higher taxes, Clinton's plan was so costly that the deficit would climb precipitously as well. Following Clinton's September 1993 health care speech, Gingrich compared Clinton's plan to "a beer and chocolate cake diet."¹¹⁰ Senator Gramm also joked that "I think my constituents and my mother will love all these new benefits. But I think they will be puzzled as to how we're going to pay for it."¹¹¹ Senator John McCain (R-Ariz.) warned, "The new taxes and employer mandates proposed . . . will be used to finance an enormous Government takeover of the health care system. They will pay for a huge new entitlement program that will subsidize at least 100 million people—almost half of the country."¹¹²

Republicans felt vindicated when the Congressional Budget Office ("CBO") projected that the Clinton plan would add \$70 billion to the deficit by the year 2000.¹¹³ Republicans criticized this prospect as typical of Democratic irresponsibility.¹¹⁴ Republican leaders ignored the CBO's further estimates that, by 2004, the Clinton plan would have only a "negligible" effect on the deficit, and could potentially reduce the deficit in the long term.¹¹⁵

Kristol and the Republicans also maintained that the Clinton plan would lower the quality of health care and limit freedom to select physicians. Kristol urged Republicans to portray the Clinton plan as undermining the "character, quality, and inventiveness of American health care."¹¹⁶ An influential article entitled "No Exit" portrayed the Clinton plan as an Orwellian construct that would force Americans into care systems they opposed. The article even claimed the system would drive parents to bribe their doctors in an effort to ensure their children received necessary medical care.¹¹⁷ Polling data from June 1994 demonstrated that a majority of the public believed both these claims.¹¹⁸ These

¹¹⁰Rubin & Hook, *supra* note 9, at 2552. Gingrich explained, "It sounded wonderful, but it seemed to have the opposite effect." *Id.*

¹¹¹*Id.*

¹¹²140 CONG. REC. S11,126 (daily ed. Aug. 10, 1994) (statement of Sen. McCain).

¹¹³CONGRESSIONAL BUDGET OFFICE, AN ANALYSIS OF THE ADMINISTRATIONS'S HEALTH PROPOSAL xiii (1994).

¹¹⁴*See* 140 CONG. REC. S8536 (daily ed. July 12, 1994) (statement of Sen. Dole).

¹¹⁵CONGRESSIONAL BUDGET OFFICE, *supra* note 113, at xiii.

¹¹⁶Memorandum from William Kristol, Chairman, Project for a Republican Future, to Republican Leaders, at 3 (Dec. 2, 1993) (on file with the *Harvard Journal on Legislation*); *see also* Adam Meyerson, *Kristol Ball: William Kristol Looks at the Future of the GOP*, POL'Y REV., Winter 1994, at 14, 15.

¹¹⁷Elizabeth McCaughey, *No Exit*, NEW REPUBLIC, Feb. 7, 1994, at 21.

¹¹⁸*See* Mollyann Brodie & Robert J. Blendon, *The Public's Contribution to Congress-*

data were quite a formidable complement to the Republican rhetorical arsenal when combined with statistics showing the public's abhorrence of managed care.¹¹⁹

Democratic factiousness made the Republicans' task easier. As Representative Fred Upton (R-Mich.) noted, "[a]s far as I can tell, there's been no effort by the Democratic powers that be to reach out to Republicans on the committee They're just trying to keep their own troops in line."¹²⁰ Republicans were thus able to play Democratic factions off against each other.

Finally, Republicans tried to paint the Democrats as unduly partisan in developing the reforms. They claimed that Democrats wrote their bills "in secret" without Republican input. Representative Gingrich warned that a bill "written in secret, brought to the floor at the last minute, and rammed through by a political machine without hearings, without understanding, without a chance to clarify things" was "guaranteed to have major mistakes."¹²¹ These baseless accusations naturally had little effect on the legislative process, as they were intended for public consumption.

b. *Incremental changes.* Although Republicans wanted to stymie Democratic legislation, they did not want blame for having done so. Because most Americans supported health reform,¹²² Republicans wanted to appear sympathetic. Representative Henry Hyde III (R-Ill.), Chairman of the House Republican Policy Committee, encouraged Republicans to make a "concerted effort" to be "more visibly compassionate" during the months of

sional Gridlock on Health Care Reform, 20 J. HEALTH POL. POL'Y & L. 403, 406 (1995).

¹¹⁹ Three-fourths of Americans surveyed opposed restrictions of their choice of specialists, and 70% felt the same about restrictions on their choice of general practitioners. Humphrey Taylor & Robert Leitman, *Consumers' Satisfaction with Their Health Care*, in SYSTEM IN CRISIS: THE CASE FOR HEALTH CARE REFORM 75, 102 (Robert J. Blendon & Jennifer N. Edwards eds., 1991). Seventy-four percent said they prefer to arrange for their own care rather than to join a health care organization. See Robert J. Blendon et al., *What Happened to Americans' Support for the Clinton Health Plan?*, HEALTH AFFAIRS, Summer 1995, at 18 (citing Harvard School of Public Health/Boston Globe/KRC Communications Research Poll, Feb. 18, 1994).

¹²⁰ Beth Donovan, *Democrats as Divided as Ever on Eve of First Markup*, 52 CONG. Q. WKLY. REP. 475, 478 (1994) (quoting Rep. Upton).

¹²¹ 130 CONG. REC. H6111 (daily ed. July 22, 1994) (statement of Rep. Gingrich).

