

## **SLIP-SLIDING AWAY:**

# **THE EROSION OF HARD-WON GAINS FOR WOMEN UNDER THE BUSH ADMINISTRATION AND AN AGENDA FOR MOVING FORWARD**

**A Report By**

**The National Women's Law Center**

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## **Slip-Sliding Away:**

# **The Erosion of Hard-Won Gains for Women Under the Bush Administration and an Agenda for Moving Forward**

### **I. INTRODUCTION AND SUMMARY**

In ways both well-publicized and carefully hidden, glaring and subtle, the Bush Administration is taking steps to roll back women's progress in every aspect of their lives – their opportunities to succeed at work and in school, their economic security, their health and reproductive rights. It is hardly a secret, for example, that the Administration's massive tax cuts are benefiting the wealthiest Americans and resulting in extensive cuts in important government programs – although the particularly harmful impact of these policies on women may be less widely recognized. Other actions with harsh effects on women are occurring almost completely “under the radar,” out of the public eye. Some of the steps backward include:

- The Department of Education, without explanation, “archived” its guidelines on sexual harassment in schools.
- The Administration ended the Equal Pay Initiative and removed all materials on narrowing the wage gap for the Department of Labor's website.
- The Department of Justice dropped cases challenging sex discrimination in employment.
- The Labor Department repealed a rule to help employees obtain paid leave for the birth or adoption of a child.
- The Department of Education reduced Title IX enforcement while it established a Commission to find ways to weaken athletics policies that open opportunities for female students.
- The Administration's budget would cut 300,000 children from child care programs by 2009.
- The Administration's tax cuts and resulting budget cutbacks are a double whammy for women because they cut services and programs women rely on while providing little tax assistance to low- and moderate-income women.
- A plan to privatize Social Security that the Administration supports would require deep cuts in Social Security benefits for all future retirees, whether they participate in a private account or not. By the Administration's own analysis, a woman retiring in 2075 (working at an average wage) would receive benefits 46% below current levels if she did not participate in a private account and 69% below current levels if she did. Even if she received an average return on a medium-risk portfolio from her private account, her *combined* income would be 21% below current benefit levels.

- The Administration’s plan to “restructure” Medicaid, changing it from an entitlement program to a block grant, will result in more women without health insurance.
- Women’s reproductive rights are being taken away by Administration-backed laws criminalizing abortion and giving the rights of “personhood” to fetuses and embryos, while family planning programs vital to women’s health are being undermined.
- Scientific information is being distorted to serve an anti-abortion and anti-family planning agenda; for example, the National Cancer Institute posted information on its website that falsely suggested there may be a link between abortion and breast cancer.
- The Defense Department limited the role of a 55-year-old advisory committee designed to promote recruitment and retention of women in the military and appointed new members to the commission who do not support opening new opportunities to women – one of whom called the Army “a vast day-care center, full of unmarried teen-age mothers using it as a welfare home.”
- The Administration has placed individuals hostile to women’s interests on other expert advisory committees as well, such as those responsible for domestic violence and reproductive health.
- The Administration has selected judicial nominees opposed to critical rights for women and girls; one nominee wrote that wives must “subordinate” themselves to their husbands.
- The Administration has proposed funding emergency shelters, crisis hotlines and other domestic violence services at 26% below authorized levels.

This report reviews these policies and others in 10 major areas important to women, and recommends a series of measures the Administration should take to expand and protect women’s rights and opportunities in each. This review, the first detailed and broad-based analysis of this kind, was undertaken in order to shed light on the many ways in which federal government policies can and do have a particularly important and concrete impact on women, and to identify ways in which, as these policies are formulated and advanced, they can ensure forward progress for women. Now, roughly three years into the Administration, there is a substantial basis on which to assess the Administration’s record, as well as an opportunity in the months ahead – as pending administrative proposals continue to be finalized, legislative measures advanced, and judicial nominations made – for the Administration to address the urgent need for constructive action on the issues that matter most to women.

### **A Pattern of Backsliding**

The Bush Administration has taken actions and embraced proposals across a wide range of policy areas that are eroding or threatening to erode the progress that women have fought hard to win. This report documents the Administration’s record in the following 10 areas: *women at work; girls and women at school; child care and other supports women need to maintain self-sufficiency; tax and budget policies; retirement security; health and reproductive rights; violence against women; women in the military;*

*judicial nominations; and government offices and advisory bodies charged with safeguarding women's interests.* The review undertaken here, while extensive, is not exhaustive; for example, this report focuses primarily on domestic issues and does not, for the most part, examine policies in the international arena.<sup>1</sup>

In each section of the report, instances in which the Administration has taken constructive actions on issues of particular importance to women are noted – such as filing a brief on behalf of plaintiffs in an important family leave case in the Supreme Court and prosecuting those who smuggle women and children into this country for prostitution and other abuses. These positive steps are overshadowed, however, by Administration actions and positions that cause great harm to women. Indeed, what is striking is the overall pattern that emerges: one of serious steps backward, instead of forward, for women.

Some of the harmful policies catalogued here are now in place. Others have been thwarted or stalled by strong opposition, at least for now. All are damaging or threatening to the livelihoods, life choices, and in some cases the very lives, of American women.

### **Out of Sight and Out of Touch**

As noted, many of the policies and proposals described here have not been widely publicized. And their low profile is no accident: these initiatives and positions are so out of touch with the views and aspirations of most American women – and men – that they would never be tolerated if subjected to public scrutiny.

By wide margins, Americans, especially women, believe that the laws against discrimination and unfair treatment in the workplace – and, in particular, stronger laws to enforce equal pay for equal work – are important;<sup>2</sup> oppose weakening Title IX, the law that prohibits sex discrimination in education and requires equal athletic opportunities for girls and women in school;<sup>3</sup> consider child care an important issue<sup>4</sup> and support expanding early learning programs like Head Start as well as programs for school-age youth;<sup>5</sup> believe that the recent federal tax cuts were too large;<sup>6</sup> favor leaving the Social Security system basically as it is over allowing people to invest some of their Social Security taxes in private accounts;<sup>7</sup> favor *Roe v. Wade*<sup>8</sup> and believe that the abortion decision should be left up to a woman and her doctor;<sup>9</sup> support women's access to contraception<sup>10</sup> and insurance coverage of prescription contraception,<sup>11</sup> and believe that violence against women is an important problem that is not getting enough attention.<sup>12</sup>

Most Americans thus do *not* agree with those who claim the pay gap for women is “phony”<sup>13</sup> and efforts to highlight its unfairness are “cockamamie;”<sup>14</sup> who disparage sexual harassment protections as “nonsense;”<sup>15</sup> who attack Title IX as a “war against boys”<sup>16</sup> and claim that boys are more entitled to athletic opportunities than girls;<sup>17</sup> who view the Social Security system as “too risky for women;”<sup>18</sup> who insist that contraception is “a frivolity, not something that women need;”<sup>19</sup> who consider *Roe v. Wade* “the worst abomination of constitutional law in our history;”<sup>20</sup> or who view the Violence Against

Women Act as a waste of money and think it “urges vulnerable women to mistrust all men.”<sup>21</sup> Yet some proponents of these fringe views are now Bush Administration officials and the Administration’s appointees to important advisory committees and other bodies,<sup>22</sup> and, as shown in this report, it is these attitudes that are widely reflected in the Bush Administration’s policies.

### **Summary of Findings**

Following is a brief summary of the findings in the 10 areas reviewed in this report.

#### ***1. Rolling Back Policies That Guarantee Equal Opportunity for Women at Work***

Although a pay gap remains for women and men doing equal work, and barriers to equal opportunity for women on the job persist – such as sexual harassment, pregnancy discrimination, and lack of access to paid family leave – the Bush Administration has adopted policies that make matters worse instead of better.

- The Administration quietly abolished the Equal Pay Matters Initiative, and the Department of Labor has refused to use tools at its disposal to identify violations of equal pay laws so they can be targeted for enforcement action.
- The Department of Justice (DOJ) has weakened enforcement of the laws against job discrimination and even abandoned pending sex discrimination suits without notice or explanation. While DOJ has just recently brought a few new sex discrimination cases and also has prosecuted sex traffickers, and the Equal Employment Opportunity Commission (an independent agency) appears to be maintaining a consistent level of enforcement activity, these efforts do not make up for the overall downturn in DOJ employment discrimination cases, especially high-impact cases.
- The Department of Labor repealed regulations that allowed paid family leave to be made available through state unemployment compensation funds. Although the Justice Department filed a brief in the Supreme Court supporting the availability of Family and Medical Leave Act (FMLA) remedies to state employees, the FMLA requires only unpaid leave.
- The Department of Labor has proposed new regulations that would deprive millions of women of the right to overtime pay – and has even given tips to employers on how to avoid paying overtime when the law still requires it.

## ***2. Backtracking on Policies That Guarantee Equal Opportunity for Girls and Women at School***

While Title IX has opened tremendous opportunities for female students in the classroom and on the playing fields, girls and women at all levels of the education system still face significant disadvantages – such as barriers to entering non-traditional fields of study (from high school training for high-paid jobs to college science and engineering programs), sexual harassment, fewer opportunities to participate in competitive athletics and inequitable treatment when they do get to play. Yet here too, the Administration has taken a number of steps backward.

- The Administration has proposed reducing funding for, and even eliminating, key programs that promote gender equity in education.
- The Department of Education “archived” a guidance on sexual harassment, making it unavailable to victims of harassment, parents, schools, and the public.
- The Department of Education has undermined athletic opportunities for women by trying to find ways to weaken Title IX athletics policies – dropping a high-profile reconsideration of those policies only after a massive public outcry – instead of using scarce resources to enforce the law. And while the Justice Department defended Title IX athletics policies in a lawsuit challenging them brought by a wrestlers association, it did so only on narrow, procedural grounds without arguing that the policies are fair and flexible, as courts across the country have held.
- Despite repeated requests, the Department of Education has refused to investigate the pervasive exclusion of women from traditionally male career education and math and science programs.
- The Justice Department urged the Supreme Court to strike down the use of affirmative action to achieve diversity in higher education, and although the Court declined to do so, the Department of Education has encouraged educational institutions to avoid using affirmative action instead of guiding them on ways they can permissibly do so.
- Most recently, the Department of Education has proposed removing existing safeguards ensuring that sex-segregated classes and schools do not perpetuate stereotypes and second-class status for girls.



### ***3. Shortchanging Child Care and Other Supports Women Need to Maintain Self-Sufficiency***

Child care and early learning programs, as well as constructive activities for school-aged youth, are critical to enabling women to work and children to succeed. Yet the Bush Administration has underfunded and undermined programs to expand access to affordable child care and has offered welfare proposals that would make matters worse for families in poverty.

- The Administration has proposed cuts in the number of children served by the Child Care and Development Block Grant, which helps low- and moderate-income families pay for child care and provides funds to improve child care quality: by its own estimate, its latest proposed budget would result in 300,000 children losing child care assistance by 2009.
- The Administration has proposed modifications to the welfare law that would impose harsh new work requirements on families in poverty – while opposing increases in their child care assistance.
- The Administration’s budget proposals would barely increase funding for Head Start and freeze funding for after-school programs, even though these programs have proven track records in helping children succeed. And the Administration has proposed a radical and untested plan for Head Start that could seriously undermine this successful program for low-income children.

### ***4. Starving Programs Women Need to Pay for Tax Cuts for the Wealthy***

The Bush Administration’s tax and budget policies – consisting of massive tax cuts primarily benefiting the very wealthy, paid for with deep budget cuts – represent a double whammy for women.

- First, low- and moderate-income women and their families disproportionately rely on the services that are slated to be starved or slashed to pay for these tax cuts, such as housing subsidies; the nutrition program for women, infants and children (WIC); Pell grants to help pay for college; grants to state and local governments, resulting in spending cuts in K-12 education and other areas; child care and early education; career education; services for domestic violence victims; and possibly Social Security benefits as well.
- At the same time, low- and moderate-income women and their families receive few of the benefits of the tax cuts that are necessitating these budget cut-backs. People with incomes below the poverty line – who are disproportionately single mothers, women of color, and elderly women living alone – are most likely to receive nothing from either the 2001 or 2003 tax cut. More than a quarter of single-parent families, the vast majority of whom are headed by a woman, get nothing from either tax cut.

- The benefits of the tax cuts principally go to the ultra-wealthy: the average tax cut for taxpayers with incomes above \$1 million from the tax cuts is about \$113,000 in 2003. This is *five times* the income that a typical single mother with children has to live on for an entire year (\$22,637).

### ***5. Increasing Retirement Insecurity for Women***

Women face special challenges in achieving a secure retirement. Because they tend to have lower lifetime earnings than men, they reach retirement age with fewer assets and pension benefits and lower monthly Social Security benefits; and because they tend to live longer than men, they need to stretch their assets over a longer period, are more likely to have higher medical expenses, and are more likely to live alone without the income or care of a partner. But instead of shoring up Social Security so that it will be there for all retirees – including women, who are most dependent on it – the Administration is taking steps to weaken it and other sources of retirement security.

- The Administration's tax cuts for the wealthy are draining revenues that could instead strengthen Social Security: the cost of eliminating the entire long-term shortfall in Social Security – ensuring that it can pay 100% of promised benefits not just until 2042, but for the next 75 years – is just one-third the cost of making the tax cuts permanent over the same period, as the Administration is proposing.
- The Administration's plans to privatize Social Security would hit older women especially hard, because privatization would siphon money out of the system and thus reduce benefits, replacing them with private investments that are risky and unlikely to make up the difference.
- The Administration is offering proposals that would undermine other sources of retirement security as well: eliminating a modest Savers Credit that gives an additional tax credit to low- and moderate- income individuals and families who contribute to a retirement account and weakening the protections for low- and moderate-income individuals in employer-based pension plans. Adding insult to injury, the Administration is proposing a series of new tax breaks to help the wealthy save for retirement.

### ***6. Sabotaging Policies That Protect Women's Health and Reproductive Rights***

Health insurance coverage and access to reproductive health care are critical prerequisites to improving women's health. Yet the Bush Administration is supporting measures that will exacerbate problems in both areas.

- The Administration's policies will weaken both Medicare and Medicaid, the two programs that provide the only health care services most low-income and elderly women receive. For example, the new Medicare prescription drug law

helps some lower-income seniors by providing them with a subsidized drug benefit, but makes other beneficiaries – the poorest beneficiaries, who are largely women – potentially worse off than they are under current law.

- The Administration’s efforts to change Medicaid from an entitlement program (in which everyone eligible gets enrolled), to a block grant (in which there is a finite allotment of funds for each state) will result in the denial of coverage for many of those now eligible and fewer services for those who enroll, again with the greatest adverse impact on women.
- With respect to reproductive health, the Administration supports dangerous federal laws impeding access to safe abortions; has taken multiple steps to undermine the constitutional right to choose as recognized in *Roe v. Wade*, including by imbuing embryos and fetuses with the status of a “child” and legal rights of a person; has undermined medical research (e.g., by limiting stem cell research and therapeutic cloning) and distorted scientific information (e.g., by falsely suggesting a connection between abortion and breast cancer) to serve its anti-abortion and anti-family planning agenda; has impaired access to family planning for the neediest women; tried to end the requirement that health insurance plans for federal employees include coverage of prescription contraceptives; and has delayed deciding whether women can obtain emergency contraception without a prescription.

#### ***7. Weakening Efforts to Combat Violence Against Women and Help Its Victims***

Although violence against women remains a serious national problem, the Administration has shortchanged domestic violence services funded under the Violence Against Women Act (VAWA).

- The Administration’s budget for Fiscal Year (FY) 2005 proposes an amount for support services, such as shelters for battered women and a national domestic violence hotline, that is 26% below the authorized level.
- Attorney General John Ashcroft appointed members to the National Advisory Committee on Violence Against Women who represent an organization that has vehemently attacked and disparaged VAWA.
- The Administration refuses to include protections for battered women in the marriage promotion programs that are part of its welfare proposal, despite the risk that poor women could be pressured to stay in abusive relationships.

## ***8. Failing to Support Our Women in Uniform***

Although few now doubt that women are essential to the modern military – 200,000 women make up 15% of the active military and serve alongside male soldiers in Iraq, Afghanistan and around the world – the Administration has failed to adequately support the nation's women in uniform.

- The Defense Department (DoD) has undermined the role of a nearly 55-year-old advisory committee designed to promote the recruitment and retention of women in the military by allowing its charter to lapse, then appointing all new members – at least one of whom does not support opening new opportunities to women in uniform – and limiting its authority.
- DoD has responded inadequately to revelations of sexual assaults in the military. After Congress intervened and required that an independent commission be created to review allegations of sexual assaults at the Air Force Academy, DoD was forced to revoke its appointment of a commission member who had publicly questioned the veracity of alleged victims, and the report issued by the reconstituted commission criticized the Air Force's handling of the sexual assaults and treatment of victims.
- Members of Congress have raised similar concerns over how DoD will handle reports of sexual assault against servicewomen – many of them by their fellow service members – in Iraq, Afghanistan and at other military bases.
- The Administration supports a policy that prohibits servicewomen from obtaining abortions at overseas military hospitals unless the pregnancy resulted from rape or incest or endangers the woman's life – and even then, for example if a servicewoman seeks to terminate a pregnancy caused by a rape by another servicemember, she must pay for the procedure with her own money.

## ***9. Packing the Courts with Judges Opposed to Women's Core Legal Rights***

The federal courts have the power to give life and meaning to legal principles that have wiped out many barriers to women's advancement over the last 30 years – and also the power to weaken those principles and undermine core legal rights for women. Many of the judicial nominees selected by the Bush Administration have records of hostility to those very rights, including the Constitutional rights to equal protection and privacy, and the right to be free from sexual harassment and discrimination in the workplace and at school. A few of the most extreme nominees have been blocked by opposition in the U.S. Senate, but many Bush Administration nominees with troubling, out-of-the-mainstream records on key issues for women have been confirmed to lifetime appointments on federal courts across the country, where they are in a position to roll back critical rights for women for years to come.

- One Bush Administration nominee has said that wives must “subordinate” themselves to their husbands.
- Another nominee has said that the courts may not bar racial slurs in the workplace and that she doubts whether women subjected to verbal sexual harassment can legally challenge it at all.
- Numerous Bush Administration judicial nominees have documented histories of seeking to overturn, vehemently denouncing, or actively undermining *Roe v. Wade* and the right to choose.
- Many of the Administration’s judicial nominees have shown that they are willing to substitute their own ideology for a fair reading of the law; a leading newspaper called one such nominee “one of the most unapologetically ideological nominees of either party in many years.”

#### ***10. Closing and Undermining Government Offices and Expert Advisory Bodies Dedicated to Safeguarding Women’s Interests***

A variety of government offices and advisory committees play an important role in developing and implementing federal policies that are critical to women. The Bush Administration has eliminated or weakened several of them, or attempted to do so – a pattern of action that is undoubtedly both a reflection and a cause of the low priority given to women’s interests.