¹²² A Wall Street Journal/NBC poll found that 55% of Americans believed overhaul was necessary. Wall Street Journal/NBC Poll, Sept. 1993, available in LEXIS, Market Library, Rpoll File. A Harris poll asked Americans every year whether the health care system needed only minor changes, fundamental changes or complete rebuilding. In 1992, a majority wanted to rebuild the entire system. See Yankelovich, *supra* note 92, at 12.

the health care debate.¹²³ To this end, Republicans—sometimes disingenuously—introduced incremental, skeletal plans which they knew Democrats would oppose. The plans were substantial enough, however, to convince the public that Republicans cared about health care reform. Republicans thus could effectively block Democratic bills without seeming obstructionist.¹²⁴

Republicans offered such bills on at least two occasions. On June 29, 1994, Senator Dole announced his own Republican leadership plan.¹²⁵ The plan was backed by 40 of 44 Senate Republicans, almost the 41 needed to sustain a filibuster. The bill extended health care access rather than expanding health care coverage; it required insurers to accept all enrollees and charge them one rate that could only be modified for age; it granted subsidies to very low income Americans, but still left 24 million Americans uninsured. This bill was far more meager than most alternatives in Congress. It provided scant subsidies for those just above the poverty level, did nothing to rein in health care costs, and offered no uniform benefits plan.

In August, Representative Gingrich also contemplated drafting a Republican-sponsored bill, but insisted his bill be accepted as is, with no modification by the House-Senate conference, the convention by which House-Senate bill differences are usually ironed out.¹²⁶ A Congress dominated by Democrats would obviously never agree to give the minority party full control over such substantial legislation. Gingrich's proposal was thus a ruse to distract the public while Republicans waited for Democratic health reform to die.

Republican-proposed measures followed the vagaries of public opinion on health care reform. As the popularity of the President and his health care plan began to slide, Republicans shifted their plans further to the right.¹²⁷ For instance, although Dole had originally supported the Chafee bill, which included universal

¹²³ Alissa J. Rubin, *GOP Seeks Unity to Bargain with Democrats*, 52 CONG. Q. WKLY. REP. 550, 550 (1994) (quoting Rep. Hyde).

¹²⁴ These moves were criticized even by some Republicans. Rep. Durenburger faulted Sen. Dole for sacrificing health care reform for the sake of "politics of the moment." Alissa J. Rubin, *Senate Finance Panel Deals Blow to Universal Coverage Proposal*, 52 CONG. Q. WKLY. REP. 1798, 1800 (1994).

¹²⁵ Alissa J. Rubin, *GOP Senators Backing Dole Plan*, 52 CONG. Q. WKLY. REP. 1799, 1799 (1994).

¹²⁶ See Cloud, *supra* note 76, at 2572.

¹²⁷ See 140 CONG. REC. S8,535 (daily ed. July 12, 1994) (statement of Sen. Dole).

coverage, by June 1994 he supported an incremental reform bill with no universal coverage provision.

Republicans also capitalized on the public's tendency to view health care reform personally rather than altruistically. Americans prioritized making health care affordable for themselves and their families over any other aim of health care reform by nearly a two-to-one margin.¹²⁸ Republicans emphasized that their plans were the most personally affordable, and, as stated above, further claimed that the Clinton plan adversely affected quality and choice.

c. Too complex, too little time. Early in the health care debate, Republicans assumed a cooperative posture. Strong public support for health care convinced them of the need to appear "visibly compassionate."¹²⁹ Intransigence seemed politically unwise. Hence, Dole was an early participant in the health care debate. Even William Kristol, later an architect of the policy to scuttle Democratic health care reform, had at first endorsed a Moynihan-Dole compromise bill.¹³⁰

By March 21, 1994, Kristol had changed his strategy. He now believed that any compromise health care plan would be political suicide for the Republicans, since Democrats and the President would receive all of the credit. Kristol counseled Republicans to spurn bipartisanship and to offer only their own alternative plans.

With health reform on a tight time schedule by the late summer of 1994, Republicans took advantage of the public's belief that health care reform was complicated and difficult, and they crafted a policy to shunt reform until the next session of Congress. On July 23, 1994, Senator Dole indicated that Democrats need not rush health care reform through Congress. Since "Congress meets every year," Dole suggested that "[if] we don't do it this year . . . let's do it next year."¹³¹ A Kristol memo dated three days later advocated that Republicans "take the noble road of opposing any alternative the Democrats offer and insist on starting over in '95."¹³² One Republican claimed, "The best thing

¹²⁸ See Blendon et al., *supra* note 119, at 12.

¹²⁹ Alissa J. Rubin, *GOP Seeks Unity to Bargain with Democrats*, 52 CONG. Q. WKLY. REP. 550, 550 (1994) (quoting Rep. Hyde, Chairman of the House Republican Policy Committee).

¹³⁰ Kristol, *supra* note 105.

¹³¹ Dole in *No Rush on Health*, N.Y. TIMES, July 24, 1994, at A22.

¹³² Memorandum from William Kristol, Chairman, Project for a Republican Future,

Congress could do now on health care is to start over next year. The most important social legislation in a quarter century should not be approved as a last-minute, poorly understood patchwork."¹³³

The Republican strategy of putting off health care relied on a conviction that Americans were confused about health care in general and uninformed about the particulars of the Clinton plan. The week after Clinton introduced his plan, only twenty-one percent said they knew a lot about it.¹³⁴ The next month only seventeen percent reported that they knew a lot about it.¹³⁵ A month later, the figure had dropped to thirteen percent.¹³⁶ An August 1994 Harris poll found that fewer than one out of five people thought they were very well-informed about the debate in general.¹³⁷ Although an additional thirty-nine percent did claim to be somewhat well-informed, their low level of familiarity left them only marginally more edified than the ill-informed. Republicans could make large segments of the public think that the bill was too complex to be rushed, simply because Americans had never understood its contents.

IV. CONCLUSION

Substantial health care reform could have passed between September 1993 and September 1994, but not without Democratic unity. Rather than focusing on interest groups, the President should have appeased members of Congress. In particular, had Clinton obtained commitments from Democrats in Congress before presenting his bill, Democratic factions would have been less likely to arise, and moderate Republicans might have joined a large organized bloc of Democrats.