- Within weeks of taking office, the Administration closed the White House Office for Women’s Initiatives and Outreach, which had monitored policy initiatives within the departments and agencies for their impact on women and served as a liaison to outside organizations concerned about policies affecting women.
- The Labor Department moved to close key offices of its Women’s Bureau, which has worked to promote opportunities for working women since 1920, backing off only after protests from women’s organizations and members of Congress.
- The Administration has also placed individuals hostile to women’s interests on expert advisory committees addressing key concerns for women. One example is the appointment of Dr. David Hager to the Food and Drug Administration’s Reproductive Health Drugs Advisory Committee; Dr. Hager is an ob-gyn who reportedly refuses to prescribe birth control to unmarried women and has suggested prayer to women suffering from premenstrual syndrome. Another example (noted above) is Attorney General Ashcroft’s appointment to the National Advisory Committee on Violence Against Women of two representatives of an organization that has vehemently attacked the Violence Against Women Act. Yet another example is the

removal from the President's Council on Bioethics of two experts who opposed a ban on therapeutic cloning, and their replacement with individuals who have opposed medical research using embryos and have spoken out against abortion.

Each of these 10 areas is discussed in more detail, with citations to authorities, in the body of this report.

### **What American Women Need: An Agenda for the Future**

This report concludes with a series of recommended actions the Administration can take to improve the lives of women and girls across the country – measures that would advance and protect women's rights and opportunities, and build on past gains for women instead of rolling them back. Briefly summarized, they include:

- Strengthening and vigorously enforcing the laws against sex discrimination in the workplace, including those that prohibit sexual harassment, discrimination in hiring and promotions, and pregnancy discrimination; working to close the pay gap; facilitating family leave and other workplace supports that women need; and expanding eligibility for overtime pay.
- Enforcing Title IX and guaranteeing equal opportunities for girls and women in school, including in vocational education and athletics; combating sexual harassment of students; funding gender equity programs; and supporting affirmative action to remedy discrimination and achieve diversity in educational institutions.
- Expanding and improving child care, Head Start, and programs for school-age youth, and focusing welfare policy on providing women in poverty with child care and other supports they need to achieve and maintain self-sufficiency.
- Adopting fair tax and budget policies that adequately fund the services women and their families need and a progressive, fair tax system that provides a more equitable society overall.
- Increasing retirement security for older women by protecting and strengthening Social Security and improving it to protect women most at risk of poverty, and adopting new pension protections for women.
- Improving the status of women's health by expanding and strengthening the Medicaid and Medicare programs, and other access to insurance coverage, as well as increasing access to abortion and family planning services and protecting a woman's constitutional right to choose, and basing policy decisions and public education efforts on sound scientific information and not an anti-choice or anti-family planning agenda.

- Combating violence against women and supporting services to help its victims.
- Supporting the nation's women in uniform by eliminating the sex discrimination that persists in the military, and in particular taking serious steps to prevent and punish harassment and violence against women in the services and service academies and providing necessary services to the victims of attacks.
- Ensuring a judicial appointments process that respects the "advise and consent" role the Constitution gives the Senate, and awards lifetime federal judicial appointments only to those who have demonstrated a commitment to the core legal rights and principles that are critical to women.
- Strengthening government offices and advisory bodies dedicated to safeguarding women's interests.

Adopting and advancing this agenda, which is described in more detail in the body of this report, will help ensure forward progress toward the goal of a nation without barriers based on gender.\*

## II. THE BUSH ADMINISTRATION RECORD

### 1. **Rolling Back Policies That Guarantee Equal Opportunity for Women at Work**

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While women have made great strides toward equal opportunity in the workplace, significant inequities and barriers to success based on gender remain an undeniable fact of life in America today. Women still earn, on average, only 77 cents for every dollar earned by men,<sup>23</sup> a gap that has persisted over time and that cannot be explained away as simply the result of different choices women make.<sup>24</sup> In fact, in some fields the pay gap is widening instead of closing.<sup>25</sup> Pregnancy discrimination complaints are on the rise,<sup>26</sup> and the United States remains one of only two industrialized countries lacking a paid maternity leave policy.<sup>27</sup> Women continue to face barriers to entering non-traditional jobs and, with a few notable exceptions, to taking top executive positions; indeed, in some areas women are losing, rather than gaining, ground.<sup>28</sup> Yet under the Bush Administration:

- ***The Equal Pay Matters Initiative has been completely eliminated.*** This effort, launched in 1999, included the allocation of additional funds to the Department of Labor (DOL), including its Women's Bureau, and the Equal Employment Opportunity Commission to improve their enforcement of the laws against pay discrimination based on race or sex, to educate employers on the importance of equal pay for equal work, and to provide women with useful information and resources. In 2002, the Bush Administration confirmed that it had ended the Initiative altogether,<sup>29</sup> and all the materials on narrowing the

wage gap were removed from the DOL's web site. In addition, the Bush Administration has not endorsed the Paycheck Fairness Act, which would strengthen the laws against sex-based pay discrimination.<sup>30</sup>

- ***The Department of Labor has refused to use critical tools at its disposal to identify violations of the equal pay laws so that they can be targeted for enforcement action.*** The DOL is charged with enforcing Executive Order 11246, a non-discrimination law that applies to federal contractors, which together employ 26 million people, nearly 22% of the entire U.S. civilian workforce.<sup>31</sup> The non-discrimination provisions of E.O. 11246 include a prohibition on pay discrimination. In 2000, after many years of preparation, DOL finalized the Equal Opportunity Survey, requiring contractors to provide data on their compensation practices. But DOL has refused to send the survey out to all contractors or use it to find and stop illegal wage discrimination, as was intended.<sup>32</sup> And although the Department's Office of Federal Contract Compliance Programs has claimed credit for "strong enforcement" of the laws,<sup>33</sup> the most recent available data show a 25% to 50% drop in the percentage of compliance reviews finding violations, compared to the percentages over the history of the federal contractor program.<sup>34</sup>
- ***The Department of Justice has weakened its enforcement of the laws against discrimination in the workplace, even abandoning pending sex discrimination cases.*** The Civil Rights Division of the Department of Justice (DOJ) brings suits to stop unlawful discrimination in public sector jobs. But the Civil Rights Division in this Administration has brought significantly fewer employment discrimination cases than in past Administrations,<sup>35</sup> and a much lower proportion of those that have been filed are "pattern or practice" cases – high-impact cases that challenge discriminatory policies affecting large numbers of people rather than isolated instances.<sup>36</sup> The Reagan, George H. W. Bush, and Clinton Administrations reportedly each brought an average of 13 employment discrimination cases per year, the vast majority of which were "pattern or practice" cases;<sup>37</sup> in contrast, the DOJ website reflects that over the past three years the current Administration has brought only 12 cases in all, only two of which are pattern or practice cases.<sup>38</sup>

Moreover, this Administration abruptly dropped two major sex discrimination cases it inherited from previous Administrations. In a case challenging the Philadelphia transportation authority's use of tests that unfairly screened out over 90% of women from transit police positions (and were more demanding than FBI or New York City police tests), DOJ suddenly pulled out on the day its appellate brief was due in court.<sup>39</sup> Similarly, in a case challenging underrepresentation of women and minorities among custodians in New York City schools, which grew out of an investigation during the first Bush Administration, DOJ reversed itself – without any advance notice to the plaintiffs – and refused to defend the parties' settlement when white, male custodians challenged it, even though the settlement itself requires DOJ to



defend it.<sup>40</sup> In addition, experienced employment discrimination attorneys have been involuntarily removed from their jobs, and at least one news report has drawn a connection between the involuntary removal of experienced attorneys from their jobs and the reduction in enforcement of the law: “the current administration has hamstrung [the employment litigation section of the Civil Rights Division] by depleting its leadership, backing out of Title VII lawsuits and settlements already filed, and insinuating politics into the hiring process.”<sup>41</sup> The resulting downturn in enforcement, this report concluded, “is an abrupt departure from past practice under both Republican and Democratic administrations.”<sup>42</sup>

The DOJ’s recent filing of a new case charging the Erie, Pennsylvania police department with sex discrimination<sup>43</sup> is a welcome development, as are reports that two additional sex discrimination cases have just been filed.<sup>44</sup> In addition, it is commendable that the Department has brought a number of human trafficking prosecutions – criminal cases against those involved in smuggling women and children into this country to perform menial work and subjecting them to sexual abuse while keeping them virtually in captivity.<sup>45</sup> These developments, however, do not reverse the overall downturn in enforcement of employment discrimination cases described above. Moreover, although recent enforcement efforts involving private sector employers by the Equal Employment Opportunity Commission, an independent agency, have been generally consistent with those of prior years,<sup>46</sup> the EEOC lacks the authority to sue state or local employers. The actions of DOJ, which has this authority, therefore leave a considerable hole in Title VII enforcement efforts.

- ***The Department of Labor has proposed modifications to its overtime regulations that would deprive millions of women of the overtime pay on which they rely to make ends meet.*** The DOL has proposed regulations that would make it easier for employers to classify their workers as “executive,” “administrative” or “professional” employees who are not entitled to the overtime protections of the Fair Labor Standards Act, regulations that would disadvantage workers and favor employers who want to avoid paying overtime.<sup>47</sup> Approximately 3.7 million women would lose overtime protections under this proposal, according to an estimate of the Economic Policy Institute.<sup>48</sup> To make matters worse, the Administration’s proposal contains tips for employers on how to avoid paying overtime in cases where it would otherwise be required – by, for example, converting workers’ annual pay to an hourly rate and cutting it, while using “overtime pay” to equal the workers’ former salaries.<sup>49</sup> Although both Houses of Congress approved legislation barring the DOL from implementing the new overtime rules, the Administration’s threatened veto forced removal of these provisions from the final version of the legislation.<sup>50</sup> As a result, final rules are expected to be issued shortly.

- ***The Department of Labor repealed a rule that allowed states to use their unemployment funds to compensate workers taking leave for the birth or adoption of a child.*** The Family and Medical Leave Act of 1993 (FMLA) requires that employers with at least 50 employees give their workers 12 weeks of unpaid leave annually to care for newborns or newly adopted children or for certain other family and medical needs.<sup>51</sup> In a positive move, the Justice Department filed a brief in an important case in the Supreme Court on the side of the plaintiffs who argued – successfully – that state employees are entitled to damages when a state agency violates the FMLA.<sup>52</sup> Many workers, however, need leave but cannot afford to go without pay – 78% in a recent survey.<sup>53</sup> In recognition of this reality, the Department of Labor in 2000 adopted a rule giving states the flexibility to use their unemployment compensation funds to provide some wage replacement when an employee takes time off to care for a newborn or newly-adopted child.<sup>54</sup> The Bush Administration repealed this rule in 2003, deciding that states were not free to use their funds in this family-friendly way.<sup>55</sup>

## **2. Backtracking on Policies That Guarantee Equal Opportunity for Girls and Women at School**

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While Title IX has enabled young women to make great strides in education over the last three decades, girls and women are still significantly disadvantaged in the classroom and on the playing field. For example, in a pattern unchanged for the last 30 years, 96% of the students in the nation's high school cosmetology programs are girls, as are 87% of those enrolled in child care training. At the same time, over 90% of the students in plumbing, welding, carpentry, and automotive technologies programs are boys.<sup>56</sup> This pervasive sex segregation results in substantial wage disparities – the *top 10%* of predominantly female child care workers, for instance, earn 41% less than the *median* wage earned by predominantly male mechanical drafters.<sup>57</sup>

There are wide disparities in the number of women and men who gain non-traditional training in higher education as well: women receive only 18% of bachelor's degrees and 16.5% of doctorate degrees in engineering,<sup>58</sup> and the number of women receiving bachelor's degrees in computer and information sciences has in fact *declined* since 1984.<sup>59</sup> And these disparities continue when women try to advance to teaching jobs within academe: a groundbreaking national study recently found that only 3% to 15% of full professors in the nation's top science and engineering schools are women, and that there are no African-American, Hispanic or Native American tenured or tenure-track women faculty in the nation's top-50 computer science departments.<sup>60</sup>

Women continue to receive fewer opportunities than men to participate in school-based sports programs and are still treated inequitably when they are allowed to play.<sup>61</sup> And, as recent allegations about the University of Colorado football team and the Air Force Academy unfortunately attest, girls and women are still subject to pervasive sexual harassment and outright sexual assault in a myriad of educational settings.<sup>62</sup>

Despite these critical problems, the Bush Administration has turned its back on women and girls in school:

- ***The Department of Education has recommended reductions in funding for, or elimination of, numerous programs important to ensure gender equity in education.*** Every year it has been in office, the Administration has tried to eliminate funding for the Women's Educational Equity Act (WEEA), which provides curricula and materials to help schools comply with Title IX, research and information on model programs to promote gender equity, and technical assistance and training programs. As of 2001, WEEA had funded over 750 programs,<sup>63</sup> including programs to expose girls to non-traditional careers; develop teaching strategies for math and science courses; and clarify school obligations with regard to sexual harassment. Although Congress has restored WEEA funding each year,<sup>64</sup> the Women's Educational Equity Resource Center, which coordinated the WEEA programs, has been eliminated.<sup>65</sup>

In its proposed budget for FY 2005, moreover, the Administration has eliminated the \$18 million National Youth Sports Program (NYSP), which provides a comprehensive sports program for more than 70,000 low-income youth. NYSP summer programs conducted at more than 200 colleges in 2003 provided guidance to participants on healthy lifestyles and the dangers of substance abuse, career planning and education, and math and science classes. And year-round Girls' Sports Clinics offer opportunities to low-income girls for sports participation and introductions to coaches and athletes who can serve as role models.<sup>66</sup>

The Administration's increase in funding for schools under Title I of the No Child Left Behind Act, moreover, falls far short of levels authorized for these schools, leaving behind 2.4 million children who would be fully served if the program were funded at the authorized level<sup>67</sup> and imposing unprecedented and unfunded mandates on state education agencies. The FY 2005 budget also recommends a 24% cut from FY 2004 levels for vocational education programs.<sup>68</sup> By one estimate, in fact, the Administration has proposed \$1 billion in cuts to job training and vocational programs since it came into office.<sup>69</sup>

- ***The Department of Education has refused to investigate the pervasive exclusion of women from traditionally male educational programs, ranging from vocational education at the high school level to enrollment and employment in math and science programs at major research universities.*** Although the Office for Civil Rights (OCR) at the Department of Education is required to investigate whenever a "report, complaint or any other information indicates a possible failure to comply" with Title IX,<sup>70</sup> OCR has explicitly refused requests that it examine the alarming under-representation of girls and women in non-traditional fields. In response to twelve Petitions for

Compliance Review filed by the National Women’s Law Center in June 2002, identifying and requesting investigation of the stark patterns of sex segregation in high school vocational programs, OCR stated that it would not “undertake such compliance activities based upon statistical data alone,” no matter how substantial the disparities.<sup>71</sup> In fact, the then-head of OCR, Gerald Reynolds, stated in an interview that while statistics *could* indicate discrimination, even stark disparities could show merely “that individuals, freedom-loving individuals, are expressing their interest in a particular area . . . Interest and ability just aren’t distributed uniformly across a particular sex or the sexes.”<sup>72</sup> Even this view, however, does not explain the refusal even to investigate to see whether there is a problem.

OCR similarly refused even to investigate when Senator Ron Wyden (D-OR), along with a group of more than 200 concerned scientists, mathematicians and engineers, requested that OCR investigate gender disparities in “STEM” (science, technology, engineering and math) disciplines. In February 2003, OCR told Senator Wyden that “statistical disparities, standing alone, do not constitute discrimination,” refused even to investigate to determine whether these stark disparities are the result of discrimination, and simply sent to the Senator a manual prepared by OCR staff in the 1980s on “What Schools Can Do To Improve Math and Science Achievement by Minority and Female Students.”<sup>73</sup> While efforts to promote voluntary activities by individuals and schools – such as those undertaken by the Department of Labor under the 21<sup>st</sup> Century Working Women’s Initiative to attempt to identify female mentors in science, engineering, and technology<sup>74</sup> – are helpful, they are no substitute for enforcing legal requirements to address systemic barriers where they exist.

- ***The Department of Education deep-sixed its current guidance on sexual harassment.*** In January 2001, the Office for Civil Rights issued a *Revised Sexual Harassment Guidance*,<sup>75</sup> which set forth critical principles governing – and OCR’s core enforcement approach to – claims charging sexual harassment of students in violation of Title IX. This Guidance is especially important because it followed and explained the impact of two significant Supreme Court cases that altered the previously applicable standards for school liability for monetary damages for such harassment.<sup>76</sup> Importantly, the 2001 Guidance made clear that the Court’s restrictive standards governing an individual’s claim for damages for sexual harassment do not apply to OCR investigations of harassment complaints or to individual requests for injunctive relief<sup>77</sup> – guidance that therefore ensures that schools take effective action to prevent and cure harassment even when monetary damages are not at issue.

Without public notice or explanation, OCR “archived” the 2001 Guidance, making it unavailable to victims of harassment, parents, schools, and the public. OCR has stated that printed copies of the Guidance are “not available for distribution,”<sup>78</sup> and has removed all mention of the Guidance both from

the Department of Education's list of Title IX publications and documents and from its list of "Sexual Harassment Resources."<sup>79</sup> These actions have deprived schools and individuals of valuable guidance about the scope of Title IX rights and responsibilities, and could be used by schools to attempt to avoid liability even for injunctive relief.

- ***The Department of Education has proposed to remove existing safeguards ensuring that sex-segregated classes or schools do not perpetuate stereotypes and second-class status for girls.*** On March 9, 2004, the Department issued proposed regulations that would decrease the safeguards that ensure equal opportunity when sex-segregated programs are provided.<sup>80</sup> Under current law, there are safeguards to ensure that single-sex programming appropriately serves a suitably important governmental interest, does not perpetuate and reaffirm stereotypes that have for decades limited educational opportunities for women and girls, and assures the equality of programs for the excluded gender. The proposed regulations, on the other hand, would allow sex-segregated programs based on stereotypes (e.g., that girls are not good at science and need remedial classes in the subject); parental bias (e.g., that girls will hold boys back in advanced technology classes); or arguments that shirk a school's civil rights responsibilities (e.g., that rather than preventing sexual harassment in coed classrooms, schools may permissibly protect girls from harassment by offering them an all-female environment). The proposed regulations further fail to ensure that those excluded from a sex-segregated program would enjoy equal opportunity in the programs to which they are consigned.
- ***The Department of Education has undermined athletics opportunities for women and girls.*** The Administration has engaged in continuous efforts – both publicly and behind the scenes – to weaken Title IX protections for female athletes. The Department of Education created a Commission to reevaluate long-standing Title IX athletics policies,<sup>81</sup> and the Commission proceeded to make numerous recommendations for damaging changes to the policies. By one estimate, just two of its recommendations could have resulted in annual losses of 50,000 athletic participation opportunities and \$122 million in scholarships for women collegiate athletes, and 305,000 opportunities for female high school athletes.<sup>82</sup> Although the Department ultimately backed down from the Commission's recommendations,<sup>83</sup> it did so only under intense public pressure. And while the Department focused on the Commission, it seriously neglected its obligations to enforce Title IX and other anti-discrimination laws. While spending approximately \$700,000 of taxpayer money on Commission operations,<sup>84</sup> OCR in FY 2002 initiated only 11 compliance reviews under any of the statutes it enforces – the lowest number it had undertaken since 1989.<sup>85</sup> In addition, despite promises by the Department that it would continue to enforce the Title IX athletics policies while the Commission's review was under way, schools reported that OCR

failed to fully investigate athletics complaints that were filed with it during the Commission proceedings.<sup>86</sup>

There is, moreover, no evidence that the Department of Education has undertaken a promised education campaign about how the Title IX athletics policies work.<sup>87</sup> In fact, although OCR recently agreed to speak at a National Collegiate Athletic Association (NCAA) seminar on Title IX, it had previously declined requests to speak on Title IX at conferences sponsored in 2004 by both the NCAA and the National Association of Secondary School Principals – both audiences that are critical in any serious effort to promote compliance with Title IX standards.

Finally, while the Administration has defended the Title IX athletics policies against a legal challenge filed by a coalition of wrestlers,<sup>88</sup> its defense rests solely on narrow procedural arguments. The Department of Justice's briefs in the case conspicuously fail to make the arguments that the athletics policies are fair and flexible and have been upheld by every federal appellate court that has addressed them. The briefs instead rely exclusively on the argument that challenges to the policies should be brought against schools, rather than against the Department of Education.<sup>89</sup> They thus mount what is, at best, a tepid defense.

- ***The Administration has taken positions that undermine other civil rights protections.*** While the Department of Justice has intervened on the side of plaintiffs in some Title IX litigation,<sup>90</sup> the Administration has opposed civil rights protections for students in a number of high-profile areas. For example, the Administration urged the Supreme Court to strike down the University of Michigan's affirmative action programs, arguing that the University could not permissibly consider race as a factor in admissions decisions to promote academic diversity and enrichment<sup>91</sup> – a position that, had it been adopted by the Court, would likely have led universities to rescind both race and gender-based affirmative action programs. The Court upheld the University's law school program, but the Administration has failed to issue any guidance to schools on how to apply that Court holding or how to permissibly take race and gender into account in admissions decisions. In fact, the Department of Education has focused its efforts on urging schools to pursue race-*neutral* alternatives to promote diversity.<sup>92</sup>

At the same time, the office of Peter Kirsanow, a Bush Administration appointee to the U.S. Commission on Civil Rights, has sent an unauthorized survey to 40 selective colleges, on Commission letterhead, seeking extensive information on the affirmative action measures used by those institutions.<sup>93</sup> The likely impact of this unauthorized survey – coming from an aide to a Commissioner who believes that the Supreme Court's University of Michigan decision is “a rank perversion of the Fourteenth Amendment”<sup>94</sup> – will be to

chill university efforts to use affirmative action programs, even where those programs are fully compliant with the law.

Moreover, the voucher program proposed by the Administration and adopted by Congress for schools in the District of Columbia<sup>95</sup> – a program that Secretary Paige lauds as “extending civil rights and social justice”<sup>96</sup> – also tramples on basic protections against discrimination, including sex discrimination. Although the legislative language prohibits discrimination based on sex and other grounds, it specifically attempts to broaden the circumstances – carefully delineated in Title IX – in which religious institutions may permissibly discriminate on the basis of sex, and to authorize single-sex schools, classes, or activities without constraint, “notwithstanding” the restrictions that Title IX imposes to protect against unwarranted sex discrimination in such programs.<sup>97</sup> The voucher provision could, therefore, lead to the proliferation of programs that assert unchecked authority to, for example, segregate girls into separate classes.

### **3. Shortchanging Child Care and Other Supports Women Need to Maintain Self-Sufficiency**

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Parents across the country depend on child care so they can work. For many families, it is not viable for one parent to stay home with the children: single parents must work to provide for their families, while two-parent families often need two incomes just to make ends meet. Without affordable child care, these parents may be unable to find work or keep their job, or may be forced to leave their children home alone, with older siblings who are too young to care for them, or in other unsafe settings. For low-income women, safe, stable, and affordable child care can make the difference between climbing out of poverty and falling deeper into it. At the same time, good quality child care and early education help children enter school ready to succeed, and safe, constructive activities for school-age children during their out-of-school time help them perform in school and avoid risky behavior.

Instead of supporting and expanding important federal programs aimed at addressing these needs the Bush Administration has underfunded and undermined them, and its welfare proposals would make matters worse for families in poverty.

- ***The Bush Administration’s policies will cut the number of children served under the Child Care and Development Block Grant (CCDBG), the largest source of federal funds for child care.*** CCDBG provides subsidies for child care for low- and moderate-income families and funds to improve child care quality. But because CCDBG is severely underfunded, only one out of seven children eligible for federal child care assistance receives help.<sup>98</sup> The first Bush Administration budget would have resulted in a \$200 million cut in child care. This budget set aside \$400 million of CCDBG funding for after-school vouchers, but instead of increasing CCDBG funding by \$400 million to cover the cost of this new program, the Administration proposed a funding increase

of just \$200 million.<sup>99</sup> The net effect: states would have had \$200 million less to spend on child care assistance for young children. Congress rejected this proposal and included a modest increase for CCDBG. Since 2002, CCDBG funding has been frozen or declining.<sup>100</sup> The Administration's FY 2005 budget would not allow CCDBG to keep pace with inflation, and it would actually reduce spending for child care in FY 2006. By the Administration's own estimates, its budget would result in 300,000 children losing child care assistance by 2009.<sup>101</sup> And this does not take into account the fact that surplus welfare funds, which states have relied on to help support their child care programs, are steadily decreasing. All told, it is estimated that approximately 500,000 fewer children will benefit from child care assistance in 2009 compared to 2002 under the Administration's proposal.<sup>102</sup>

- ***The Bush Administration's proposed modifications to the welfare law would impose harsh new work requirements on families in poverty and fail to provide them with the supports they need to become self-sufficient.*** Many women have left welfare for work since the 1996 welfare law was passed, but most can find only unstable, low-wage jobs that do not enable them to lift their families out of poverty.<sup>103</sup> The Administration's welfare reauthorization proposal would be a major step backward. Low-income mothers receiving Temporary Assistance to Needy Families (TANF) with children over age one would have to work more hours per week (40 hours instead of the 20 hours now required for families with children under six and 30 hours for families with older children), and the percentage of welfare recipients that would have to meet these requirements would also increase. Yet the Administration, at the same time, strongly opposes including in the welfare reauthorization bill increased funding for child care subsidies to enable these women to work.<sup>104</sup> The Administration's welfare proposal also would limit state strategies to help women obtain better jobs by putting greater restrictions on counting education or training toward their work requirements. The Administration's welfare proposal includes some modest child support reforms, but it would give far less additional child support to poor families than measures which have received strong bipartisan support.
- ***The Administration's policies would radically alter and undermine the successful Head Start program for low-income children.*** Head Start is unique in its comprehensive approach to supporting children and families, offering early education, health care, social services, and nutrition services, while emphasizing parent involvement and support and building on the strengths of local communities. Despite a long track record of helping children succeed, only three out of five eligible preschool-age children and 3% of eligible infants and toddlers can participate.<sup>105</sup> But the Bush Administration's budget proposals have barely covered the program's required cost-of-living increase. This not only means that additional children are not helped, but also that there are no new resources to support efforts to improve the quality of Head Start.<sup>106</sup> Moreover, in 2003, the Administration



proposed an untested, radical plan to give the states more leeway to shape Head Start programs and eliminate core program standards that ensure children receive comprehensive services, gambling the future of nearly one million children.<sup>107</sup> States that are struggling with unprecedented budget deficits would also be allowed to replace current federal dollars invested in early childhood with Head Start funds. Thus far, Congress has resisted adopting these proposals in full.<sup>108</sup>

- ***The Administration has proposed cuts to the major federal program supporting after-school activities – the 21<sup>st</sup> Century Community Learning Centers Program.*** Research has repeatedly demonstrated that constructive after-school activities can help children’s development, safety, and school performance as well as reduce risk-taking behaviors such as the use of drugs, alcohol, and tobacco. Yet 6.4 million school-age children remain home alone and unsupervised on a regular basis,<sup>109</sup> which places them at greater risk for a range of problems. Low-income children, who have the greatest need for after-school programs, are less likely to have access to constructive activities during their out-of-school time. The Bush Administration, however, has not only failed to increase funding for the 21<sup>st</sup> Century Community Learning Centers program, which funds community-based organizations and schools to provide after-school activities for children and youth, but also, in its proposed FY 2004 budget, included a \$400 million – or 40% – cut in this program. This would have eliminated needed after-school services for 570,000 children.<sup>110</sup> Congress rejected this proposal and added \$5 million to the 21<sup>st</sup> Century Community Learning Centers program in the FY 2004 Appropriations bill. For FY 2005, the Administration has proposed freezing funding for this program, keeping appropriations at just half of the \$2 billion level authorized by Congress. This would leave behind 1.4 million children who need after-school services.<sup>111</sup>

#### **4. Starving Programs Women Need To Pay for Tax Cuts for the Wealthy**

Tax policy is a critical women’s issue for two reasons. First, taxes provide the revenues needed to fund the services women and their families need, including education, child care, enforcement of civil rights laws, health care and Social Security. Second, a fair and progressive tax system, based on ability to pay, can promote a more equitable society overall and directly – through tax assistance – help families struggling to make ends meet.

The Bush Administration’s tax policy consists of nonstop tax cuts. The Administration pushed through a massive tax cut in 2001, when budget surpluses were projected – and pushed again for large tax cuts in 2002 and 2003, even though projected surpluses had turned to deficits for many years into the future, the nation faced the rising costs of war and its aftermath, and urgent needs to improve education, health care, child care and other services remained unaddressed. This year, the Administration is calling for even more tax cuts, including making nearly all of the 2001 and 2003 tax cuts

permanent. To pay for these tax cuts, which primarily benefit the wealthiest Americans, the Administration is proposing deeper and deeper cuts in services that women and their families depend on, and changes to the rules for setting the federal budget that would severely limit spending for domestic programs for years to come, while doing nothing to slow the tax-cutting that is generating record federal deficits.

For women, these tax cuts represent a double whammy. Low- and moderate-income women and their families disproportionately rely on the services that are being starved or slashed as the tax cuts promoted by the Administration drain the federal revenues needed to sustain them. At the same time, low- and moderate-income women receive little if any benefit from the tax cuts, which are overwhelmingly skewed to the wealthiest Americans.

These are not unintended consequences of the tax cuts, but reflect the goals of some on the far right who seek to force drastic cuts in popular public programs by starving the government of the revenues needed to support them. Leading tax cut promoter Grover Norquist, the President of Americans for Tax Reform, has explained his goal: “to cut government in half in twenty-five years, to get it down to the size where we can drown it in the bathtub.”<sup>112</sup> House Majority Leader Tom DeLay recently declared, “We should not be spending more than 15% of the GDP [gross domestic product, the overall size of the U.S. economy], whatever that is.”<sup>113</sup> But the last time federal spending was at or below 15% of the economy was 1951.<sup>114</sup> a time before Medicare and Medicaid, the Department of Education, Head Start, the Child Care and Development Block grant, the Environmental Protection Agency, even the interstate highway system.

The second goal of some on the far right is to eliminate the progressive tax system, shifting the tax burden from wealth and the wealthy to the middle class – and even the poor. The *Wall Street Journal* railed against the “lucky duckies” who make up the “non-taxpaying class” – referring not to multimillionaires or corporations who utilize legal or illegal tax shelters to escape taxation, but to people who make \$12,000 a year.<sup>115</sup> The *Journal* cautioned against providing additional tax relief to this group: “Workers who pay little or no taxes can hardly be expected to care about tax relief for everybody else.”

The Administration’s tax and budget policies are promoting this radical agenda.

- ***The Administration is proposing to cut vital services for women and their families to pay for its tax cuts.*** In the same budget that proposes over \$191 billion in new tax cuts over the next five years, and \$1.2 trillion over the next ten years,<sup>116</sup> primarily for the benefit of the wealthiest Americans, the Administration proposes deep cuts in funding for domestic discretionary programs other than homeland security over the next five years. For example:
  - **Housing** for low- and moderate-income families faces steep cuts. Next year, over 250,000 families – most of whom are headed by women raising children, or by elderly or disabled householders – could lose housing

vouchers. Within five years, the cuts will equal \$6 billion – equivalent to vouchers for 800,000 families.<sup>117</sup>

- Funding cuts in the **Supplemental Nutrition Program for Women, Infants and Children (WIC)** would mean 450,000 fewer low-income women and young children could be served by the program by 2009.<sup>118</sup>
- The value of **Pell grants**, which help students from low- and moderate-income families pay for college, would continue to decline relative to the cost of higher education. Pell grants are especially important for women's access to college; women represent 63.5% of Pell grant recipients, but only 56.4% of all undergraduates.<sup>119</sup> But, while the costs of attending public 4-year and 2-year colleges rose 14% in just the past year,<sup>120</sup> the Administration's budget would freeze the maximum Pell grant at its 2003 level.<sup>121</sup>
- **Federal grants to state and local governments** for all programs other than Medicaid – grants that fund a wide range of services including education, social services for the elderly and children, transportation and law enforcement – would decline in value by \$6 billion next year, after adjusting for inflation and population growth.<sup>122</sup> In addition, the federal tax cuts already enacted and those proposed by the Administration would further reduce revenues in many states, because their tax codes are linked to the federal tax code.<sup>123</sup> Because most states – unlike the federal government – cannot run deficits, the squeeze these federal policies put on state governments means deeper cuts in state services, higher state and local taxes, or both, for many women and their families. For example, since late 2001, 34 states cut eligibility for public health insurance; 23 states cut eligibility for child care subsidies or otherwise limited access to child care; 34 states decreased spending for K-12 education in real per-pupil terms, bringing shorter school days, larger classes, new fees for textbooks and other cuts in services; and states across the country cut higher education funding, forcing tuition increases and reduced course offerings.<sup>124</sup> A majority of states (29) have raised taxes, though by less than they have cut services – and most of the recent state and local tax changes have increased the tax burden on low- and middle-income families more than higher-income families.<sup>125</sup>
- Cuts in federal funding for child care and early education, career education, services for domestic violence survivors, and possible cuts in Social Security benefits, are discussed in separate sections of this report.

These draconian cuts are profoundly unfair and unnecessary. *The savings over the next five years from all of the domestic discretionary cuts combined would be substantially less than the cost of the 2001 and 2003 tax cuts just for the one percent of households with the highest incomes over the same period.*<sup>126</sup>

- ***Low- and moderate-income women and their families, who are paying the price of these tax cut policies, receive few of their benefits.***
  - One-quarter of all households receive nothing from either the 2001 or 2003 tax cut.<sup>127</sup> People with incomes below the poverty line – who are disproportionately single mothers, women of color, and elderly women living alone – are most likely to receive nothing from the tax cut. More than one-quarter (27%) of families headed by a single parent – the vast majority of whom are headed by a woman – get nothing from the 2001 or 2003 tax cuts.<sup>128</sup>
  - Over half of all households (52.3%) received a federal income tax cut of \$500 or less in 2003 from the 2001 and 2003 tax cuts.<sup>129</sup> At the same time, as described above, federal tax cut policies are contributing to cuts in valuable federal, state, and local services and increases in state and local taxes and fees – which may add up to a net loss for most families.
  - The Administration excluded millions of low-income working families from the increase in the child tax credit in 2003. To provide some help to the families that need it most, the Senate included in its tax-cut bill a provision that would have extended the increase in the child tax credit to these families in 2003 – a provision that was not part of the Administration’s original 2003 tax cut proposal or the House-passed bill. But the provision was dropped in the House-Senate conference to make room for even larger tax breaks for the wealthy. As a result, over seven million families with incomes between \$10,500 and \$26,500 were denied the 2003 increase in the child tax credit in the bill signed by President Bush.<sup>130</sup> Two-thirds of the parents hurt by this exclusion are women, disproportionately single mothers, women of color, and married women who are out of the paid labor force.<sup>131</sup> After advocates called attention to this injustice, the Senate quickly passed a separate bill increasing the child tax credit for these families, fully paid for by increasing other revenues. However, the Administration did virtually nothing to get this bill passed in 2003, nor did it include the proposal in its FY 2005 budget.
- ***The benefits of the tax cuts overwhelmingly go to the ultra-wealthy.***
  - The average tax cut for millionaires from the 2001 and 2003 tax cuts was about \$113,000 in 2003.<sup>132</sup> This is *five times* the income that a typical single mother with children has to live on for an entire year (the median annual income of single mother with children is \$22,637).<sup>133</sup>
  - If the 2001 and 2003 tax cuts are made permanent, as the Administration is urging, taxpayers with incomes above \$1 million would receive an

average annual tax cut of \$144,000, not including the benefits of cuts in the estate tax. This is higher than the income of about 94% of tax filers.<sup>134</sup>

- ***The Administration is proposing unprecedented, one-sided budget rules that would lock in these distorted priorities for years to come.*** The new rules proposed by the Administration, instead of promoting a responsible budget process, would pervert it. Past budget rules constrained both new tax cuts and new spending to bring down high deficits in a balanced way. But under the Administration's proposed rules changes, new tax cuts would never have to be paid for; indeed, to disguise how irresponsible these rules are, the proposed rule would require that the over \$1 trillion cost of extending the 2001 and 2003 tax cuts when they expire be reported as *zero*. On the other hand, any increases in spending for the programs that benefit women and their families – for example, to expand health care coverage for uninsured women, enroll more children in Head Start, or improve Medicare – would have to be paid for with cuts in other spending programs. They could not be paid for by closing corporate tax loopholes or trimming tax cuts for millionaires. Finally, new, extremely low caps would be applied to discretionary spending – for programs such as Head Start, afterschool, and housing assistance. Because the caps would apply to all discretionary spending, programs that address the needs of women and their families would have to compete for scarce dollars with homeland security and defense, as well as other domestic programs.<sup>135</sup>

## **5. Increasing Retirement Insecurity for Women**

Women face special challenges in achieving a secure retirement. Lower lifetime earnings than men – the result of lower wages and more time out of the labor force for unpaid caregiving – mean women reach retirement age with fewer assets and pension benefits and lower monthly Social Security benefits than men.<sup>136</sup> And women's longer life expectancy means that they need to stretch their more limited assets over a longer period of time, are more likely than older men to experience disability and to have higher medical expenses, and are more likely to be living alone in their later years, without the income or caregiving support of a partner. Half of all nonmarried women 65 and older get 80% or more of their income from Social Security, compared to only 39% of comparable men.<sup>137</sup> Without Social Security, more than half of all women 65 and older would be poor.<sup>138</sup> But even with Social Security, older women are at greater economic risk than older men; nearly seven out of ten poor elders are women, and the poverty rate for older women is about 60% higher than that of older men (12.4% v. 7.7%).<sup>139</sup>

Instead of working to increase women's economic security in retirement, the Administration is pursuing an agenda that would undermine all three of its components: Social Security, savings, and pensions. The Administration's policies pose a double threat to Social Security. Its tax cut policies – both in effect and proposed – are squandering the revenues needed to strengthen Social Security for the long term, and privatization of Social Security, which it has consistently promoted, would mean deep cuts in Social Security benefits. As for savings, the Administration would allow the

expiration of a modest tax credit aimed at helping low- and moderate-income Americans (disproportionately women) save for retirement, while proposing that wealthy Americans be able to shelter even more investment income from taxation. Finally, the Administration would eliminate important pension protections, reducing women's access to pension coverage.

- ***The Administration is draining revenues that could strengthen Social Security to finance tax cuts for the wealthy.*** Social Security faces a long-term financial shortfall. Americans are living longer, the large baby boom generation is nearing retirement, and the ratio of workers to retirees is shrinking. If no changes are made to current law, Social Security will have sufficient resources to pay 100% of promised benefits until 2042; at that point, the reserves in the Trust Fund will be exhausted and payroll taxes will cover about 73% of promised benefits.<sup>140</sup> But instead of getting the nation's fiscal house in order to meet this financial challenge, the Administration's reckless tax cut policies, which overwhelmingly benefit the wealthiest Americans (see Section 4), are draining the revenues that could be used to secure and improve the Social Security benefits on which women especially depend.