Even without Republican support, Democratic unity would have enabled a significant bill to pass. Instead, Democratic infighting allowed conservative Republicans to coopt the debate. While projecting an image of concern about health care reform, Repub-

to Republican Leaders, at 3 (July 26, 1994) (on file with the *Harvard Journal on Legislation*).

¹³³ 140 CONG. REC. H5661 (daily ed. July 14, 1994) (statement of Rep. Thomas (R-Wyo.)).

¹³⁴ L.A. Times Poll, Sept. 28, 1993, available in LEXIS, Market Library, Rpoll File.

¹³⁵ Wash. Post Poll, Oct. 7, 1993, available in LEXIS, Market Library, Rpoll File.

¹³⁶ ABC News/Wash. Post Poll, Nov. 15, 1993, available in LEXIS, Market Library, Rpoll File.

¹³⁷ *Media and the Health Care Reform Debate*, Louis Harris/Robert Wood Johnson Foundation Poll, Aug. 4, 1994, available in LEXIS, Market Library, Rpoll File.

licans exaggerated the negative effects of the Clinton plan and refused to offer feasible alternatives of their own.

Major health care reform in the 103d Congress seems to have been attainable. Disarray among Democrats, however, rendered the majority party incapable of coordination with the President, which in turn left Congress vulnerable to forces interested in paralyzing this legislation.

BOOK REVIEWS

CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS. By *John R. Hibbing* and *Elizabeth Theiss-Morse*. Cambridge, England: Cambridge University Press, 1995. Pp. xiv, 162, appendix, references, index. \$15.95 paper.

As the first session of the 104th Congress came to a close, the *Washington Post* took the pulse of public opinion about Congress: "The American people are disgusted again—should anyone really be surprised?"¹ Not according to John R. Hibbing and Elizabeth Theiss-Morse, who predicted an early end to the 104th Congress's honeymoon in *Congress as Public Enemy* (p. 35). Hibbing and Theiss-Morse argue that recurrent dissatisfaction with Congress and with the federal government in general hinges on the public's negative perceptions of the very processes which constitute modern democracy. In particular, Hibbing and Theiss-Morse contend that the American people dislike the professionalization, the interest group influence, and even the debate and compromise which characterize the current operation of Congress. Although the authors acknowledge that reform of these congressional processes might have a limited positive impact on public approval of Congress, they conclude that significant improvement will not occur until the American people are educated about the inherent unruliness of democracy.

Hibbing and Theiss-Morse identify and tackle many of the difficulties inherent in any attempt to understand public attitudes toward complex institutions. Indeed, their data debunk some common myths about public attitudes toward Congress and raise important questions about the potential of proposed procedural reforms to increase approval of Congress. But ultimately, the complexity of public opinion and the difficulty of identifying and measuring its sources undermine the authors' boldest contention—that unless re-educated about the nature of democracy, the American people will condemn any Congress which operates according to democratic processes.

Hibbing and Theiss-Morse contribute to the discussion of public attitudes toward political institutions by applying an intui-

¹ Kevin Phillips, *The Rise and Folly of the GOP: As Voter Disgust Rises, So Do Clinton's Chances*, WASH. POST, Aug. 6, 1995, at C1.

tively appealing theoretical framework to a wealth of new data. As they explain in Chapters One and Two, the authors are unimpressed with existing data and theory about dissatisfaction with our political system. In particular, they conclude that existing theory pays too little attention to public concern with political processes (how policy is made as opposed to its substantive content) and fails to analyze and compare support for specific institutions (pp. 13–15). Existing data are similarly inadequate because they derive from survey questions that lack consistency across studies and are otherwise incapable of parsing complex public attitudes (pp. 36–38). Hibbing and Theiss-Morse contend that their research methodology of comparing cross-sectional data on public attitudes toward different institutions, considering public attitudes toward processes as well as policy outcomes and member characteristics, and using focus groups as well as surveys to unravel complex attitudes, will bring about a better understanding of popular discontent with the political system and its components.

Hibbing and Theiss-Morse gathered data in the summer and fall of 1992 by conducting a nationwide telephone survey of 1400 adults and by holding eight focus group sessions in four different parts of the country (p. 42). The authors recognize that focus group research is not a widely accepted technique in the social sciences but argue that a combination of survey data and focus group results provides the rigor and depth necessary to understand public attitudes toward political institutions (pp. 85–86). Reliance on survey research alone, the authors contend, would yield only a superficial understanding of these attitudes (p. 86).

In Chapter Three, the authors begin their attempt to pinpoint the sources of Americans' negative assessments of the political system by comparing responses to questions about the three branches of government. Among the survey questions were several designed to expose any differences between respondents' attitudes toward Congress, the Presidency, and the Supreme Court; between their attitudes toward the institutions of government and the membership of those institutions; and between their attitudes toward the people, policies, and processes of political institutions (pp. 42–43, 47). The responses to these questions suggest that people generally approve of the institutions of government, considered not in terms of their membership, but in terms of their "buildings, historical traditions, and purposes laid out in

the Constitution” (p. 44). When the survey directed respondents’ attention instead to the membership of the three political bodies, approval for all three dropped, with the membership of Congress eliciting the least approval. Only twenty-four percent of the respondents approved of the members of Congress, while forty-six percent approved of the President and seventy-six percent approved of the Supreme Court Justices (p. 45). More specific questions about respondents’ attitudes toward the three bodies yielded further evidence that Congress is particularly unpopular. For example, more respondents (forty-three percent) thought that Congress had too much power than thought similarly of the Presidency (nineteen percent) or the Supreme Court (twenty-six percent) (p. 52). In fact, Congress was thought to be doing the worst job of handling the nation’s most pressing problems (p. 54). Finally, respondents reported negative emotional reactions (feelings of anger, fear, disgust, and unease) to the members of Congress more than to the Supreme Court Justices or the President (p. 57).

In Chapter Four, Hibbing and Theiss-Morse consider data particular to public attitudes about the members of Congress to determine specifically what people dislike about them. The authors cite survey results and a few focus group observations to show that people think the members of Congress operate in a system that gives too much influence to special interests, distracts members from the concerns of ordinary people, and bestows undeserved perquisites upon them (pp. 63, 68). The survey respondents accordingly supported reforms that might insulate the members of Congress from the corrupting influence of Washington, such as reduced salary for members, term limits, and a balanced budget constitutional amendment (p. 75).

Hibbing and Theiss-Morse acknowledge that a possible explanation for public disapproval of the members of Congress, and attendant support for reform, is that people are misinformed about Congress (pp. 71–72). But the survey respondents in fact underestimated the magnitude of some of the congressional features they disliked most, such as salary, staff size and time in office. Therefore, the authors contend, simply correcting misperceptions about Congress would do little to improve public attitudes toward its members (pp. 72–75).

The focus group comments reported in Chapter Five echo the survey results from Chapters Three and Four. Focus group participants were knowledgeable about and supportive of the con-

stitutional structures of the three branches of government (pp. 90–91), reinforcing the survey results indicating support for political institutions in the abstract. As to support for the people in government, the focus group comments help explain why the members of Congress are the most unpopular of the Washington actors. While the focus group participants spoke of Supreme Court Justices (who received the most membership approval in the survey) predominantly in terms of their constitutional role, they associated the members of Congress with a supposed “Washington system,” in which special interests and abundant privileges corrupt even good people (pp. 90, 92, 96–100). Such responses prompt the authors to suggest that the public perceives two political systems: a hallowed constitutional system, and a maligned Washington system (p. 87). The public approves of all three institutions of government in the abstract because it considers them part of the constitutional system (p. 87). Public servants associated with the constitutional system, such as Supreme Court Justices, also enjoy public approval (p. 89). By contrast, those who appear to be embedded in the Washington system, such as the members of Congress, generate public disfavor (p. 90).

In Chapter Six, the authors analyze survey results to explain variations in individual respondents’ appraisals of the members of Congress and thus to describe more precisely what people dislike. The authors measure respondents’ perceptions of features of professionalized government such as large staff size, of modern methods of representation such as interest group influence, and of democratic procedures such as debate and compromise. Their premise is that professionalization, interest group representation, and debate and compromise characterize the current functioning of Congress. They expect that aversion to these congressional features will explain some of the public’s low regard for the members of Congress.

This expectation is borne out in part, as dislike for professionalization and dissatisfaction with representation appear to be important predictors of respondents’ disapproval of the membership of Congress and, not surprisingly, of support for term limits (pp. 116–17, 123).² This result is consistent with the authors’

²The process variables are analyzed in a multivariate regression that also includes sex, education, income, party identification, ideology, external efficacy, and political involvement as possible explanatory variables for approval of the members of Congress.

previously mentioned model of the Washington system and with focus group comments maligning lobbyists and congressional perks (p. 99). Hibbing and Theiss-Morse are surprised to find, however, that aversion to debate and compromise does not appear to be a significant predictor of disapproval of the membership of Congress. Indeed, if anything, the survey results suggest that people who like debate and compromise tend to disapprove more of the members of Congress.³ Hibbing and Theiss-Morse explain this unexpected result by arguing that people may say they like debate and compromise in theory, but when they see these processes in action they interpret them as “bickering” and “selling-out” (p. 117). The authors accordingly suggest that their survey question (which asked respondents if they thought that debate and compromise should be an important part of what Congress does) may have been ill-suited to elicit reactions to debate and compromise “as they are practiced,” and that people who dislike debate and compromise in action are in fact also likely to disapprove of the members of Congress. They authors admit, however, that the actual survey results do not supply support for this view (p. 117).

Despite this concession, in Chapter Seven the authors further support their thesis that evaluations of congressional processes are important determinants of evaluations of the membership of Congress. In particular, they show that some survey respondents were especially disposed to interpret the political world in terms of process (or have a “process propensity”), as demonstrated by their tendency to answer open-ended questions about the federal government in process terms (pp. 129–30). For that group of people, the relationships between the “process variables” (perceptions of professionalization, representation, and debate and compromise) and disapproval of the members of Congress were stronger than they were for respondents in general (p. 132). Respondents who were the most knowledgeable about politics were those most likely to have a process propensity (p. 140). Moreover, Hibbing and Theiss-Morse found that such political experts were more likely than other respondents to think that

³Hibbing and Theiss-Morse’s analysis of the impact of support for debate and compromise (which they refer to as the “democratic-procedures variable”) on support for the members of Congress generates a negative regression coefficient, suggesting the possibility of an inverse relationship between support for debate and compromise and support for Congress (p. 116). The magnitude of the coefficient is not statistically significant, however (p. 116).

debate and compromise were important to the job representatives do (p. 141), yet were less approving of the members of Congress (p. 144). Again, this finding fails to support authors' theory that disdain for debate and compromise undermines approval of Congress. Hibbing and Theiss-Morse do not express surprise at the result here, however. They argue that political experts are especially disturbed by professionalized and interest group-dominated procedures and therefore disapprove of Congress despite approving of debate and compromise (p. 144).

Hibbing and Theiss-Morse view debate and compromise, and perhaps even some degree of professionalization and representation through interest groups, as vital characteristics of modern democracy (pp. 16–17, 147). In the final chapter of *Congress as Public Enemy*, they conclude that the American people lack an appreciation of these important processes. People dislike not only occasional abuses of professionalization and interest group representation, but any manifestations of these phenomena (p. 147). Unavailing survey data notwithstanding, the authors argue that their focus group results suggest similar indiscriminate disapproval of debate and compromise (p. 155). Therefore, reform alone, if it were to fall short of dismantling what the authors consider vital democratic processes, would leave Americans dissatisfied (pp. 154–55). In addition to realistic reform, the authors assert, people need education about “unavoidable democratic realities” such as debate and compromise, and about the inherent “ugliness” of democracy in action (pp. 157–58, 160–62).