Federal Reserve Chairman Greenspan recently emphasized the tradeoffs between tax cuts for the wealthy and making good on Social Security's promises. He testified to the House Budget Committee in February 2004 that the nation cannot afford both to make the tax cuts permanent and to pay promised Social Security benefits; his preference was to cut Social Security benefits, except for those in or near retirement, in order to keep the tax cuts.<sup>141</sup> The Administration responded that it would not cut benefits for those in or near retirement, but it said nothing about benefits for those just a little further from retirement – and nothing about how it would pay for the tax cuts it advocates while ensuring the future of Social Security.<sup>142</sup>

To put the tradeoffs between strengthening Social Security and tax cuts into perspective: the cost of eliminating the entire long-term shortfall in Social Security – ensuring that it can pay 100% of promised benefits not just until 2042, but for the next 75 years – is just one-third the cost of making the tax cuts permanent over the same period.<sup>143</sup>

- ***The Administration is proposing to undermine Social Security – and Social Security benefits – with privatization.*** The Administration's answer to Social Security's long-term financial challenge is to privatize it; that is, to allow the diversion of Social Security payroll taxes from the Social Security Trust Fund into private accounts.<sup>144</sup> But this approach would make Social Security's financial situation worse, not better. Most of the money paid into Social Security goes to pay current beneficiaries; extra revenues are invested in U.S. Treasury Bonds and held by the Social Security Trust Fund to pay future benefits. Thus, if younger workers are allowed to put part of their Social

Security taxes into private accounts rather than Social Security, as the Administration proposes, the Social Security system will have *less* money to pay promised benefits to current and future retirees.

In addition, private accounts cannot duplicate the insurance protections that Social Security offers: secure, predictable benefits that do not fluctuate with the stock market, last for a lifetime, and keep pace with inflation; a progressive benefit formula that provides a higher percentage of pre-retirement income to workers with lower lifetime earnings; and benefits for children, spouses, surviving spouses (and ex-spouses after a 10-year marriage), when workers are disabled, retired, or deceased. These features are especially important to women, because of their lower earnings, longer life spans, and family responsibilities. With private accounts, what an individual has to live on in retirement depends on how much the individual can put into the account and how well the individual's investments do.<sup>145</sup>

Although the Administration has not yet presented a specific legislative proposal for privatizing Social Security, the plan it appears to favor<sup>146</sup> would require deep cuts in Social Security benefits for *all* future retirees, whether they participated in a private account or not, according to an analysis of the plan by the Social Security Chief Actuary.<sup>147</sup> For example: for a woman retiring in 2075, after working for a lifetime at the average wage, Social Security benefits would be *46% below* current levels – even if she chose not to participate in a private account. If she chose to participate in a private account, her benefits would be cut by an *additional 23%*. And adding the income from her private account to the reduced benefit would likely still leave her with retirement income below current benefit levels. If she earned an average return on a medium-risk portfolio (50% equities), the analysis found that her *combined income would be 21% below current benefit levels*. If her investments did badly, or she retired during a market downturn, her income throughout retirement would be even less.<sup>148</sup>

- ***The Administration's proposals to increase savings would help the wealthy shelter more income while eliminating a modest tax credit that helps low- and moderate-income Americans.*** Just over half of all Americans have any savings in a retirement account, such as a 401(k) or Individual Retirement Account (IRA).<sup>149</sup> But only 14% of families with incomes below \$15,000 – who are disproportionately female-headed families<sup>150</sup> – have any retirement savings.<sup>151</sup> And among people who have retirement accounts, women's average account balances are less than half of men's (\$25,020 v. \$57,239 in 1998).<sup>152</sup>

Women and other low- and moderate-income Americans could use help saving for retirement. But the savings proposals the Administration has included in its budget for FY 2005 would make things worse. Incredibly, the Administration would allow the expiration of the modest Savers Credit that

gives an additional tax credit to low- and moderate-income individuals and families<sup>153</sup> who contribute to a retirement account.<sup>154</sup> At the same time, it is proposing new tax benefits to help the wealthy save for retirement: replacing existing IRAs with “Retirement Savings Accounts” and increasing the maximum contribution level for IRAs – a move that would help only the 5% of Americans who currently contribute the maximum; creating new tax-favored “lifetime savings accounts” allowing those with income to spare to shelter even more from taxation; and removing income restrictions on contributions or conversions to these tax-favored accounts.<sup>155</sup>

- ***The Administration proposes to eliminate protections for women in the employer pension system.*** Just over half the women in the labor force participate in an employer-sponsored pension plan (53% of female employees v. 60% of male employees).<sup>156</sup> But the Administration’s proposals concerning employer-based retirement plans would reduce women’s access to pension coverage.

Current law provides generous tax benefits for employer-sponsored retirement plans. But to qualify for these tax benefits, employers must comply with rules that ensure that at least some of the company’s retirement contributions are made on behalf of low- and moderate-income workers – who are disproportionately women – not just on behalf of owners and top executives. These “non-discrimination rules” have had some success in expanding pension coverage for lower-wage workers.<sup>157</sup> Unfortunately, the Administration’s proposal for replacing various types of employment-based retirement plans with “Employer Retirement Savings Accounts” would, in the name of simplification, change the non-discrimination rules<sup>158</sup> and weaken protections for lower-income workers.<sup>159</sup>

In addition, the combined effect of the Administration’s new retirement savings tax breaks is likely to reduce the number of employers that offer pension coverage. Because these proposals would enable owners and top executives to shelter tens of thousands of additional dollars from taxation without offering a pension plan to their employees, fewer businesses may offer pension coverage.<sup>160</sup>

## **6. Sabotaging Policies That Protect Women’s Health and Reproductive Rights**

The status of women’s health in America is in serious need of improvement, and in many respects falls far short of the nation’s goals set by the Department of Health and Human Services itself.<sup>161</sup> In particular, the nation is far from reaching the goal of providing health insurance for all women; the most recent statistics indicate that almost 18% of women aged 18 to 64 in the U.S. (almost 16 million women) are uninsured.<sup>162</sup> The lack of insurance is directly correlated to poor health outcomes, as uninsured women are likely to have difficulty obtaining health care services they need.<sup>163</sup> For example, in a study of nearly 4,700 breast cancer patients, uninsured women had a 49% greater chance



of dying following diagnosis of breast cancer than did privately insured women.<sup>164</sup> Too many women continue to die from heart disease, lung disease, strokes and AIDS.<sup>165</sup> AIDS, in particular, disproportionately affects women of color: while African American and Hispanic women represent only about one-fourth of all U.S. women, they represent an estimated three-fourths of AIDS cases in women reported to date.<sup>166</sup>

A critical component of women's health and well-being is reproductive health, yet in this area, too, the United States falls short. Over 20 countries have lower maternal mortality levels than the United States.<sup>167</sup> Over 16% of women do not get prenatal care in the first trimester of pregnancy, care that is critical to ensuring a healthy mother and healthy baby.<sup>168</sup> Currently, half of all pregnancies in the United States are unintended,<sup>169</sup> and yet millions of women in need of subsidized family planning services do not have access to them.<sup>170</sup> The number of abortion providers across the country has declined by 37% since 1982.<sup>171</sup> Nationwide, 87% of U.S. counties have no abortion provider, and 34% of women reside in these counties.<sup>172</sup> The absence of health care providers trained and available to provide abortion services can endanger women's health and their lives.

Instead of advancing policies that will effectively address these problems, the Bush Administration is supporting and implementing measures that will exacerbate them. On the health insurance front, Medicaid and Medicare are critical sources of health insurance for many women, and in particular low-income women.<sup>173</sup> Yet the Administration has proposed policies that will weaken both of these public programs and result in women losing, rather than gaining, health insurance coverage and care. With respect to reproductive health care, the Administration has demonstrated hostility to these services on many fronts, undermining the constitutional right to choose and impeding access to abortions and family planning services that are vital to women's health and well-being.

**a. The Administration is Restructuring Medicaid and Medicare in Ways That Are Harmful to Women, and Its Approach to Covering the Uninsured Will Not Help the Women It Is Intended to Reach**

- ***The Medicare prescription drug law enacted by Congress last year, which was heavily influenced by the Administration, disadvantages poorer beneficiaries, the majority of whom are women.*** Medicare is the federal program that provides health coverage for seniors. In December 2003, Congress passed, with the Administration's strong support, a law that changes Medicare in numerous ways, including by offering a modest drug benefit to Medicare beneficiaries who choose to pay premiums to purchase it.<sup>174</sup> All Medicare beneficiaries will be able to purchase a modest benefit covering a limited list of drugs, although significant cost-sharing is required. A small portion of beneficiaries, about three million, will get a subsidy to help pay for this benefit. However, more than six million people – the poorest beneficiaries – who are eligible for both Medicare (including the subsidized drug coverage) and Medicaid (the joint federal-state program that provides health coverage for some groups of low-income people) will potentially be

worse off than they are with Medicaid coverage only.<sup>175</sup> This is because under Medicaid, beneficiaries receive coverage for the whole range of drugs they need, while under the new Medicare law, they only have Medicare drug coverage and will receive coverage for only a limited range of drugs. This may force these low-income beneficiaries to go without necessary medications. It is women who will be most affected by this provision, since women make up the majority of the elderly poor.<sup>176</sup>

Other significant changes to the Medicare program under the new law are also likely to detrimentally affect lower-income women. For example, the law specifically prohibits the government from negotiating the price of drugs on behalf of all Medicare beneficiaries. This prohibition will mean that the government cannot use its purchasing power to purchase drugs in bulk on behalf of all beneficiaries. Drug companies will thus have an increased ability to control drug prices for the drugs used for Medicare beneficiaries. This provision protects drug company profits and will, undoubtedly, lead to higher drug costs for everyone.<sup>177</sup>

The new law also provides significant new funding to HMOs, while the traditional Medicare program, allowing beneficiaries to see any provider they choose, does not receive this new funding. Older beneficiaries, usually women, rely on the traditional program for their care. Younger and healthier people who are attracted to better funded HMO's will leave the traditional program. Older people, who are usually sicker, are likely to remain in the traditional program, where premiums are likely to dramatically increase without younger, healthier beneficiaries to balance out the costs of older beneficiaries.<sup>178</sup>

- ***The Administration's efforts to "restructure" Medicaid will result in more uninsured women.*** Medicaid provides a comprehensive benefit package for the lowest-income women, including comprehensive family planning services in every state. In fact, Medicaid provides more funds for family planning than any other federal program, and Medicaid covers almost 40% of births nationwide.<sup>179</sup> The Administration's stated goal is to change Medicaid from an entitlement program, in which everyone who is eligible gets enrolled, to a block grant, in which there is a finite allotment of funds to each state.<sup>180</sup> Because funds will be limited under a block grant approach, some people will be denied coverage even though they are eligible, and fewer services will be covered for those who are enrolled.

While this restructuring has not yet been accomplished through legislative changes, the Administration is pursuing administrative processes to achieve its goal. The Administration claims it is committed to devoting more resources to improve federal oversight of Medicaid to promote "fiscal integrity."<sup>181</sup> In actuality, the Department of Health and Human Services (HHS) has been holding up federal matching funds from states whose Medicaid expenditures it

questions, apparently seeking agreement from the states to block-grant the state programs. In a recent settlement over disputed claims for federal matching funds, New Hampshire announced that HHS had agreed to release to the state millions of disputed dollars and that the state had agreed to ask HHS for a waiver to block-grant its whole Medicaid state program. If this result becomes more commonplace, more states may, in effect, accept block grants in return for settling financial disputes with the Administration. Since block grants mean federal funds to the state are capped, more block-granted state programs could in turn result in women losing essential health services and more women losing Medicaid coverage and becoming uninsured.

- ***The Administration's approach to expanding coverage to the uninsured, namely, to provide a refundable tax credit so low-income people can buy individual health insurance, will not help the women it is intended to serve.*** The Administration's proposed refundable tax credit of up to \$1,000 a year for a single person and up to \$3,000 a year for a family of four (the exact amount of the credit depends on income and phases out at an income of \$30,000 for an individual and \$60,000 for a family of four)<sup>182</sup> is insufficient to buy a comprehensive health plan. Individual health plans that can be purchased for the price of the tax credit buy only very minimal coverage with very high out-of-pocket requirements, if they are available at all.<sup>183</sup> The cost of comprehensive plans will not be fully covered by the tax credit, which means these plans will be out of reach for the low-income people who are eligible for the credit. Additionally, as women reach age 55, individual health plans escalate in price, so that health plans for these women costing \$1,000 are virtually non-existent in the vast majority of states, and comprehensive plans for them are likely to cost, on average, over \$5,000.
- ***The Administration's proposal to expand the use of Health Savings Accounts (HSAs) will not help women with limited resources obtain health care.*** Another Administration plan to help Americans gain access to health care is to allow individuals to deduct their premiums for high-deductible insurance plans from their taxable income and to save pre-tax dollars in special accounts called Health Savings Accounts (HSAs) to pay for out-of-pocket medical expenses.<sup>184</sup> HSAs, by design, give an advantage to people who are in higher tax brackets because contributions to the plans are made with pre-tax dollars and withdrawals for health expenses are not taxed. Also, wealthier people can afford to leave money in the account to accumulate tax-free rather than use it to meet medical expenses. But 90% of the uninsured are either in the 15% tax bracket or have no tax liability.<sup>185</sup> And individuals who incur little or no income tax liability will receive little or no advantage from the deposits or the accounts, even if they have the disposable income to make significant contributions. Deducting the premiums for high-deductible health plans from their taxable income will also provide little or no financial advantage to them. Lower-income people who manage to purchase a high-deductible health plan will still be left with high out-of-pocket-costs that

might make obtaining health care out of reach. Additionally, this proposal could prompt some employers to reduce the insurance coverage they offer, since individuals will be able to obtain tax deductions for purchasing high-deductible coverage on their own. Without low-deductible, comprehensive insurance, lower-income workers will find it harder to afford needed health care.

**b. The Administration Is Restricting Access to Reproductive Health Care and Undermining the Constitutional Right to Choose**

- **The Administration supports dangerous federal laws that impede access to safe abortions and violate the constitutional right to choose:**
  - *The Administration supports and is vigorously defending the first federal law that bans medically necessary abortion procedures since *Roe v. Wade*, a law that contains no exception to protect a woman’s health and is plainly unconstitutional.* The “Partial-Birth Abortion Ban Act of 2003” was passed by Congress last year and signed into law by President Bush.<sup>186</sup> This bill bans safe abortions, performed as early as the 12<sup>th</sup> to 15<sup>th</sup> week of gestation, and contains no exception to protect a woman’s health. The Supreme Court’s decision in *Stenberg v. Carhart* in 2000, striking down a similar ban on “partial birth abortion,”<sup>187</sup> makes it clear that this law is unconstitutional. In fact, three federal district courts hearing separate challenges have all temporarily enjoined enforcement of the law. Yet the Department of Justice is aggressively defending it in court, even going so far as to issue numerous subpoenas to hospitals where abortions have been performed to force the production to the government of highly confidential medical records – an action that poses a risk of invasions of patients’ privacy and could seriously chill the exercise of women’s constitutional right to terminate a pregnancy.<sup>188</sup>
  - *The Administration supports the Abortion Non-Discrimination Act (ANDA), a bill that would allow a broad range of health care entities to refuse to comply with existing laws providing access to abortions, no matter how important for women’s health.* ANDA provides that a federal, state, or local government may not require health care entities to perform, provide coverage for, pay for, or refer for abortions, with no exception to protect a woman’s health. It broadly defines health care entities to include insurance companies, hospitals, and HMOs, among others.<sup>189</sup> In reality, ANDA is the opposite of what it claims to be: rather than protecting against discrimination, it discriminates against women needing abortion services.
- **The Administration has taken multiple actions to imbue embryos and fetuses with the status of personhood in an effort to undermine *Roe v. Wade*, even at the expense of medical research, and has distorted**

**scientific information to further its anti-abortion and anti-family planning agenda:**

- ***The Department of Health and Human Services (HHS) has given a fetus the status of a “child” in insurance regulations.*** In 2002, the HHS Centers for Medicare & Medicaid Services issued final regulations under the State Children’s Health Insurance Program (SCHIP) defining “child” to include an “unborn child” for the purposes of who a state may deem eligible for health insurance benefits under the program in a previously uncovered population of immigrant women.<sup>190</sup> Covering prenatal and postnatal care for more immigrant women is a laudable goal. But these regulations, by covering the fetus instead of the woman, could lead states to focus inadequately on pregnant women’s comprehensive health needs and undermine a woman’s right to choose.
- ***The Administration endorsed the Unborn Victims of Violence Act (UVVA), which unnecessarily creates a new criminal offense for harm to an “unborn child.”*** This legislation, which the President signed into law on April 1, 2004, creates a new federal criminal offense for harm to an “unborn child” during the commission of other criminal acts. The act defines “an unborn child” as “a member of the species homo sapiens, at any stage of development, who is carried in the womb” and punishes this violation as if the offense had occurred to a person.<sup>191</sup> It is the first federal law under which a zygote, blastocyst, embryo or fetus can be an independent victim of a crime, and thus a “legal person” with the same legal rights as live-born individuals. Particularly because other approaches could have been adopted to penalize the attack on the pregnant woman herself and the resulting harm to her fetus, without defining a fetus as a legal person, it is clear that this law is intended as another way to undermine *Roe v. Wade*.
- ***The Administration has undermined important medical research by limiting federal funding for stem cell research, supporting a criminal ban on therapeutic cloning, including embryos as “human research subjects” whose welfare must be protected, and taking steps to eliminate a diversity of viewpoints on the President’s Council on Bioethics.*** Human embryonic stem cells have the potential to improve understanding and treatment of diseases such as Parkinson’s, Alzheimer’s, stroke, and heart disease. Bowing to abortion opponents, however, the Administration issued regulations in 2001 limiting the use of federal funds for stem-cell research to stem-cell lines that were already established at that time.<sup>192</sup> President Bush defended this limitation on the ground that the blastocysts from which the stem cells came have at least “the potential for life.”<sup>193</sup> Embryonic stem cells can also be obtained through therapeutic cloning,<sup>194</sup> a process widely supported by scientific experts because of its potential for developing new medical therapies for life-threatening diseases.<sup>195</sup> The

Administration, however, supports legislation that would criminalize therapeutic cloning because it “would require the destruction of nascent human life.”<sup>196</sup> In addition, the Administration revamped the charter of a federal advisory committee that addresses the safety of research volunteers by adding embryos to the list of “human subjects” whose welfare must be safeguarded in medical experiments.<sup>197</sup>

Finally, in February 2004, the Administration removed from the President’s Council on Bioethics two experts who opposed a ban on therapeutic cloning – one a renowned biomedical scientist and one a moral philosopher.<sup>198</sup> In their places, and to fill a vacancy, the Administration named three new members who appear to have views closer to the Administration’s. One of them, for example, is a political scientist who reportedly has described stem cell research in which embryos are destroyed as “evil,” and another reportedly has written about the immorality of abortion.<sup>199</sup> Following these events, the biomedical scientist who was removed asserted that “there is a growing sense that scientific research – which, after all, is defined by the quest for truth – is being manipulated for political ends . . . through the stacking of the membership of advisory bodies and through the delay and misrepresentation of their reports.”<sup>200</sup>

- ***The National Cancer Institute distorted the science on whether abortion can cause breast cancer.*** In November 2002, the National Cancer Institute (NCI) removed from its website its analysis finding no link between abortion and breast cancer risk<sup>201</sup> and replaced it with new information erroneously suggesting that it is an open question whether abortion causes breast cancer. After members of Congress protested the change, NCI convened a three-day conference of experts on abortion and breast cancer. The participants concluded that “[i]nduced abortion is not associated with an increase in breast cancer risk,” and in March 2003 the NCI website was updated to reflect this conclusion.<sup>202</sup>
- ***The Centers for Disease Control and Prevention replaced a comprehensive online fact sheet about condoms with one lacking crucial information on condom use and efficacy.*** The new fact sheet begins by emphasizing condom failure rates and the effectiveness of abstinence, and it lacks instructions on condom use and specific information on the effectiveness of different types of condoms. It also drops a discussion of the evidence that sex education does not lead to increased sexual activity.<sup>203</sup>
- ***The Administration is seeking to double the funding for unproven abstinence-unless-married (“abstinence only”) education.*** Federally funded abstinence-unless-married education programs (abstinence-only programs) are required to teach adolescents that abstinence from sexual

activity is the only acceptable form of behavior outside of marriage and that "sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects."<sup>204</sup> Programs receiving federal abstinence-only funds are prohibited from providing information about contraception, except failure rates, and can provide referrals for contraceptive services only if asked.<sup>205</sup> There is no reliable evidence that abstinence-only education delays sex or reduces teen pregnancy, while there is evidence that comprehensive sex education does work.<sup>206</sup> However, even though abstinence-only education has received over \$1 billion in federal and state dollars since 1996,<sup>207</sup> the Bush Administration has repeatedly proposed dramatic increases for these programs, culminating in a proposed doubling of funding in the FY 2005 budget over FY 2004 funding levels, despite the recommended mere .1% increase for domestic discretionary programs overall.<sup>208</sup> In fact, the proposed FY 2005 funding for abstinence-only education is now on par with the proposed funding for Title X, the nation's critical family planning program, for which the Administration proposes no increase for FY 2005 (see below). Comprehensive sex education programs receive no federal dollars.