As Hibbing and Theiss-Morse acknowledge, their conclusions are based on data that are less convincing than they would like them to be. In particular, the authors are surprised to find that survey results do not support their theory that dissatisfaction with Congress is related to disapproval of debate and compromise (pp. 117, 147, 152). As previously noted, Hibbing and Theiss-Morse explain this unexpected result by arguing that people misperceive what is in fact debate and compromise. Another possible explanation of this aspect of the survey results, not explored by the authors but based on their survey and focus group findings, is that people know compromise when they see it and they see too little of it in Congress. Indeed, in Chapter Three the authors reported that fifteen percent of the responses to an open-ended survey question about dislike for Congress referred to an unwillingness to work with the President and that eleven percent referred to an unwillingness of its members to

work with one another (pp. 48–49). One focus group participant elaborated on his frustration with the supposed intransigence of the members of Congress: “I think that there has to be major communication between . . . the Democrats and Republicans and the Senate and the House, you know, everybody. Just have to say, ‘There’s a problem. We won’t leave this room until it’s fixed’” (p. 97). Hibbing and Theiss-Morse’s earlier contention that people think Congress is doing too little to solve the country’s most pressing problems (p. 55) is also consistent with public desire for compromise.

Even the professionalization and representation variables may fail to reflect the attitudes that the authors were aiming to quantify, despite having produced the expected results. Both variables are based on responses to survey questions which asked respondents to evaluate some aspect of congressional performance but which might have triggered responses based on views of Congress in general. For example, if a respondent agreed with the statement, “Congress addresses difficult issues in a reasonably efficient way,” the authors considered that to be a pro-professionalization response (pp. 170–71). But it is conceivable that such responses reflected general approval of the way Congress is handling its job, instead of specific support for the procedures that embody professionalization. The respondents’ conceptions of the questions upon which the representation variable is based are similarly uncertain. For example, the set of statements about representation to which the survey asked people to respond included: “Congress does a good job representing the diverse interests of Americans, whether black or white, rich or poor” (p. 171). Again, while this statement aimed to draw respondents’ attention to a process issue, it is possible that they treated it as a question about whether they approved of Congress in general, or about their opinion of Congress’s success or failure to enact particular substantive policies. Indeed, a rough translation of both of these statements is, “Congress does a good job.” If that is how respondents understood these statements, their responses reveal little about process-related reasons for disapproval of the members of Congress.

These concerns about Hibbing and Theiss-Morse’s process variables illustrate the difficulty of interpreting survey responses and suggest the value of the authors’ complementary use of focus groups. In this case, focus group results allay concern about the reliability of the representation and professionalization

variables to some extent because the focus group participants in fact complained about large congressional staff sizes and member preoccupation with special interests (pp. 98–99). Indeed, such complaints are so commonplace that Hibbing and Theiss-Morse's argument that public distaste for professionalization and interest group representation contributes to disapproval of the members of Congress is not very surprising.

The authors' more surprising and troubling contention is that people dislike procedures that are vital to democracy, such as debate and compromise (p. 147). This contention, however, is weak on several fronts. Hibbing and Theiss-Morse admit that it is not supported by their survey results (pp. 117, 154–55). Even if they had obtained the expected results, their proper interpretation would be unclear. One might even question the authors' assumption that debate and compromise are vital to democracy in action (pp. 17–18, 147). Nonetheless, Hibbing and Theiss-Morse's boldest and most problematic argument should be pursued, not ignored.

The current Congress may offer an opportunity for further testing of the authors' theory. As noted earlier, Hibbing and Theiss-Morse correctly predicted in early 1995 that relatively high approval ratings for the 104th Congress would eventually fall to more typical low levels.⁴ Had the authors more time to observe this Congress in action, they might have revised their views on the degree to which public perceptions of process features contribute to disapproval of the members of Congress. The Republican freshmen elected in 1994 are notable for their distance from the so-called Washington system and some of its supposedly unpopular processes. Indeed, many of them are not professional politicians. The class includes a doctor, a rancher, a seed store owner, and a vintner.⁵

While these new members may yet be "corrupted" by perks and special interests, they seem steadfast in their opposition to another purported feature of the legislative process: compromise.

⁴ According to a CBS News/New York Times telephone survey in February 1996, only 22% of those questioned approved of the way Congress was handling its job. See *CBS News/New York Times Survey*, Feb. 26, 1996, available in DIALOG, POLL-Database, Question No. 004.

⁵ See Joel Achenbach, *See You in September: The GOP Freshmen Had a Giddy First Semester, But the Grading Gets Tougher When They Return*, WASH. POST, Aug. 14, 1995, at D1.

Many have displayed an unwillingness to compromise even with Republican leaders, most notably during the debate over the 1996 budget.⁶ If part of Hibbing and Theiss-Morse's most troubling contention is true and the American people disapprove of the members of Congress because they compromise, all other things equal, the public should look favorably upon the freshman Republicans of the 104th Congress. Or, if the authors' most troubling conclusion is incorrect and the American people do value compromise, even as it is manifested in Congress, the freshman Republicans should be especially unpopular. Of course, all other things are not equal. Sorting out the reasons for current disapproval of Congress would entail the kind of ambitious and sophisticated analysis which Hibbing and Theiss-Morse bring to the study of public attitudes toward political institutions, but at which they only partially succeed. Hopefully, such analysis of recent developments in Congress, facilitated by Hibbing and Theiss-Morse's work in *Congress as Public Enemy*, will reveal that the views of the American people are more compatible with democracy than Hibbing and Theiss-Morse suggest.

—Molly E. Shaffer

⁶ See Eric Pianin & Ann Devroy, *House Resists Dole Plan to End Shutdown; Talks Resume*, WASH. POST., Jan. 3, 1996, at A1.

INTENSIVE CARE: HOW CONGRESS SHAPES HEALTH POLICY. Edited by *Thomas E. Mann* and *Norman J. Ornstein*. Washington, D.C.: American Enterprise Institute for Public Policy Research and The Brookings Institution, 1995. Pp. xi, 304, index. \$42.95 cloth, \$18.95 paper.

In response to growing public criticism of Congress, the American Enterprise Institute and the Brookings Institution established the Renewing Congress Project to identify Congress's strengths and weaknesses and to offer constructive suggestions for its reform (p. 1). After having issued a series of reports on methods for strengthening organizational structure and process in general, the Project undertook a case-study in policy-making with *Intensive Care: How Congress Shapes Health Policy*, edited by Thomas E. Mann¹ and Norman J. Ornstein.² The goal of this study was not so much to examine the intricacies of health care policy as to consider "how process shapes policy and how that process might be improved in turn" (p. 1).

After an introductory chapter, the book consists of two sections. The first of the two sections examines the organizational framework through which health care policy is developed and accordingly contains chapters on committee jurisdiction, budgeting, information, and oversight (Chapters Two through Five, respectively). The second section of the book chronicles two recent attempts at major health care reform: the 1988-89 enactment and eventual repeal of the Medicare Catastrophic Coverage Act (Chapter Six) and the unsuccessful effort to pass national health reform in 1994 (Chapters Seven and Eight). This approach comprehensively depicts the factors underlying the failure of both major health care reform efforts as well as the obstacles to significant reform in any policy area. Perhaps the lesson that can be derived from the health care reform experience is that Congress should focus its efforts on achieving smaller, more incremental goals.

In Chapter Two, "Committees and Health Jurisdictions in Congress," Lawrence Evans³ offers a cogent analysis of the effect of *jurisdictional disputes* on the 103d Congress's consideration of

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¹ Director of Governmental Studies, The Brookings Institution.

² Resident Scholar, American Enterprise Institute.

³ Professor of Political Science, the College of William and Mary.

major health care reform (pp. 25–51). The chapter provides insights as to the daunting procedural challenges facing health care overhaul proposals as well as any major reform effort.

Upon the introduction of President Bill Clinton's health care reform bill, overlapping committee jurisdiction over health care issues gave rise to battles for control over the bill. In the House, the Ways and Means Committee and the Commerce Committee were the primary contenders, due to their jurisdiction over Medicare, Medicaid, and the U.S. Public Health Service. Other committees also had valid interests in the legislation, in light of their control over issues involving the Employee Retirement Income Security Act (ERISA), medical malpractice, and rural health and nutrition. In the Senate, the battle was less widespread but nonetheless contentiously disputed by the Finance Committee and the Labor and Human Resources Committee (p. 3). Because all of these committees put forth legitimate arguments for gaining control over the reform proposal, the bill was referred in whole or in part to three different committees in the House and was not referred formally to any committee in the Senate (p. 31). The results of these multiple and indeterminate referrals were confusion among the public (p. 45), significant delay in reporting bills to the floor (p. 43), and a failure to report a bill with a sufficiently broad base of support to secure passage (p. 45).

Surprisingly, despite explaining in depth this "giant spitting contest" among House and Senate committees (p. 43), Evans concludes that jurisdictional disputes did not decide the outcome of health care reform in 1994 (p. 42). This conclusion is consistent with his theory of jurisdictional significance. Evans believes that the degree to which an issue is "salient" and "controversial" predicts the type of consideration it will receive in Congress (p. 41). Specifically, he perceives that jurisdictional allocation may have less impact on congressional decision-making regarding issues that are "controversial, nationally salient, and prominent on the agendas of the two political parties," because key decisions about such issues are made by each chamber as a whole rather than at the committee level (p. 41). Evans views the major health care reform effort of 1993–94 as having been sufficiently salient and controversial to render jurisdictional allocation largely irrelevant to its outcome (p. 42).

This conclusion seems somewhat strange, given that Evans devotes a majority of the chapter to an account of the battle over health care jurisdiction and the serious detrimental effect this

had on the reform effort. While jurisdictional disputes were certainly not the only impediment to reform, the chapter permits the inference that the power struggle for jurisdiction played a role in the reform effort's eventual demise. The continuing division of power over health care issues among many committees means that "a degree of jurisdictional fragmentation in health care policy is unavoidable" in the future (p. 50).

Budgetary issues are also barriers to major reform, as Joseph White⁴ explains in Chapter Three, entitled "Budgeting and Health Policymaking" (pp. 53–78). White opens the chapter with a gloomy yet perceptive prediction as to the outcome of the major reform effort of 1993–94, offered by former Congressional Budget Office (CBO) Director Robert Reischauer in testimony before the House Committee on Ways and Means on February 8, 1994. Reischauer warns of his "considerable foreboding that the information contained in [his] statement and in the CBO report might be used largely in destructive rather than constructive ways—that is, it might be used to undercut a serious discussion of health-reform alternatives or to gain short-term partisan political advantage" (p. 53).

Ultimately, Reischauer's prediction proved accurate. Both parties' political need to avoid increasing the deficit (p. 69), along with the requirements of "pay-as-you-go" (paygo) budget rules (p. 70), resulted in the need for the CBO to "score" each and every proposal for its costs. According to White,

The process affected the very terms of the debate, directing attention to arcane questions of scorekeeping instead of to the workability of policy. The budget process delayed the schedule of drafting and consideration again and again, first within the Clinton administration as it sought estimates for alternatives, and later in Congress as members waited for CBO to score . . . bills. (p. 54)

Indeed, CBO scoring not only slowed the pace of the reform effort but also provided political ammunition for its critics (p. 73).

White notes that a project so extensive as the 1993–94 health care reform effort is not a good tool for assessing budgeting's effect on policy-making (p. 54), much as Evans observed that congressional consideration of large-scale issues poorly illustrates the impact of jurisdictional allocation. White, like Evans,

⁴Health Policy Analyst, The Brookings Institution.

suggests that the study of smaller health care issues may be more instructive in this regard (p. 54).