- **The Administration, both in its domestic and international policies, is impairing family planning access, including for the neediest women:**
  - *The Bush Administration has consistently proposed reduced or level funding for Title X of the Public Health Service Act, the nation's crucial family planning program, and has taken actions to weaken the program by shifting its priorities.* For more than three decades, Title X has been an integral component of the nation's public health care system, providing federal funds for high-quality family planning services and other preventive health care to low-income or uninsured individuals who may otherwise lack access to health care. Title X-funded services include family planning services, blood pressure evaluations, Pap tests, breast examinations, pelvic examinations, and testing for sexually-transmitted diseases (STD) and HIV.<sup>209</sup> Title X clinic services prevent unintended pregnancies; reduce the number of abortions; lower rates of STDs, including HIV; and improve women's health.<sup>210</sup> In this time of state fiscal crisis, Medicaid cuts, and a growing number of uninsured Americans, the Title X program is struggling to address the growing demand for subsidized family planning services. The Administration, however, has three times recommended level-funding the program and once even recommended an \$8 million decrease.<sup>211</sup> The Administration's current proposed funding for Title X is less than half the \$600 million it would need to keep pace with inflation.<sup>212</sup> At the same time, despite the program's historic mandate to provide contraceptive methods and services to sexually-active individuals, HHS has announced that it will be promoting, through the Title X grant award process, an "abstinence" approach to education and counseling.<sup>213</sup>

- ***The Administration tried to end the requirement that health insurance plans offered to federal employees include coverage of prescription contraceptives if the plans cover other prescription drugs and devices.*** Since 1999, Congress has required insurers participating in the Federal Employees Health Benefit Program (FEHBP) to include coverage of prescription contraceptives for federal employees. During the first year of the Bush Administration, the Administration's budget proposed the elimination of this requirement – despite the fact that access to reliable contraception is essential to promoting healthy pregnancies and preventing unintended pregnancies,<sup>214</sup> that exclusion of this coverage from an otherwise comprehensive health plan violates the laws against sex discrimination,<sup>215</sup> and that adding this coverage to FEHBP did not result in any increase in premiums.<sup>216</sup> Congress rejected the Administration's proposal to repeal this provision.
  
- ***The Administration named to the Reproductive Health Drugs Advisory Committee of the Food and Drug Administration (FDA) Dr. David Hager, who reportedly has refused to prescribe birth control to unmarried women and suggested prayer to women suffering from premenstrual syndrome.***<sup>217</sup> The Reproductive Health Drugs Advisory Committee provides expert scientific and medical advice to the FDA on drugs such as those used for contraception, medical abortion, infertility treatments, hormone replacement therapy and labor and delivery. Dr. Hager was originally named to serve as chair of the Advisory Committee, and after a public outcry was appointed a member but not the chair. As discussed below, of the 27 members of two expert advisory committees that jointly considered allowing emergency contraception to be made available without a prescription, Dr. Hager was one of only four to recommend against this policy.
  
- ***The FDA has delayed deciding whether to allow emergency contraception (EC) to be available without a prescription, despite strong scientific evidence and the overwhelming recommendation of two FDA Advisory Committees in favor of allowing EC to be provided over the counter.*** Emergency contraception is a time-sensitive form of birth control which, if taken within 72 hours of intercourse, reduces the risk of pregnancy by up to 89%.<sup>218</sup> Overwhelming public testimony in favor of allowing EC to be available without a prescription was presented to a joint meeting of the FDA's Advisory Committees on Nonprescription Drugs and on Reproductive Health Drugs on December 16, 2003. Following the hearing, *every member* of the two committees, including Dr. Hager, found that EC without a prescription was safe, and an overwhelming majority of the committee members (23 of 27) voted to recommend that EC be made available without a prescription.<sup>219</sup> Although a decision was expected by February 20, 2004, the company that makes EC announced on February



13 that the FDA was delaying its decision by 90 days.<sup>220</sup> The FDA said the delay is necessary to examine more scientific evidence, including data on teens using EC without a prescription.<sup>221</sup> At the hearing, however, there was strong expert testimony in support of making EC available without a prescription for all women, including teens,<sup>222</sup> and that data was before the two expert Committees when they voted unanimously that EC is safe and voted overwhelmingly that no prescription should be required.<sup>223</sup> The longer the FDA delays its decision, the longer women will be denied timely access to a safe, effective and much-needed second chance to prevent pregnancy.

- ***The Bush Administration reinstated the Reagan-era “global gag rule” and extended it to the entire State Department budget.*** This rule, originally implemented by President Reagan and later rescinded by President Clinton, prohibits U.S. family planning funding to non-governmental organizations abroad that use *their own funds* to counsel and refer for abortion services, provide abortions, or engage in advocacy about abortion law in their own countries – even though the use of U.S. funds to pay for abortion services is already prohibited. The Bush Administration reinstated this rule within weeks of taking office,<sup>224</sup> and in August 2003 extended it to apply not only to programs funded by the U.S. Agency for International Development but to any family planning activities funded under the State Department budget.<sup>225</sup> This policy has caused significant harm in developing countries. For example, U.S. condom donations were ended for 16 developing nations (including Swaziland, which has one of the highest HIV prevalences worldwide) when family planning organizations refused to sign a declaration that they would not offer or discuss abortion services.<sup>226</sup>
- ***For three consecutive years, the Administration has withheld funding for the life-saving reproductive health services offered through the United Nations Population Fund (UNFPA) in over 150 poor countries around the world.*** The Administration has withheld the entire amount of funding that Congress appropriated for this program in Fiscal Years 2002, 2003, and 2004, based on unsupported allegations that UNFPA endorsed the Chinese government’s involuntary abortion and coercive sterilization practices.<sup>227</sup> In reality, UNFPA does not provide or pay for abortion services anywhere in the world; indeed, UNFPA works to reduce the need for abortion by promoting voluntary family planning.<sup>228</sup>

## **7. Weakening Efforts to Combat Violence Against Women and Help Its Victims**

Violence against women persists as a serious problem. An estimated 1.5 million women are physically assaulted or raped by their intimate partners each year.<sup>229</sup> The Violence Against Women Act (VAWA) – passed with overwhelming bipartisan support in 1994 and reauthorized and strengthened in 2000 – has made a difference in the lives of millions of women and their families. VAWA takes a two-pronged approach to dealing with domestic violence. It seeks to improve the law enforcement response to cases of domestic violence, through programs administered by the Department of Justice (DOJ). In addition, it supports resources that battered women need to escape the violence and rebuild their lives, through programs administered by the Department of Health and Human Services (HHS): crisis lines, emergency shelter, counseling and other assistance. For example, the National Domestic Violence Hotline, created by VAWA and funded in part through grants administered by HHS under VAWA, is a 24-hour a day, toll-free, bilingual telephone hotline that connects victims with counseling and referrals to shelters and other services all across the country; every month it helps more than 13,000 callers and often is their first step toward finding safety.<sup>230</sup> VAWA also supports battered women's shelters, which serve more than 300,000 women and their families but are forced to turn away nearly as many as they help.<sup>231</sup> The Bush Administration's approach to these issues includes the following.

- ***The Administration has underfunded services for victims of domestic violence.*** The Bush Administration has supported close to full funding for VAWA law enforcement programs in DOJ, although in its FY 2005 budget it proposes to cut \$3 million from DOJ grants to states to improve stalking databases, encourage arrests, reduce violent crimes against women on campus, and enhance protections for older and disabled women from domestic violence and sexual assault.<sup>232</sup> But along with its failure to adequately fund many services that help women and their families lead more secure lives, as documented elsewhere in this report, the Administration has consistently and seriously shortchanged domestic violence services provided through HHS. When Congress reauthorized VAWA in 2000, it authorized over \$175 million a year in HHS funding for battered women's shelters, the national hotline, and other services. But the Administration's budget for FY 2005 proposes level funding – an amount that is already 26% below the authorized level of \$129 million – the same amount it requested in 2003 and 2004, without even an adjustment for inflation.

Victims of domestic violence represent a significant part of the homeless population; studies indicate that between 18 to 50 % of homeless women and children left their homes because of abuse.<sup>233</sup> In addition to access to shelters, battered women need access to affordable housing if they are to avoid a return to abusive partners. In a positive step, the Department of Housing and Urban Development in 2003 issued non-binding guidance to public housing authorities across the country encouraging them to assist domestic violence victims in obtaining and maintaining access to public housing.<sup>234</sup> But other

actions of the Administration have only exacerbated the difficulties victims of domestic violence face in seeking safe, affordable housing. For instance, while federal law recognizes the needs of victims by giving battered women and other displaced families priority access to federal low-income housing assistance programs, such as the Section 8 housing voucher program that helps families pay their rent, Section 8 is the very program targeted for some of the deepest cuts in the Administration's FY 2005 budget (see Section 4, above).

- ***The Attorney General has appointed harsh critics of VAWA to an advisory committee on violence against women.*** The National Advisory Committee (NAC) on Violence Against Women was created to advise the Departments of Justice and Health and Human Services about implementing and enforcing the Violence Against Women Act. In 2002, Attorney General John Ashcroft appointed two representatives of an organization that has engaged in longstanding, vigorous attacks on VAWA – Independent Women's Forum (IWF) President Nancy Pfotenhauer and IWF National Advisory Board Member Margot Hill – to the NAC. The IWF has stated that VAWA is a waste of money that “urges vulnerable women to mistrust all men,”<sup>235</sup> that it is based on “ignorance, non-facts, and wishful thinking about the power of the federal government to curb violence between intimate partners,”<sup>236</sup> and that VAWA is “apt to hurt, rather than help, women involved in dangerous relationships.”<sup>237</sup> IWF also urged the U.S. Supreme Court to declare a key provision of VAWA to be unconstitutional.<sup>238</sup> Following the appointments of Pfotenhauer and Hill, IWF said that it will use “our membership on the VAWA Advisory Committee” to give advice on the implementation of VAWA.<sup>239</sup>

The Administration also resisted creating an independent office to provide a strong and distinct voice for battered women within the Department of Justice, as mandated by Congress in 2002. The Administration announced that it planned to ignore the law and keep the program as a subdivision of the Office of Justice Programs.<sup>240</sup> Then in March 2003, under bipartisan pressure, Attorney General Ashcroft announced that DOJ would reverse course and afford the Office independent status.<sup>241</sup> Even so, it was not until February 2004 that DOJ changed the organizational chart on its home page to show an independent Violence Against Women Office.

- ***The Administration refuses to include important protections for battered women in marriage promotion programs.*** As part of its proposal for the reauthorization of the Temporary Assistance for Needy Families (TANF) program, the Administration proposes dedicating \$1.8 billion in federal and state funds over the next five years to promote “healthy marriages” among low-income, heterosexual couples.<sup>242</sup> But the Administration is proposing no increase in overall funding for TANF or the Child Care and Development Block grant (see Section 3 above). Thus, this \$1.8 billion would come out of

funds that would otherwise be available for child care, job training, transportation, and other services with greater demonstrated effectiveness in helping poor women – a disproportionate number of whom are victims of domestic violence<sup>243</sup> – achieve self-sufficiency. In addition to the diversion of resources, advocates have expressed concern that marriage promotion programs could pressure poor women into staying in abusive relationships, endangering them and their children.<sup>244</sup> Advocates have urged the Administration to include specific protections for battered women in marriage promotion programs, including ensuring that participation in marriage promotion programs be voluntary, and without threat of penalty for nonparticipation; that programs receiving grants consult with experts in domestic and sexual violence to ensure that domestic violence is adequately addressed; that children or parents not be discriminated against because of the marital status of the parent; and that programs be rigorously and independently evaluated.<sup>245</sup> But the Administration continues to resist including such protections in the welfare reauthorization bill.

- ***The Administration has failed to protect battered women from gun violence.*** Women living in a home with a gun are three times more likely to be murdered than women living in a home where there is no gun.<sup>246</sup> Persons convicted of domestic violence or subject to a restraining order are prohibited from buying a gun under the Brady Act. Although it is a felony to lie about such information when attempting to purchase a firearm, the offense almost always goes unpunished by the Department of Justice; in FY 2002, 99.6% of cases of lying on the background check form went unenforced.<sup>247</sup> The Administration also supported reducing the period during which the government may retain records of background checks on gun purchasers from 90 days to 24 hours, a change enacted by Congress in 2004. Such quick destruction of purchase records will make it more difficult for law enforcement to discover if a perpetrator of domestic violence has recently purchased a weapon.

## **8. Failing to Support Our Women in Uniform**

The U.S. military, as the nation's largest employer, provides important opportunities for women to serve their country and to receive training and experience in non-traditional areas, which can help them advance in civilian employment as well. Many of the past barriers to opportunity for women in the military have been lifted in recent years and servicewomen are now putting their lives on the line, like their male counterparts, in Iraq, Afghanistan, and around the world. Today, about 200,000 women make up 15% of the active military.<sup>248</sup> At the same time, the military is one of the last bastions of officially sanctioned sex discrimination in the United States, in that it still forbids women from serving in some military assignments. Although there are no remaining statutory barriers to women's military service, and women are eligible for 92% of military assignments, they are still barred by Pentagon policy from serving in military

occupational specialties engaged in “direct ground combat,” without regard for whether they are able to meet the physical and other requirements for the specialty.<sup>249</sup>

Other barriers also remain, including hostility and harassment from male peers. Studies have consistently shown widespread sexual harassment in the services. The Department of Defense (DoD) recently released a study showing that although reports of sexual harassment have decreased since 1995, 24% of servicewomen surveyed in 2002 reported being sexually harassed.<sup>250</sup>

Criminal sexual misconduct and outright assault are also serious problems both in the service academies and in all branches of the Armed Services themselves. In the past year, numerous cases have come to light of sexual assaults of female cadets at the Air Force Academy, and in many cases the women were doubly punished when they were penalized or even driven out of the Academy for reporting the assaults.<sup>251</sup> Reports that over two dozen women at Sheppard Air Force Base in Texas sought assistance at a local rape crisis center in 2002 have recently come to light.<sup>252</sup> An Air Force review of sexual assault in the Pacific command discovered that at least 92 accusations of rape were made between 2001 and 2003.<sup>253</sup> Similarly, DoD officials recently revealed that there have been at least 106 reports of sexual assault of servicewomen serving in Iraq, Kuwait, and Afghanistan, many of them by fellow American troops.<sup>254</sup> Like the students at the Academy, many of these women complained that they were met with further harassment and hostility when they reported their assaults. One woman, for example, who had been told by her superiors to forget her rape and “drive on,” alleges that she was pressured to leave the military hospital where she was seeking treatment for the emotional trauma caused by her assault, and was eventually offered a discharge from the Army if she dropped her rape allegations.<sup>255</sup> Although the Department of Veteran’s Affairs has been widely commended for the sexual assault counseling that it provides, the services available to active duty military personnel have been the object of much criticism.<sup>256</sup>

In the face of the serious issues facing women in the military, the Bush Administration has done the following.

- ***DoD limited the role of the Defense Advisory Committee on Women in the Services (DACOWITS).*** DACOWITS, formed nearly 55 years ago to promote the recruitment and retention of women in the armed services, in the past has strongly supported opening more military positions to women and has voiced concerns about, and made recommendations to address, sexual assault and harassment in the services. Yet, Elaine Donnelly, former DACOWITS member and president of the Center for Military Readiness, a conservative group that advocates limiting positions open to women in the military, has called DACOWITS a “feminist lobby”<sup>257</sup> and her Center has urged the Administration to dismantle it altogether.<sup>258</sup> The Administration appears to be listening: in March 2002, DoD allowed the DACOWITS charter to expire, terminating the membership of appointees whose terms had not expired. Although DoD then issued a new charter, it allowed President Bush to appoint all new members. Despite being authorized to appoint up to 35 members (as

had been the case under the old charter), only 12 have been named,<sup>259</sup> reducing the committee membership by nearly two-thirds.<sup>260</sup> One of the new appointees, Catherine L. Aspy, has been outspoken in her opposition to opening ground combat positions to women, and has reportedly said that, in her view, “[t]he Army is a vast day-care center, full of unmarried teen-age mothers using it as a welfare home.”<sup>261</sup>

The new charter expands DACOWITS’s charge to include family issues. Although these issues are important for military men and women, the Administration’s dramatic reduction in DACOWITS’s membership raises the question whether the Committee has sufficient resources to handle an expansion in the issues they address. Moreover, under its new charter, DACOWITS is limited to addressing only those issues specified for its attention by the Secretary of Defense, as opposed to choosing for itself what to focus on from “the full range of issues” under the original charter.<sup>262</sup> Since the Secretary will be choosing from a broader range of issues, it is unclear to what extent DACOWITS will be focusing on women’s issues. The full ramifications of the changes to DACOWITS’ autonomy and authority remain to be seen.