In Chapter Four, "How Health Policy Information is Used in Congress," political scientist Mark Peterson⁵ offers an inside perspective on congressional use of *information* (pp. 79–125). Peterson identifies three types of knowledge that members of Congress must develop in order to make fully informed choices among policy options (pp. 83–84). *Ordinary knowledge* reflects "implicit popular assumptions about individual motives, fairness, and government capabilities and represents a broad understanding of how the world works and how events can be explained" (p. 84). *Distributional knowledge* allows for assessment of the likely effects of policy change on constituents and interest groups and is developed with the help of information provided by lobbyists, constituents, and interest groups (pp. 85–86, 89). Finally, *policy-analytic knowledge* reduces programmatic uncertainty. It accordingly relies upon objective statistics as to the likely effects of current proposals, often involving comparison to past national, state or foreign experience (p. 87). This type of research is generally provided by consulting firms, think tanks, and congressional agencies such as CBO and the General Accounting Office (GAO) (p. 89).

Peterson explains that the modern Congress has access to an incredibly broad array of information, especially of the ordinary and distributional variety, with which to inform its decisions (p. 91). He offers the conclusion that at least ordinary and distributional information have a significant effect on policy-making, as members of Congress consult it to assuage uncertainty about policy outcomes (pp. 103–04, 112–13).

Too much information, however, can be counter-productive. In the 103d Congress, the barrage of health-related information made coalition building "fragmented and difficult" (p. 102). Members of Congress and their staffs were unable to digest the volumes of available data (pp. 117–18). Furthermore, the public could neither process the information nor separate the truthful from the misleading, resulting in confusion, distrust, and diminished support for reform (pp. 90, 115). These challenges seem

⁵Professor of Public Affairs and Political Science, the University of Pittsburgh. Peterson was a legislative assistant responsible for analyzing health policy issues for Senator Tom Daschle (D-S.D.) when the Senator began in 1990 to collaborate with Senator John Danforth (R-Mo.) in exploring ways to control the increasing costs of the nation's health care system (pp. 108–09).

inherent to the consideration of complex issues in the information age.

Mark Nadel⁶ provides brief insight as to the similarly increasing role of "Congressional Oversight of Health Policy" in Chapter Five (pp. 127–42). Nadel defines *oversight* as the legislative branch's formal and informal review of the executive branch's implementation and operation of programs and policy (p. 128). He identifies the purpose of legislative oversight as monitoring the administration, efficacy, and financial ramifications of enacted policies (pp. 128–29).

Nadel postulates that *oversight* has taken on widening importance in the past several years for two reasons. First, oversight increases when opposing parties control Congress and the executive branch, for Congress is then distrustful of executive action (pp. 127–28). Second, budget realities have necessitated tinkering with existing programs instead of establishing new ones (p. 128).

As described by Nadel, oversight allows for the identification of problems even if it does not necessarily produce change. Because of the difficulty of passing complex legislation, however, oversight may be increasingly attractive to legislators in their quest for exposure and political gain. Indeed, members of Congress will likely use oversight to display their sympathy and attention to a given issue without having to engage in the sort of political battle that occurred over major health care reform.

Chapter Six is written by reporter Julie Rovner.⁷ Entitled "Congress's 'Catastrophic' Attempt to Fix Medicare," it provides in-depth analysis of the passage of the Medicare Catastrophic Coverage Act in 1988 and the Act's repeal in 1989. Rovner explains that the movement to reform Medicare arose out of both "policy" concern about the existence of gaps in Medicare's coverage of senior citizens' medical expenses (pp. 148–51) and the "political" motives of President Ronald Reagan and the Democratic Congress, particularly their desire to curry favor with politically powerful seniors (pp. 151–52). By July 1988, Congress and President Reagan reached agreement on a catastrophic coverage program financed through premium increases (pp. 165–66). When

⁶ Associate Director, U.S. General Accounting Office, Health, Education and Human Services Division.

⁷ Rovner is a health care reporter whose writings have been published in *Congress Daily*, *Medical News Network*, the *Washington Post*, and *Congressional Quarterly*.

seniors realized that they would have to pay for catastrophic coverage, however, a backlash ensued, ultimately resulting in the repeal of such coverage one year after its enactment (pp. 167–73).

The most compelling part of the chapter generalizes as to the problems which efforts at significant reform will encounter. For example, a persuasive point is that “it is hard to explain and sell changes to people who do not understand the underlying system being changed” (p. 175). Indeed, a 1984 Gallup poll discovered that seventy-nine percent of respondents mistakenly believed that Medicare covered most long-term nursing home care (p. 163). It is thus unsurprising that any program which expanded long-term care was not appreciated, especially one which increased out-of-pocket costs to seniors.

Rovner analyzes the 1993-94 reform effort in Chapter Seven, “Congress and Health Care Reform 1993-94” (pp. 179–225). As in the preceding chapter, Rovner offers a chronology of the reform effort, charting the course from its early high-water mark through its steady decline. She relates how the prognosis for success became weaker as major interest groups initially supportive of reform either backed away or concentrated their efforts on “killing off a particular piece of a plan under consideration” (p. 179). For example, though favorably disposed to the ideas of universal coverage and employer mandates, the Health Insurance Association of America (HIAA) aired its grievances with the Clinton plan’s impact on individuals’ choice of health plans through the well-known series of Harry and Louise television commercials (pp. 197–98).

Rovner also emphasizes the difficulty of explaining what a given plan would cost and the source of its financing, commenting that “if the media is the fourth branch of government, the 1993-94 fight over health reform saw coronation of a fifth: the number crunchers” (p. 181). Instead of providing credibility to plans whose proposals were sound, an abundance of cost estimates effectively diminished support for every suggested plan because verifying whose numbers were right and whose were wrong was extremely difficult. The resulting distrust for the numbers contributed to the transformation of public opinion from “strongly supportive of” to “strongly opposed to” major reform (p. 181).