- ***DoD has responded inadequately to allegations of sexual assault.*** The military’s response to revelations of sexual assault in the services and at the academies has been an ongoing cause for concern. Because of concerns about the thoroughness of internal reviews in the wake of the Air Force Academy sexual assaults, Congress intervened and mandated that an independent commission be created to review the allegations at the Academy. The Executive Director and another member of this Commission originally selected by Secretary Rumsfeld were replaced after public outcry: Anita Blair, selected to be Executive Director, helped found the conservative Independent Women’s Forum to “serve as a counterpoint to the National Organization for Women”<sup>263</sup> and later opposed admitting women to the Virginia Military Institute;<sup>264</sup> Amy McCarthy, named as a commission member, made several public statements questioning the veracity of the women alleging rape at the Academy and suggested that the women were engaged in questionable conduct at the time of the incidents.<sup>265</sup> (A second controversial selection as a commission member, Sally Satel, a former member of the Independent Women’s Forum Advisory Council, was permitted to stay.) The report issued by the reconstituted Commission, chaired by former Congresswoman and House Armed Services Committee member Tillie Fowler, sharply criticized a report by the Air Force General Counsel for failing to acknowledge the “chasm in leadership” that “helped create an environment in which sexual assault became a part of life at the Academy,”<sup>266</sup> and concluded that “the Air Force General Counsel attempted to shield Air Force Headquarters from public criticism by focusing exclusively on events at the Academy.”<sup>267</sup> The report also criticized *Agenda for Change*, Air Force Secretary James G. Roche’s series of policy directives and improvements for the Academy, for

“effectively eliminat[ing] the Academy’s confidential reporting policy for sexual misconduct”<sup>268</sup> by mandating reporting of sexual assaults and failing to recognize the psychotherapist-patient privilege.

Members of Congress recently indicated that they are similarly prepared to intervene if the Department of Defense fails to respond quickly and meaningfully to the recent revelations of allegations of sexual assault against servicewomen in Iraq, Kuwait, and Afghanistan and at other military bases and installations. Although Secretary Rumsfeld has ordered Under Secretary David Chu to conduct a review of the reports and the military response to the allegations, and this issue has been placed on DACOWTIS’ agenda for the next year, some members of Congress have already expressed concern about the military’s willingness to take the allegations seriously. The Chairman of the Senate Armed Services Committee has warned that he is prepared to “take over” reform of military practices if the Department of Defense does not fix the ongoing problem of sexual assault in the military.<sup>269</sup> Another Committee member expressed concern that nothing had changed for years and wondered why there was “no sense of outrage” among military leaders.<sup>270</sup>

- ***DoD has sanctioned restrictive clothing and other discriminatory requirements on female servicemembers overseas.*** In 2001, Lt. Col. Martha McSally, an Air Force fighter pilot, sued the Department of Defense, challenging DoD regulations that required women stationed in Saudi Arabia to wear the traditional Muslim abaya, have a male escort whenever they left the base, and forbid servicewomen to drive off the base and require them to ride in the back seat of all vehicles off the base.<sup>271</sup> No similar restrictions are imposed on male service members. McSally alleges that these regulations discriminate against women and violate her First Amendment right to freedom of religion.<sup>272</sup> In response, the military changed its abaya policy to one that “strongly encourages” women to wear the abaya,<sup>273</sup> despite the fact that female State Department employees in Saudi Arabia are not subject to the same requirement and even the Saudi Arabian government does not require non-Muslim women to wear the abaya.<sup>274</sup> In 2002, Congress stepped in and passed a law prohibiting the military from requiring or strongly encouraging female personnel to wear abayas.<sup>275</sup> Other aspects of McSally’s suit against the government are still pending.
- ***The Administration supports restrictions on servicewomen’s access to abortion.*** Since 1985, Congress has prohibited the use of federal funds to pay for abortions at any military facility, except where the life of the woman is endangered.<sup>276</sup> Since 1996, Congress has additionally prohibited women from using their own private funds to pay for abortion services at overseas military facilities, unless the pregnancy resulted from rape or incest, or endangered the woman’s life.<sup>277</sup> The Bush Administration supports this policy,<sup>278</sup> in a reversal of the past DoD position.<sup>279</sup> These restrictions force servicewomen facing unwanted pregnancies while stationed overseas, who depend on their base

hospitals for medical care, to place their health at risk while they delay the procedure until they can arrange for home leave, or turn to local – and often illegal and unsafe – abortion providers. And even if a servicewoman seeks to terminate a pregnancy caused by a rape, including a rape by another servicemember, although she is permitted to have an abortion on base, she must pay for the procedure with her own money.

## **9. Packing the Courts With Judges Opposed to Women’s Core Legal Rights**

The Administration is not only implementing executive branch policies and supporting Congressional legislation harmful to women – it is also attempting to extend its ideology to the third branch of government, the federal judiciary. Although the Bush Administration has not yet had the opportunity to fill any Supreme Court vacancies, it is seeking to fill the lower federal courts – especially the U.S. Courts of Appeals, which are just below the Supreme Court – with ideologically driven judges whose past records show that they are hostile to the core legal rights that are critical to women. A handful of the Administration’s most extreme judicial nominees have been blocked by opposition in the U.S. Senate, which, under its constitutional “advice and consent” responsibility, must confirm a nominee before he or she can take office. But many others with troubling records on issues of concern to women have been confirmed. And two of the most extreme nominees, whom the Senate refused to confirm, have been given seats on Courts of Appeals *without* Senate consent through highly unusual and controversial “recess appointments” by President Bush, which do not require Senate confirmation: Charles Pickering on the Fifth Circuit and William Pryor on the Eleventh Circuit.<sup>280</sup>

The federal courts wield enormous power over the lives of all Americans. Federal judges have lifetime tenure, often holding their seats for decades. The Courts of Appeals, in particular, have wide latitude to interpret and apply the broad principles laid down by the Supreme Court, and they usually have the final word because the Supreme Court reviews only a tiny fraction of cases in the federal system. This means that the core legal principles that have helped wipe out arbitrary barriers to women’s advancement could be eviscerated by federal judges who are hostile to them – judges like the Bush Administration nominee to a federal court in Arkansas, J. Leon Holmes, who has written that “the woman is to place herself under the authority of the man” and “the wife is to subordinate herself to her husband”<sup>281</sup> and who compared the pro-choice movement to Nazi Germany.<sup>282</sup> Moreover, many of the Administration’s judicial nominees have shown that they are willing to substitute their own ideology for a fair reading of the law. The *Washington Post* called one Bush Administration nominee, “one of the most unapologetically ideological nominees of either party in many years.”<sup>283</sup> Another nominee, as a state court judge, wrote an opinion restricting reproductive rights that the current White House Counsel – then a fellow judge on her court – called “an unconscionable act of judicial activism.”<sup>284</sup> Another nominee was described by his former supervisor in the Justice Department as so “ideologically driven that he could not be trusted to state the law in a fair, neutral way.”<sup>285</sup>



The ways in which the Bush Administration's judicial nominees can jeopardize core legal rights for women – and examples of some of the nominees with hostile views on these rights – include the following.

- ***The Administration has selected nominees who disagree with core principles establishing the right of women to equal protection of the law.*** It is well settled that the Equal Protection Clause of the 14<sup>th</sup> Amendment to the Constitution prohibits most laws and government policies that discriminate on the basis of sex. Laws or government policies based on harmful stereotypes or overgeneralizations about women, or the proper roles of men and women in society, are not permitted. But some Bush Administration nominees have records suggesting they actually disagree with the Supreme Court's rulings in this area. For example, William Pryor, now on the Eleventh Circuit through a "recess appointment" by President Bush as noted above, has derided as "political correctness"<sup>286</sup> the Supreme Court's 7-1 ruling that the Constitution does not permit a state-run university to bar all women from admission based on outmoded stereotypes,<sup>287</sup> and Ninth Circuit nominee Carolyn Kuhl filed a brief on the side of the university in that case.<sup>288</sup>
- ***The Administration has selected nominees who have opposed strong protections against sexual harassment.*** Several nominees have trivialized the harms caused by sexual harassment, written articles or briefs arguing for weaker legal protections against sexual harassment, or, as trial court judges, cavalierly dismissed sexual harassment cases before them. D.C. Circuit nominee Janice Rogers Brown, as a state Supreme Court justice, even suggested in a dissent that she had doubts about whether verbal harassment in the workplace can be challenged under federal law at all, despite longstanding precedents holding that it can.<sup>289</sup> Michael McConnell, confirmed and sitting on the Tenth Circuit, criticized the Supreme Court for making it too easy for women to hold their employers responsible for sexual harassment by a supervisor, and commended the Court for making it much harder for female students to hold a school district responsible for sexual harassment by a teacher.<sup>290</sup>
- ***The Administration has selected nominees who have undermined the laws against other forms of sex discrimination.*** Several nominees, as sitting trial court judges, have routinely dismissed claims of employment discrimination based on sex (or race), and written opinions that would undermine the enforcement of state and federal anti-discrimination laws. Charles Pickering testified in his confirmation hearing for a Fifth Circuit seat that as a federal trial judge he deliberately threw out cases alleging sex or race discrimination on the job, assuming they all lacked merit.<sup>291</sup> Pickering now sits on the Fifth Circuit as the result of a recess appointment, as noted above. Terrence Boyle, a nominee to the Fourth Circuit, flagrantly disregarded well-settled law as a trial judge in order to reject the settlement of a sex discrimination case against a state prison system, which required the state to stop discriminating against

women in the hiring and promotion of prison guards – a settlement to which the parties had agreed.<sup>292</sup> Judge Boyle was reversed on appeal for an abuse of his discretion.<sup>293</sup>

- ***The Administration has selected nominees who have sought to limit Congress’s authority to protect the public welfare.*** Numerous Bush Administration judicial nominees have been leaders in the so-called “federalism” movement to challenge the authority of Congress to pass laws punishing discrimination and violence against women and protecting public health, safety and welfare in other ways. Jeffrey Sutton, now on the Sixth Circuit, was previously a prominent proponent of “federalism” arguments to hold states immune from damages for violating the federal laws against discrimination based on age and disability.<sup>294</sup> William Pryor, now on the Eleventh Circuit through a recess appointment, was the only state attorney general to urge the Supreme Court to strike down a key provision of the Violence Against Women Act on the ground that it was beyond Congress’s power to enact;<sup>295</sup> he also urged the Court to find states immune from damages under the Family and Medical Leave Act – a position rejected by the Court in a 6 to 3 decision.<sup>296</sup> Other nominees, too, have been harshly critical of Congress’s enactment of the Violence Against Women Act.<sup>297</sup> D.C. Circuit nominee Janice Rogers Brown has repeatedly expressed hostility to the role of government more broadly, claiming, for example, that government causes civil society to “disintegrate.”<sup>298</sup>
- ***The Administration has selected nominees who have sought to overturn Roe v. Wade and undermine women’s reproductive rights.*** Numerous Bush Administration nominees to the Courts of Appeals have documented histories of seeking to overturn, vehemently denouncing, and/or actively undermining *Roe v. Wade* and the right to choose. To give just a few examples: Charles Pickering, now on the Fifth Circuit, and Lavensky Smith, now on the Eighth Circuit, have called for a constitutional amendment to reverse *Roe* and ban all abortions;<sup>299</sup> William Pryor, now on the Eleventh Circuit, called *Roe* “the worst abomination of constitutional law in our history”<sup>300</sup> and Tenth Circuit judge Michael McConnell called *Roe* “illegitimate”;<sup>301</sup> several others (including John Roberts, now on the D.C. Circuit,<sup>302</sup> and Ninth Circuit nominee Carolyn Kuhl)<sup>303</sup> have urged the Supreme Court to overrule *Roe*; and Fifth Circuit nominee Priscilla Owen, on the Texas Supreme Court, sought to restrict access to abortion even when the plain terms of state law required otherwise.<sup>304</sup> Several nominees not only oppose the right to choose; they have troubling records on women’s access to contraception and family planning services as well.<sup>305</sup>
- ***The Administration has selected nominees who have opposed or sought to limit other core civil rights protections.*** Several nominees have extremely disturbing records on race discrimination and other civil rights issues. Charles Pickering, as a trial judge, pressured the Justice Department to lower the

sentence of a convicted cross-burner,<sup>306</sup> and earlier in his career wrote an article proposing ways to strengthen Mississippi's ban on interracial marriage.<sup>307</sup> Ninth Circuit nominee Carolyn Kuhl led attempts to reverse longstanding U.S. tax policy and give tax-exempt status to Bob Jones University despite the school's racially discriminatory policies.<sup>308</sup> Other nominees have criticized or failed to enforce the Voting Rights Act.<sup>309</sup> Others have opposed laws against discrimination based on sexual orientation (and Fourth Circuit nominee Claude Allen even referred to gays and lesbians as "queers")<sup>310</sup> and have disparaged the need for laws against disability and age discrimination as well.<sup>311</sup>

## **10. Closing and Undermining Government Offices and Expert Advisory Bodies Dedicated to Safeguarding Women's Interests**

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The Bush Administration has eliminated or undermined a wide range of federal offices and advisory committees charged with focusing on women's issues, and backed off plans to eliminate others only in the face of strong opposition from Congress and the public. Some of these offices have served as internal watchdogs for women's interests as government policies were formulated and adopted; others have had a role in implementing policies important to women. The Bush Administration's pattern of closing and downgrading them can only be construed as a manifestation of the low priority it gives to addressing women's concerns, and, at the same time, it is undoubtedly a contributing factor in the widespread adoption of policies harmful to women as documented in this report.

- ***The Administration closed the White House Women's Office.*** Immediately after President Bush's inauguration in January 2001, the White House Office for Women's Initiatives and Outreach was quietly closed. The office, established in 1995, had monitored policy initiatives developed in the White House and cabinet departments for their impact on women and served as a liaison to outside organizations concerned about policies affecting women. In March 2001, the White House confirmed that this office had "expired."<sup>312</sup> After this prompted unfavorable news coverage, the White House announced that it was designating someone in the White House Office of Public Liaison to review administration policies that affect women and communicate with women's rights advocates.<sup>313</sup> This arrangement gives women's advocates a point of access in the White House, but not an effective force within the government for advancing policies important to women – especially since White House staff bluntly informed women's organizations that a major area of concern for women, reproductive rights, must be treated as "off the table."<sup>314</sup> Moreover, conservative groups have made it clear that while they will tolerate an "open door" White House policy for women's rights organizations, that is true only "so long as it doesn't result in any change in administration policies."<sup>315</sup>

- ***The Labor Department sought to close key offices of its Women’s Bureau.*** In late 2001, the press disclosed that the Bush Administration’s proposed budget for the next fiscal year would include the elimination of the 10 regional offices of the Women’s Bureau of the Department of Labor. Since its creation in 1920, through Administrations of both parties, the Women’s Bureau has carried out its mission of promoting the welfare of working women and advancing their opportunities. The Bureau’s regional offices have played a crucial role in ensuring that this mission is carried out effectively at the local level. Regional offices have, for example, helped ensure that women are aware of legal protections against workplace abuses and resources available to them for help; run conferences on domestic and workplace violence; and helped businesses with successful child care and other work-family policies share their ideas with other employers. After the proposal to eliminate these offices sparked protests from several dozen members of Congress as well as women’s organizations (including the Center), as well as unfavorable newspaper editorials, the Administration shelved the idea.<sup>316</sup>
- ***The Administration has placed individuals hostile to women’s interests on expert advisory committees on issues critical to women.*** Each of the following examples has been described in more detail in the relevant section of this report, but they are summarized here to demonstrate the pattern of efforts to undermine advisory committees in this manner across a variety of issue areas important to women. The Administration has:

  - ***Named to the Food and Drug Administration’s Reproductive Health Drugs Advisory Committee Dr. David Hager, who has refused to prescribe birth control to unmarried women and suggested prayer to women suffering from premenstrual syndrome.*** Dr. Hager voted against allowing emergency contraception to become available without a prescription, one of a small minority of the members of two advisory committees considering this issue to take that position. (See section 6 above.)
  - ***Appointed harsh critics of the Violence Against Women Act (VAWA) to the National Advisory Committee on Violence Against Women.*** Attorney General Ashcroft appointed to this advisory committee two representatives of the Independent Women’s Forum (including its president), which has vehemently attacked VAWA (See section 7 above.)
  - ***Limited the role of the Defense Advisory Committee on Women in the Services (DACOWITS).*** The Department of Defense (DoD) allowed DACOWITS’ charter to expire, and although a new charter was then issued, DoD named all new members, including one who has been outspoken in opposing expanded opportunities for women in the military. DoD also limited the DACOWITS mandate, at a time when serious problems remain for women in the services and the service academies –

including sexual assaults and widespread sexual harassment. As also described above, DoD attempted to stack an independent commission investigating sexual assault at the Air Force Academy with members hostile to women's rights. (See section 8 above.)

- ***Removed from the President's Council on Bioethics two experts who opposed a ban on therapeutic cloning, replacing them with members who have spoken out against therapeutic cloning, written about the immorality of abortion, and described research involving the destruction of embryos as "evil."*** Therapeutic cloning, which produces embryonic stem cells, has the potential to lead to medical breakthroughs in connection with Parkinson's, Alzheimer's, and other diseases. Yet the Administration has placed anti-abortion politics and concerns for embryo protection above respect for science and medicine, including through the stacking and manipulation of advisory bodies like the Council on Bioethics. (See section 6 above.)

### **III. AN AGENDA FOR THE FUTURE**

As this Report documents, a review of Bush Administration policies reveals a wide range of policies and proposals that are harmful to women. The Center recommends, in their place, policies to advance and protect the legal rights and expand the possibilities for women and girls all across the country. Specifically, the Center recommends that the Administration take the following steps.

#### **1. Guarantee Equal Opportunity and Fairness for Women at Work**

Women deserve workplaces that are free from sex discrimination and barriers to equal opportunity, as well as access to the supports they need to balance work and family responsibilities. Toward that end, the Bush Administration should:

- Vigorously enforce Title VII of the Civil Rights Act of 1964 and other laws prohibiting sex discrimination in the workplace – such as sexual harassment, discrimination in hiring and promotions, and pregnancy discrimination – through the Department of Justice, the Department of Labor, the Equal Employment Opportunity Commission, and other relevant federal departments and agencies. This must be accomplished by, among other things, promptly and thoroughly investigating all complaints, especially those involving broad-based “pattern or practice” violations rather than individual instances of discrimination; where authorized, initiating reviews of potentially discriminatory practices; bringing lawsuits where appropriate; and remedying discrimination when it is found.
- Strengthen and aggressively enforce the laws guaranteeing equal pay for equal work, including by giving adequate resources and priority to enforcement of the Equal Pay Act, supporting legislation to strengthen the remedies and

enforcement provisions of the Equal Pay Act, and fully utilizing existing administrative tools for equal pay enforcement, such as the Department of Labor's Equal Opportunity Survey.

- Support legislation necessary to overturn damaging Supreme Court decisions that have cut back on the rights of civil rights plaintiffs and to strengthen the remedies available under the civil rights laws.
- Facilitate expansion of the workplace supports women need, such as job-protected family leave and child care. The Family and Medical Leave Act should be expanded to cover more workplaces and employees and a broader range of family needs, and efforts to provide paid family and medical leave should be supported – including by reinstating a Department of Labor policy to allow the states to use unemployment compensation funds for paid leave. (Child care policies and other employment supports are discussed in Section 3, below.)
- Expand, rather than restrict, eligibility for overtime pay.

## **2. Ensure Equal Opportunity for Girls and Women in School**

Girls and women in school deserve an opportunity to learn and thrive in an environment free from sex stereotyping, sexual harassment, and other forms of sex discrimination and unequal treatment based on sex. To meet this goal, the Administration should:

- Vigorously enforce Title IX of the Education Amendments of 1972, especially as it applies in each of the following areas: sex segregation in vocational education; under-representation of women in non-traditional fields such as science, engineering and high technology; unequal athletic opportunities; sexual harassment; and single-sex education based on gender stereotyping. Vigorous enforcement includes:
  - promptly and thoroughly investigating all complaints;
  - conducting systemic investigations of potential discrimination;
  - seeking sanctions against violators;
  - supporting plaintiffs in litigation challenging Title IX violations;
  - rejecting efforts to weaken Title IX and its implementing regulations and defending it in litigation challenging it; and
  - working actively to educate the public and schools in order to achieve full compliance with the law.
- Restore and adequately fund educational programs, including No Child Left Behind and programs that promote gender equity at the secondary and post-secondary levels.

- Support affirmative action in education, and help educational institutions remedy discrimination and promote academic diversity and enrichment by encouraging them to take full advantage of the flexibility of current law allowing race- and gender-based affirmative action.
- Support legislation to ensure effective enforcement of Title IX and other civil rights laws, including by overturning damaging Supreme Court decisions that cut back on the rights of Title IX plaintiffs and by mandating that schools collect and publicize data on the gender breakdowns of their educational programs.

### **3. Expand and Improve Child Care and Early Learning Programs, and Provide Women the Supports They Need to Maintain Self-Sufficiency**

In order for parents to succeed at work, and for children to thrive, the availability, affordability and quality of child care, early learning, and after-school programs must be improved. Toward that end, the Administration should:

- Expand access to affordable child care by significantly increasing overall funding for the Child Care and Development Block Grant (CCDBG) and making the Dependent Care Tax Credit refundable, and improve child care quality by increasing the quality set-aside in CCDBG and supporting measures to help early childhood providers increase their education and link improved education to better compensation.
- Fully fund Head Start and expand Early Head Start without shifting control to the states; strengthen program quality by increasing the credentialing requirements for Head Start teachers and funding improved education and compensation for them; and halt inappropriate testing of four-year-olds.
- Fully fund the 21<sup>st</sup> Century Community Learning Centers after-school program.

Poor women need help in achieving long-term self-sufficiency. Reauthorization of the nation's welfare program – Temporary Assistance to Needy Families (TANF) – must therefore:

- Increase access to affordable, quality child care, so that parents receiving TANF and low-income parents not on TANF can work knowing that their children are safe and well cared for.
- Increase access to the education, training, and other services women need to obtain and retain jobs paying living wages, including by eliminating inflexible work requirements and providing adequate funding for these services.

- Increase the support that children receive by giving those who currently or formerly received TANF more of the child support that noncustodial parents pay on their behalf, rather than using those payments to reimburse federal and state welfare costs.
- Eliminate discrimination against legal immigrants in the receipt of federally funded TANF benefits, and ensure fair and nondiscriminatory treatment of all TANF applicants and recipients.
- Focus on proven strategies to increase self-sufficiency rather than marriage promotion, but if marriage promotion programs are included in TANF, include safeguards to ensure that these programs do not jeopardize women's safety, as outlined in the domestic violence section below.

#### **4. Adopt Fair Tax and Budget Policies**

To fund the services that women and their families need and want, and improve fairness in federal taxes for women, the nation needs a federal tax system that raises adequate revenues and requires individuals and corporations to contribute their fair share, based on ability to pay. To advance this goal, the Administration should:

- Support measures to raise much-needed revenues and increase the progressivity of the tax code, including by reversing recent tax cuts that overwhelmingly benefit the wealthy.
- Close loopholes that allow corporations and wealthy individuals to evade and avoid federal taxes.
- Enable low-income families to take advantage of tax benefits, for example by increasing the refundability of the Child Tax Credit and making the Dependent Care Tax Credit refundable.
- Adopt responsible budget rules to require that additional tax cuts, not just increases in entitlement programs, be paid for.
- Adequately fund the services needed to expand women's opportunities and increase women's well-being, including as recommended in the other sections of this agenda.

#### **5. Increase Retirement Security for Women**

Women deserve a secure retirement. To improve the economic security of older women, the Administration should support measures to:

- Protect and strengthen Social Security by ensuring that there are adequate federal revenues to pay promised Social Security benefits.



- Increase Social Security benefits for women most at risk of poverty, including by improving the survivor benefit and the minimum benefit, and finance such improvements and make Social Security taxes more equitable by increasing the Social Security contribution base.
- Adopt increased pension protections for women, including the extension of spousal rights that now apply to traditional, defined-benefit pensions to defined-contribution, 401(k)-type plans; close loopholes in the Civil Service Retirement System and Railroad Retirement system that deny pension benefits to widows and divorced spouses; and enforce discrimination rules that promote participation by lower-wage workers, who are disproportionately women, in pension plans.
- Supplement, rather than substitute for, promised Social Security benefits and are targeted to low-income people, disproportionately women, who are least likely to have retirement savings.

## **6. Improve the Status of Women's Health**

In order to improve the status of women's health, women must have better access to health insurance. Toward that end, the Administration should:

- Support measures to expand and strengthen the Medicaid and Medicare programs so that those without access to private insurance have coverage for the range of services they need. This requires, for example:
  - Providing funds to states so they can provide Medicaid coverage to all low-income women, including more parents, immigrants, pregnant women, women who are leaving TANF, and childless women.
  - Preserving the entitlement nature of Medicaid without a financial cap on federal funding.
  - Permitting women age 55 and over who do not have access to affordable health insurance to buy into Medicare.
  - Strengthening Medicare to ensure that it remains available to older, disabled women and that it covers the full range of services women need, including a comprehensive drug benefit that does not make the poorest and sickest beneficiaries worse off.
- Improve access to employer-based health care coverage for workers and their families and make this coverage affordable.

A critical component of women's health and well-being is reproductive health care. To broaden access to reproductive health care, the Administration should:

- Expand access to abortion services and protect a woman’s constitutional right to choose, by, for example:
  - Supporting legislation to protecting the fundamental right of all women, including low-income and young women, to choose to bear a child or to terminate a pregnancy without governmental interference or discrimination.
  - Rejecting legislation that interferes with the ability of women and their doctors to decide which abortion procedures are the safest and best for a woman’s health and legislation that interferes with health care entities’ provision of meaningful access to abortion.
  - Treating abortion procedures like other medical treatment for purposes of federal funding and use of federal facilities.
  - Allowing for international family planning clinics abroad that receive U.S. support to counsel women about all safe sexual and reproductive health options, including abortion, and to advocate for the right to choose in their own countries.
  
- Expand access to family planning services within the United States and abroad, for example by:
  - Funding international family planning programs to the fullest extent possible.
  - Strengthening and fully funding Title X of the Public Health Service Act.
  - Maintaining Medicaid funding for family planning services.
  - Ensuring convenient access to all safe and effective contraceptives, including emergency contraceptives.
  - Supporting insurance coverage for prescription contraceptives.
  - Funding comprehensive sex education rather than unproven abstinence-only programs.
  
- Base policy decisions and public education campaigns on sound scientific information and not an anti-choice or anti-family planning agenda.

## **7. Combat Violence Against Women and Support Services to Help Its Victims**

The nation should strive to prevent domestic violence and empower battered women to lead safe, secure, and independent lives. To advance these goals, the Administration should:

- Fully fund services authorized by the Violence Against Women Act (VAWA) for victims of domestic violence, such as emergency shelters and the national domestic violence hotline, as well as the law enforcement programs that are part of VAWA.

- Strengthen programs beyond crisis intervention that can help battered women avoid a return to abusive partners, such as housing subsidies.
- Allow states to focus federal and state TANF resources on proven strategies to increase self-sufficiency, rather than earmarking funds for marriage promotion; but, if marriage promotion programs are included in TANF, include specific protections to ensure that participation is voluntary and unpressured, that programs receiving funds are required to collaborate with domestic violence experts to ensure that programs do not jeopardize safety, that discrimination on the basis of marital status is prohibited, and that programs are rigorously and independently evaluated.
- Increase employment stability for victims of domestic violence, by, for example, allowing victims of domestic violence to take leave from work to address domestic violence.
- Strengthen protections for battered women from gun violence.
- Consult with experts in domestic violence in developing policy on domestic violence issues and appoint them to policy-making and advisory positions.

## **8. Support Our Women in Uniform**

In order to address the barriers that remain for women serving in the military, the Administration should:

- Enable and encourage the Defense Advisory Committee on Women in the Services (DACOWITS) to conduct meaningful investigations into the issues confronting military women.
- Eliminate discrimination that persists in the military by making military assignments available on a gender-neutral basis to anyone who can meet the requirements of the position; recruiting and promoting women on an equal basis with men; maintaining and expanding gender-integrated basic training; and eliminating other discriminatory policies that mark women with a badge of inferiority.
- Provide to military victims of discrimination, harassment, and assault at least the degree of procedural protections that are afforded civilian victims.
- Take seriously violence against women in the military, including assault, rape, and domestic violence, by providing appropriate counseling and medical services to victims of violence against women; adopting measures to protect the privacy of victims; and significantly improving efforts to prevent and redress incidents of violence.

- Support the right of military servicewomen to exercise the full spectrum of reproductive rights.

## **9. Ensure a Fair and Balanced Judiciary**

A fair and independent judiciary is essential to protecting women's legal rights. To ensure a fair and independent judiciary, the judicial appointment process should comply with the U.S. Constitution, which provides that federal judges shall be nominated by the President "by and with the advice and consent of the Senate," and thereby gives the Senate a co-equal role in judicial appointments. This means, for example, that:

- The Administration should engage in meaningful consultation with the Senate in selecting nominees (in keeping with the "advice" component of "advice and consent"), with the goal of finding consensus nominees and avoiding contentious confirmation proceedings.
- The "recess appointment" power, which bypasses the Senate and denies it its constitutional role, should not be used for the appointment of controversial nominees who lack broad, bipartisan support in the Senate and whom the Senate has refused to confirm.

The President should select, and the Senate should confirm, only those nominees who, in addition to demonstrating the requisite character and intellect:

- Have a record demonstrating that their views on important legal issues fall within the mainstream of legal opinion.
- Bring an open, non-ideological mind to decision-making and have shown that they will not substitute their own ideology for a fair reading of the law.
- Have demonstrated a commitment to core legal rights for women and other core civil rights protections, and to the constitutional role that Congress plays in promoting these rights and protecting the public interest.

## **10. Strengthen Offices and Advisory Bodies Dedicated to Safeguarding Women's Interests**

Government offices and expert advisory committees charged with safeguarding women's interests should be preserved and strengthened, including in the following ways:

- Federal offices historically charged with focussing on women's issues should be given active roles in developing and implementing policies of importance to women. For example:

- The White House Women's Office should be reopened and given a mandate to serve as a watchdog for women's interests as government policies are formulated and adopted (without arbitrary limitations on the scope of the mandate), as well as a point of access for women's rights organizations.
- The Women's Bureau of the Department of Labor should serve as a strong advocate for programs to promote the welfare of working women and expand their opportunities, and the Women's Bureau's regional offices across the country should be given active roles in carrying out this mission.
- The selection of members for expert advisory committees with key roles on issues important to women should be based on expertise and not on an ideological agenda that is harmful to women, and the mandates of these bodies should not be arbitrarily circumscribed. These include, among many others:
  - The FDA Advisory Committee on Reproductive Health Drugs
  - The National Advisory Committee on Violence Against Women
  - The Defense Advisory Committee on Women in the Services
  - The President's Council on Bioethics

If the Administration adopts and advances this agenda, it will help ensure forward progress toward the goal of a nation without barriers based on gender.

## ENDNOTES

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\*The Introduction and Summary of this Report was slightly revised following the release of the Report.

<sup>1</sup> In the international arena, the Bush Administration's record also contains a number of troubling aspects. For example, the Administration has failed to make it a priority to obtain Senate ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), an international agreement that has been used to secure real changes for women in countries that are parties to it. CEDAW, adopted by the United Nations General Assembly in 1979, contains a broad and comprehensive prohibition against gender discrimination and promotes equality in employment, education, health, and political and social participation. It has been ratified by 174 countries, including every industrialized democracy except the United States, and has influenced national courts in interpreting national laws. Although the treaty was signed by President Carter in 1980, it has never been ratified by the U.S. Senate. During the Clinton Administration, CEDAW was listed as a high-priority treaty for Senate ratification. Although the Bush Administration includes CEDAW on a list of treaties it "believes are generally desirable and should be approved," it does not list the treaty as one of high importance. In addition, when the Senate Foreign Relations Committee scheduled the treaty for a vote in July 2002, the Bush Administration asked that the vote be delayed to allow for more time to conduct a "careful review" of the over 20-year-old treaty. Noy Thrupkaew, "Money where his mouth is," *The American Prospect*, vol. 13 no. 7, Sept. 23, 2002. It has recently been reported that the Bush Administration also tried to weaken another international agreement by seeking to remove all references to "reproductive health," "family planning services," "sexual health," and "condoms" in a declaration of support for the Programme of Action of the United Nations International Conference on Population Development (the "Cairo Consensus" adopted by 179 countries in Cairo in 1994), considered recently in Santiago, Chile. The declaration that was adopted did not reflect the U.S. position. Joanne Omang, "U.S. isolated on international women's health," *Women's ENews*, March 14, 2004, available at <http://www.womensenews.org/article.cfm/dyn/aid/1749/context/archive>. To its credit, the Administration has supported a new interim constitution in Afghanistan that contains language guaranteeing equal rights for women. However, some observers closely monitoring the situation there have expressed concerns about other language in the document that could undercut women's rights, as well as the Administration's failure to adequately fund women's programs as it invests in the reconstruction of Afghanistan. See, e.g., Global Women's Issues Scorecard on the Bush Administration, [www.WglobalScorecard.org](http://www.WglobalScorecard.org), March 4, 2004; Rep. Carolyn B. Maloney, "A Better Future for Afghan Women?" *Ms. Magazine*, Spring 2004. In addition, reports from international observers indicate that many Afghan women have seen little change over the two years since the Taliban regime was ousted. Noeleen Heyzer, "Making a Nation More Equal," editorial, *New York Times*, Dec. 3, 2003.

<sup>2</sup> Greenberg, Quinlan, Rosner Research, "Women's Voices Women Vote," poll conducted Oct.-Nov. 2003; Lake, Snell, Perry and Associates for the AFL-CIO, "Ask a Working Woman: Survey 2002," poll conducted March 4-7, 2002, available at [http://www.twu.org/CivHmnRights/women/Ask\\_a\\_WWS.pdf](http://www.twu.org/CivHmnRights/women/Ask_a_WWS.pdf).

<sup>3</sup> CNN, USA Today, and Gallup Poll, poll conducted Jan. 2-5, 2003, available at [www.usatoday.com/sports/other/2003-01-07-titleix\\_x.htm](http://www.usatoday.com/sports/other/2003-01-07-titleix_x.htm).

<sup>4</sup> Women's Voices Women Vote, *supra* note 2.

<sup>5</sup> Mason Dixon for Fight Crime Invest in Kids, "Crime-Education Poll," poll conducted Aug. 21-28, 2001, available at <http://nationaljournal.com/members/polltrack/2001/todays/09/0905masondixon.htm>.

<sup>6</sup> Peter Hart and Robert Teeter for NBC News and Wall Street Journal, poll conducted March 6-8, 2004, available at <http://nationaljournal.com/members/polltrack/2004/issues/04socsec.htm#3>.

<sup>7</sup> NBC News and Wall Street Journal Poll, poll conducted Jan. 10-12, 2004, available at <http://nationaljournal.com/members/polltrack/2004/issues/04socsec.htm#3>.

<sup>8</sup> ABC News and Washington Post Poll, poll conducted Jan. 16-20, 2003, available at [www.pollingreport.com/abortion.htm](http://www.pollingreport.com/abortion.htm); CNN, USA Today, and Gallup Poll, poll conducted Jan. 10-12, 2003, available at [www.pollingreport.com/abortion.htm](http://www.pollingreport.com/abortion.htm).

<sup>9</sup> Peter Hart and Robert Teeter for NBC News and Wall Street Journal, poll conducted Nov. 8-10, 2003, available at [www.pollingreport.com/abortion.htm](http://www.pollingreport.com/abortion.htm).

<sup>10</sup> Global Strategy Group for NARAL, "Contraception," poll conducted March 2001, available at <http://nationaljournal.com/members/polltrack/2001/todays/06/0602naral.htm>; Pew Research, "Technology

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and the 20<sup>th</sup> Century,” poll conducted April-May 1999, *available at*, <http://nationaljournal.com/members/polltrack/1999/todays/hp990706.htm>.

<sup>11</sup> Kaiser Family Foundation, “Contraception in the ‘90’s,” *available at* [www.kff.org/womenshealth/1270-contr90f.cfm](http://www.kff.org/womenshealth/1270-contr90f.cfm); NARAL poll, *supra* note 10; Fox News, “Opinion Dynamics,” poll conducted May 6-7, 1998, *available at* <http://nationaljournal.com/members/polltrack/1998/issues/98healthcare.htm>.

<sup>12</sup> Penn and Schoen for Lifetime Television, poll conducted March 2002, *available at* [http://www.lifetimetv.com/community/olc/violence/poll\\_results.html](http://www.lifetimetv.com/community/olc/violence/poll_results.html).

<sup>13</sup> Diana Furchtgott-Roth, “This pay gap is phony,” *Washington Post*, Jan. 31, 2000.

<sup>14</sup> Linda Chavez, “How to Spend Equal Pay Day,” *Jewish World Review*, April 6, 1999, *available at* [www.jewishworldreview.com/cols/chavez040699.asp](http://www.jewishworldreview.com/cols/chavez040699.asp).

<sup>15</sup> Linda Chavez, “The no-taste police no laughing matter,” *The Detroit News*, Aug. 9, 1996; Independent Women’s Forum, “Beware: Bra-Snapping Now a Crime,” May 28, 1999, *available at* [www.iwf.org/news/990528.shtml](http://www.iwf.org/news/990528.shtml).

<sup>16</sup> Jessica Gavora, “The War Against Boys,” *Women’s Quarterly* (Washington, D.C.: Independent Women’s Forum, Spring 2003), *available at* [http://www.iwf.org/archives/archive\\_detail.asp?ArticleID=222](http://www.iwf.org/archives/archive_detail.asp?ArticleID=222).

<sup>17</sup> Jessica Gavora, *Tilting the Playing Fields: Schools, Sports, Sex, and Title IX* (San Francisco, CA: Encounter Books, Sept. 2003).

<sup>18</sup> Independent Women’s Forum, “Agenda for Women 2004,” at 4, *available at* [www.iwf.org/pdf/agenda\\_04\\_1.pdf](http://www.iwf.org/pdf/agenda_04_1.pdf).

<sup>19</sup> Heather Cirimo, spokeswoman for Family Research Council, on “MSNBC Live Today,” June 13, 2001 (tape on file with the National Women’s Law Center).

<sup>20</sup> William Pryor, “Federalism and the Court: Do Not Uncork the Champagne Yet,” Remarks Before the National Federalist Society, Washington, D.C., Oct. 16, 1997. Pryor was nominated by the Bush Administration to fill a lifetime seat on the U.S. Court of Appeals for the Eleventh Circuit. His nomination was blocked by opposition in the U.S. Senate, but President Bush then named him to the court through a “recess appointment” that does not require Senate confirmation, as a result of which he now sits on the Eleventh Circuit and will serve there until the end of 2005. *See*, section 9 of this report and accompanying notes.

<sup>21</sup> Betsy Hart, “Violence Against Taxpayers,” *Women’s Quarterly* (Washington, D.C.: Independent Women’s Forum, Jan. 1995).