Like Rovner, Allen Schick⁸ attributes some of the responsibility for the failure to enact reform in 1993-94 to interest groups in Chapter Eight, "How a Bill Did Not Become a Law" (pp. 227-72). Schick's arguments, however, are at times at odds with those advanced by Rovner, who believes that public and congressional support for health care reform was initially sufficient to allow for ultimate enactment but gradually eroded due to attacks by interest groups. Schick, on the other hand, opens his chapter with the premise that major health care reform *never* had a sufficient level of support to succeed (p. 227).

Although Schick is skeptical about health care reform's chances no matter how it was sold, he is nevertheless critical of the way the effort proceeded. He lays much of the blame in this regard at President Clinton's feet:

What if Clinton had accepted incremental reform at the start rather than at the very end; if he had sent Congress an outline rather than an overdetailed plan; if he had introduced the legislation earlier and not squandered scarce congressional time; if he had reached out more to Republicans and depended less on Democrats; if he had proposed smaller subsidies and less redistribution; if the subsidies had been targeted more strategically to supporters of reform rather than being spent on some who opposed it anyway; if he had attacked drug and insurance companies less and had worked for support for doctors and other affected groups more; if he had steered clear of health alliances and other novel arrangements and relied on familiar institutions instead; if, rather than entrusting reform to a special task force, he had worked at the outset with congressional committees and leaders (pp. 227-28).

Indeed, Schick's seeming hostility towards President Clinton's "demands" is a prevalent theme of the chapter. One passage reads, "In the end, presidential weakness spread to congressional Democrats who found themselves doubly blamed—for following an unpopular president's unenactable demands, and for not enacting health reform" (p. 267). Schick's criticism of President Clinton is nevertheless softened by his acknowledgment that due to both the political separation of the executive and legislative branches and recent congressional independence in formulating

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public policy, the President typically lacks influence over the legislative outcomes of his proposals (pp. 228–29).

Although he reserves most of his criticism for President Clinton, Schick suggests that Republicans are not entirely free from blame for the failure of health care reform. He reports that Republican opposition to reform stemmed at least as much from political considerations as from genuine policy concerns, with then-House Minority Whip Newt Gingrich (R-Ga.) leading the partisan charge. Gingrich believed that Republicans would escape minority status in Congress only by actively impeding the passage of health care reform (p. 247). Likewise, in a now famous memo, William Kristol of the Project for a Republican Future noted, “[T]he Clinton proposal is . . . a serious political threat to the Republican party. Republicans must therefore . . . adopt an aggressive and uncompromising counterstrategy designed to delegitimize the proposal and defeat its partisan purpose” (pp. 247–48).

Schick concludes with six “lessons” he believes the health care reform experience of 1993-94 offers to an understanding of Congress as an institution (pp. 266–72). The distinct theme underlying all of these propositions is that political realities dictate the behavior of Congress (p. 266). Representative John McDermott’s (D-Wash.) reference to health legislation speaks precisely to this theme: “Usually a committee works on a bill, and then committee members say to the rest of us, ‘trust me, this is a good bill,’ and we vote for it. But it’s very dicey to accept a ‘trust me’ on this bill It affects every person in every member’s district” (p. 265).

A common theme pervades the various analyses contained in *Intensive Care*, namely, that the sort of health care reform attempted in 1993-94 was just too big and cumbersome to avoid the obstacles in its path. Interest group involvement, budgetary restrictions, and jurisdictional politics combined with partisan struggle to defeat a movement for reform that started with what seemed to many as unstoppable momentum. If all major reform efforts are to be fraught with such peril, then a piecemeal approach to the achievement of far-reaching goals seems a more viable strategy for the future. Attacking *aspects* of an issue one-by-one would avoid many of the burdens incident to large-scale reform. Specifically, jurisdiction would be easier to determine, budgetary consequences less dramatic, interest group involve-

ment diminished, and the political stakes of supporting or opposing a proposal minimized.

This is hardly a satisfactory conclusion to be drawn from a study which claims as its purpose the explanation of "how process shapes policy and *how that process might be improved in turn*" (p. 1, emphasis added). What hope does it offer those desirous of passing *major* legislation in the future? Readers of *Intensive Care* will not receive an answer to this question. The book does an effective job of identifying problems which Congress faces with respect to large-scale reform efforts. It fails, however, to offer viable proposals for empowering Congress to "enact boldly." In failing to meet this self-imposed goal, *Intensive Care* misses an opportunity to help Congress achieve greater responsiveness and an improved public image.

—Mona E. Mitrani



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Presenting "A Colloquy on Products Liability: Comprehensive Discussions on the *Restatement (Third) of Torts – Products Liability*"

The *University of Michigan Journal of Law Reform* provides a forum for discussion that identifies contemporary issues for reform efforts and legal change. The forthcoming Symposium Issue (Volume 30: 2&3) presents articles interpreting the current draft of the proposed *Restatement (Third) of Torts: Products Liability*, discussing issues such as Statutory Compliance, Warning Defect, Design Defect Tests (Risk-Utility, Consumer Expectation, and Reasonable Alternative Design), and the general effects of the new *Restatement* on fairness. The Issue also presents hypothetical briefs for a case that could arise under the new *Restatement*. The Symposium authors include

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with an Introduction by *Robert L. Rabin*, and a special Postscript by *James A. Henderson*, Reporter for the *Restatement*.

The *Journal* publishes quarterly. For subscription information, please contact Maureen Bishop, Business Manager, *University of Michigan Journal of Law Reform*, University of Michigan Law School, Ann Arbor, MI 48109-1215. Tel: (313) 763-6100. Transcripts and four-part video tape series of the Products Liability conference, held on on March 22-23, 1996, are also available directly from the *Journal*.