<sup>22</sup> These include a number of the individuals quoted above and other representatives of their organizations. For example, Diana Furchtgott-Roth, formerly a member of the National Advisory Board of the Independent Women’s Forum (IWF), served as Chief of Staff of the President’s Council of Economic Advisors in the Bush Administration and is now an official of the Department of Labor in the Office of Assistant Secretary for Policy. Anita Blair, an IWF founder, is Deputy Assistant Secretary of the Navy. Linda Chavez, a member of the IWF National Advisory Board, was President Bush’s first choice for Secretary of Labor but withdrew her nomination in the wake of allegations that she may have violated labor and immigration laws with respect to a female domestic employee. Another member of IWF’s National Advisory Board, Elaine Chao, did become Secretary of Labor. Jessica Gavora, former director of the IWF anti-Title IX project, is now Senior Policy Advisor in the Department of Justice Office of Legal Policy. IWF’s President and Chief Executive Officer Nancy Pfotenhauer, and IWF National Advisory Board member Margot Hill, serve on the Department of Justice National Advisory Committee on Violence Against Women. Pfotenhauer also was named by the Bush Administration, along with IWF Senior Fellow Kate O’Bierno, to represent the United States as delegates to the United Nations Commission on the Status of Women.

<sup>23</sup> U.S. Census Bureau, “Current Population Reports, P60-221,” *Income in the United States: 2002*, at 10 (Washington, D.C.: U.S. Govt. Printing Office, Sept. 2003), *available at* <http://www.census.gov/prod/2003pubs/p60-221.pdf>; “Women’s pay lags men’s in law, sales, journalism,” *Reuter’s*, Dec. 9, 2003 (reporting the results of a recent survey conducted by the National Association of Female Executives).

<sup>24</sup> General Accounting Office Report to Congressional Requesters, *Women’s Earnings: Work Patterns Partially Explain Differences Between Men’s and Women’s Earnings*, at 64, Oct. 2003, *available at* [http://www.house.gov/dingell/documents/pdfs/womens\\_report03.pdf](http://www.house.gov/dingell/documents/pdfs/womens_report03.pdf).

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- <sup>25</sup> General Accounting Office Testimony before the Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, House of Representatives, *Women in Management: Analysis of Selected Data from the Current Population Survey*, at 18-19, Oct. 2001, available at <http://www.gao.gov/new.items/d02648t.pdf>.
- <sup>26</sup> The Equal Employment Opportunity Commission, "Pregnancy Discrimination Charges EEOC & FEPA's Combined: FY 1992 - FY 2003," available at <http://www.eeoc.gov/stats/pregnanc.html>. In FY 2002, EEOC received 4,649 charges of pregnancy-based discrimination, compared with 4,166 in 1999.
- <sup>27</sup> Catherine Valenti, "Paid Leave for All?" *ABC News*, Oct. 9, 2003, available at [http://abcnews.go.com/sections/business/US/paidleave\\_031009.html](http://abcnews.go.com/sections/business/US/paidleave_031009.html); see also, International Labour Conference, *Report V(1): Maternity Protection at Work* (Geneva: International Labour Office, 1999).
- <sup>28</sup> Peopleclick Research Institute, "New Census Data Reveal Women's Share of Executive Positions Decreased," Feb. 23, 2004, available at <http://www.peopleclick.com/news/asp/22304.asp> (analysis of Census data shows that women's share of executive management positions dropped 13.1 percentage points, from 31.9% in 1990 to 18.8% in 2000, and that their share of computer and mathematical operations jobs also declined, from 32.3% to 30.0%).
- <sup>29</sup> Letter from Mitchell E. Daniels, Jr., Director of the U.S. Office of Management and Budget, to Rep. Rosa L. DeLauro (on file with the National Women's Law Center).
- <sup>30</sup> Introduced as S. 76 and H.R. 1688, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003), now encompassed in the Civil Rights Act of 2004, H.R. 3809, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (2004).
- <sup>31</sup> U.S. Dept. of Labor, Office of Federal Contract Compliance Programs Mission Description, available at [www.dol.gov/esa/ofccp/ofwedo.htm](http://www.dol.gov/esa/ofccp/ofwedo.htm) (last viewed March 16, 2004).
- <sup>32</sup> "OFCCP will distribute 10,000 pay surveys to federal contractors," *BNA Employment Discrimination Report*, Dec. 11, 2002; Kathleen Carroll, "James plans to scale back EO survey; employers must draw own line on applicants," *BNA Employment Discrimination Report*, Dec. 4, 2002. The regulations accompanying issuance of the survey called for it to be sent to 50,000 contractors each year, so that over a two-year period it would go to all of the approximately 100,000 contractors covered by the E.O. program. 65 Fed. Reg. 68038 (March 13, 2000) (finding that this is necessary if the E.O. Survey is to be a "credible enforcement tool").
- <sup>33</sup> U.S. Dept. of Labor, "Office of Federal Contract Compliance Programs Continues Strong Enforcement in Fiscal Year 2003."
- <sup>34</sup> LCCR, *The Bush Administration Takes Aim: Civil Rights Under Attack*, April 2003, available at [www.civilrights.org/publications/reports/taking\\_aim/bush\\_takes\\_aim.pdf](http://www.civilrights.org/publications/reports/taking_aim/bush_takes_aim.pdf) (39% of compliance reviews found violations in FY 2002, compared to between 54% and 77% over the history of the program).
- <sup>35</sup> Doug Huron, "No more enforcers? Justice has lost enthusiasm for employment discrimination cases," *Legal Times*, May 19, 2003.
- <sup>36</sup> Shannon McCaffery, "U.S. backs off discrimination cases," *Detroit Free Press*, Dec 11, 2003.
- <sup>37</sup> Huron, *supra* note 35.
- <sup>38</sup> Dept. of Justice, Civil Rights Division website, [www.usdoj.gov/crt/emp/papers.htm](http://www.usdoj.gov/crt/emp/papers.htm) (last viewed April 1, 2004).
- <sup>39</sup> Vanessa Blum, "The Fight Within: Equality in the Justice Department," *The Recorder*, Sept. 19, 2003.
- <sup>40</sup> McCaffery, *supra* note 36.
- <sup>41</sup> *Id.*
- <sup>42</sup> *Id.*
- <sup>43</sup> *U.S. v. City of Erie, Pennsylvania*, complaint filed Jan. 8, 2004, available at [www.usdoj.gov/crt/emp/documents/eriecomp.htm](http://www.usdoj.gov/crt/emp/documents/eriecomp.htm).
- <sup>44</sup> Prepared Statement of R. Alexander Acosta, Assistant Attorney General for Civil Rights, Submitted to House Committee on the Judiciary, Subcommittee on the Constitution, March 2, 2004. Mr. Acosta also testified that the Civil Rights Division has opened 41 new "pattern or practice" investigations, although it is not clear how many of them, if any, will result in enforcement actions. *Id.*
- <sup>45</sup> *Id.*
- <sup>46</sup> See EEOC charge processing and litigation data, available at [www.eeoc.gov](http://www.eeoc.gov).
- <sup>47</sup> 68 Fed. Reg. 15560, 29 C.F.R. Part 541 (March 31, 2003).
- <sup>48</sup> Estimate prepared for National Women's Law Center by Economic Policy Institute, Feb. 2004.



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- <sup>49</sup> 68 Fed. Reg. 15560, 15576-77 (March 31, 2003); *see also*, Leigh Strobe, “Labor Dept. offers ways not to pay overtime,” *The Miami Herald*, Jan. 6, 2004.
- <sup>50</sup> *See, e.g.*, Diane Stafford, “Senate panel to weigh overtime reform plans; Labor groups clash with White House over proposal,” *Kansas City Star*, Jan. 20, 2004; Emily Heil, “Chao again refuses request to delay overtime rules,” *CongressDaily*, Jan. 20, 2004. The legislation was the FY 2004 Consolidated Appropriations Bill, Pub. L. No. 108-199, 118 Stat. 3 (2003).
- <sup>51</sup> Family and Medical Leave Act of 1993, Pub. L. No. 103-0, § 101-601 (1993). The FMLA also provides for leave to care for an ill family member or for personal illness.
- <sup>52</sup> Brief for the United States, *Nevada v. Hibbs*, 538 U.S. 721 (2003).
- <sup>53</sup> Survey conducted by the Dept. of Labor, cited in National Partnership for Women and Families, *Editorial Board Memorandum on 10<sup>th</sup> Anniversary of FMLA*, available at [www.nationalpartnership.org/content.cfm?L1=3&L2=4&DBT=Documents&NewsItemID=552&HeaderTitle=Family%20%26%20Medical%20Leave](http://www.nationalpartnership.org/content.cfm?L1=3&L2=4&DBT=Documents&NewsItemID=552&HeaderTitle=Family%20%26%20Medical%20Leave).
- <sup>54</sup> 65 Fed. Reg. 37210 (June 13, 2000).
- <sup>55</sup> 68 Fed. Reg. 58540 (Oct. 9, 2003).
- <sup>56</sup> National Women’s Law Center, *Title IX and Equal Opportunity in Vocational and Technical Education: A Promise Still Owed to the Nation’s Young Women*, June 2002, available at [www.nwlc.org/pdf/titleixcareereducationreport.pdf](http://www.nwlc.org/pdf/titleixcareereducationreport.pdf).
- <sup>57</sup> *Id.*
- <sup>58</sup> National Center for Education Statistics, *Digest of Education Statistics* (2002), available at [http://nces.ed.gov/programs/digest/d02/list\\_tables.asp](http://nces.ed.gov/programs/digest/d02/list_tables.asp).
- <sup>59</sup> *Id.* (women received 37% of bachelor’s degrees in computer science in 1984-1985, but only 28% of these degrees in 2000-2001).
- <sup>60</sup> Dr. Donna J. Nelson & Diana C. Rogers, *A National Analysis of Diversity in Science and Engineering Faculties at Research Universities*, Jan. 2004, available at [http://www.now.org/issues/diverse/diversity\\_report.pdf](http://www.now.org/issues/diverse/diversity_report.pdf).
- <sup>61</sup> *See, e.g.*, National Women’s Law Center, *Equal Opportunity for Women in Athletics: A Promise Yet to be Fulfilled*, at 6-8, Aug. 2002, available at [www.nwlc.org/pdf/EOforWomeninAthletics\\_APromiseYettobeFulfilled.pdf](http://www.nwlc.org/pdf/EOforWomeninAthletics_APromiseYettobeFulfilled.pdf) (setting forth evidence of continuing discrimination, including fact that, while women comprise 53% of students at Division I colleges, they receive only 41% of the opportunities to play sports, 36% of athletic operating budgets, and 32% of the money spent to recruit new athletes).
- <sup>62</sup> Associated Press, “Chronology of the CU crisis,” *Denver Post*, Feb. 26, 2004; Rick Reilly, “Another victim at Colorado: After being verbally abused and molested by teammates, former kicker Katie Hnida says, she was raped by one of them,” *Sports Illustrated*, Feb. 16, 2004. *See also* American Association of University Women Educational Foundation, *Hostile Hallways: Bullying, Teasing and Sexual Harassment in School*, 2001 (about 80% of students experience sexual harassment at some time during their education).
- <sup>63</sup> Letter from National Coalition for Women and Girls in Education to U.S. Congressional Conferees, Nov. 27, 2001, available at <http://www.newge.org/weea.html>.
- <sup>64</sup> Dept. of Educ., “Fiscal Year 2004 Congressional Action,” available at <http://www.ed.gov/about/overview/budget/budget04/04action.pdf>.
- <sup>65</sup> *See* [www.edc.org/WomensEquity/](http://www.edc.org/WomensEquity/), indicating that the site “is no longer active.”
- <sup>66</sup> *See* [http://www.nyscorp.org/nysp\\_overview.htm](http://www.nyscorp.org/nysp_overview.htm).
- <sup>67</sup> Children’s Defense Fund, “Children’s Defense Fund Says Bush Administration Budget Perpetuates ‘School to Prison Pipeline,’” available at [www.childrensdefense.org/pressreleases/040204.asp](http://www.childrensdefense.org/pressreleases/040204.asp).
- <sup>68</sup> Calculation by the NWLC using U.S. Dept. of Educ., “Fiscal Year 2005 Budget Summary,” available at <http://www.ed.gov/about/overview/budget/budget05/index.html>.
- <sup>69</sup> AFL-CIO, “The Real State of the Union: Few Jobs and Tough Times for America’s Workers,” Jan. 21, 2004, available at <http://aflcio.org/yourjobeconomy/jobs/ns01212004.cfm>.
- <sup>70</sup> 34 C.F.R. § 100.7 (incorporated into Title IX regulations at 34 C.F.R. § 106, Subpart F).
- <sup>71</sup> Letter from Gary D. Jackson, Director, Seattle Office for Civil Rights, and Enforcement Coordinator, Western Division, to Marcia Greenberger, Co-President, National Women’s Law Center, Jan. 22, 2003.
- <sup>72</sup> Matt Stearns, “From The Frying Pan to the Fire Ex-Kansas Citian Faces More Disputes in Education Post,” *Kansas City Star*, Aug. 10, 2003.

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- <sup>73</sup> Letter from Eleanor Baker, Team Leader, Customer Service Team, Office for Civil Rights, to Senator Ron Wyden, U.S. Senate, Feb. 6, 2003.
- <sup>74</sup> Dept. of Labor Women’s Bureau, *21<sup>st</sup> Century Working Women Initiatives: Opportunities for Partnerships*, March 2004, available at <http://www.dol.gov/wb//FY04-Outlook.ppt>.
- <sup>75</sup> U.S. Dept. of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, Jan. 2001 [hereinafter Revised Guidance].
- <sup>76</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).
- <sup>77</sup> Revised Guidance, *supra* note 75, at iii-iv & n. 2.
- <sup>78</sup> Letter from Eleanor Baker, Team Leader, Customer Service Team, Office for Civil Rights, to Leslie T. Annexstein, National Women’s Law Center, Aug. 25, 2003.
- <sup>79</sup> <http://www.ed.gov/about/offices/list/ocr/publications.html#TitleIX>; <http://www.ed.gov/about/offices/list/ocr/sexharassresources.html> (last viewed March 24, 2004). These sources contain only an earlier guidance issued by OCR in 1997, and make no mention of the more recent guidance. Although OCR has recently restored the 2001 Guidance to its list of “Archived Information” in its Reading Room, [www.ed.gov/offices/OCR/archives.html](http://www.ed.gov/offices/OCR/archives.html), this link was inoperative throughout the fall of 2003.
- <sup>80</sup> Dept. of Educ., Notice of Proposed Rulemaking, 69 Fed. Reg. 11276 (March 9, 2004).
- <sup>81</sup> Charter – Secretary’s Commission on Opportunity in Athletics, approved July 5, 2002, available at [www.ed.gov/about/bdscomm/list/athletics/charter.html](http://www.ed.gov/about/bdscomm/list/athletics/charter.html).
- <sup>82</sup> Julie Foudy & Donna de Varona, *Minority Views on the Report of the Commission on Opportunity in Athletics*, at iii, Feb. 2003; *id.* at 18-20 (making points that Commission lacked representation of important constituencies and that witnesses selected by the Dept. of Education testified two-to-one against current policies while requested expert testimony on the other side was not provided), available at [www.nwlc.org](http://www.nwlc.org). Commissioners Foudy and de Varona were forced to prepare a separate Minority Report because the Commission refused to allow them to include a full statement of their dissenting views in the majority report presented to Secretary of Education Rod Paige; the Secretary then refused to accept the Minority Report for inclusion in the official record of Commission proceedings).
- <sup>83</sup> U.S. Dept. of Educ., Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance*, July 11, 2003, available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.
- <sup>84</sup> Charter, *supra* note 81 (estimated two-fiscal year cost for Commission operations was approximately \$700,000).
- <sup>85</sup> U.S. Dept. of Educ., Office for Civil Rights, *Annual Report to Congress, Fiscal Years 2001 and 2002*, at Fig. 1, July 2003, available at <http://www.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html>.
- <sup>86</sup> See, e.g., Susan Drumheller, “Sandpoint Title IX issue on back burner: expected visit from federal agency never materialized,” *The Spokesman Review*, Sept. 18, 2002 (OCR told school superintendent in Lake Pend Oreille School District, Ponderay, Idaho that complaint was on the “back burner”).
- <sup>87</sup> U.S. Dept. of Educ., *supra* note 83.
- <sup>88</sup> *Nat’l Wrestling Coaches’ Assoc. v. Dept. of Educ.*, 263 F.Supp.2d 82 (D.D.C. 2003).
- <sup>89</sup> Brief for Dept. of Educ., *Nat’l Wrestling Coaches’ Assoc. v. Dept. of Educ.*, 263 F.Supp.2d 82 (D.D.C. 2003), Brief for Appellee, *Nat’l Wrestling Coaches’ Assoc.* (No. 03-5169) (D.C. Cir).
- <sup>90</sup> Prepared Statement of R. Alexander Acosta, Assistant Attorney General for Civil Rights, Submitted to House Committee on the Judiciary, Subcommittee on the Constitution, March 2, 2004, at 13-14 (noting that Department has participated as a party and as *amicus* in unspecified Title IX cases involving discrimination in athletics and in-school harassment, supporting the right of individuals to challenge retaliation in court and the application of Title IX to the states). See also U.S. Department of Justice, “Justice Department files motion to intervene in Title IX sexual harassment case against Rhinebeck Central School District,” March 18, 2004, available at [www.usdoj.gov](http://www.usdoj.gov).
- <sup>91</sup> Brief for the United States as *Amicus Curiae* in Support of Petitioners, *Gratz v. Bollinger*, 539 U.S. 244 (2003).
- <sup>92</sup> U.S. Dept. of Educ., Office for Civil Rights, *Achieving Diversity: Race-Neutral Alternatives in American Education*, March 26, 2004, available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>. See also Dept. of Educ. News Release, “Paige Issues Statement on Today’s Supreme Court Decisions about University of Michigan’s Admissions Policies,” June 23, 2003.

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<sup>93</sup> Peter Schmidt, "Head of Civil-Rights Panel Denounces Affirmative-Action Survey Sent Out on Panel's Letterhead," *The Chronicle of Higher Education*, Feb. 13, 2004.

<sup>94</sup> Peter Kirsanow, "The Abominable Snow Job," *National Review*, June 2003, available at <http://www.nationalreview.com/comment/comment-kirsanow062403.asp>.

<sup>95</sup> The U.S. Congress has authority to legislate for the District of Columbia. U.S. Const. art. I, § 8, cl. 13; U.S. Const. art. IV, § 3, cl. 2.

<sup>96</sup> Prepared Remarks of Secretary Rod Paige at the 2005 Education Budget Rollout Press Conference, Feb. 2, 2003.

<sup>97</sup> District of Columbia School Choice Incentive Act, § 308 (b), (e), encompassed in FY 2004 Consolidated Appropriations Act, Pub. Law No. 108-199, 118 Stat. 3 (2004).

<sup>98</sup> Calculations using data on the number of children served from U.S. Office of Management and Budget, *Analytical Perspectives: Budget of the United States Government FY 2005* (Washington, D.C.: U.S. Government Printing Office, Feb. 2004) [hereinafter *Analytical Perspectives*] and data on the number of children eligible from the U.S. Dept. of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, as presented by Julie B. Isaacs at the State Administrators Meeting in Washington, D.C., Aug. 13, 2001.

<sup>99</sup> U.S. Dept. of Health and Human Services, *Budget in Brief FY 2002* (2001).

<sup>100</sup> U.S. Dept. of Health and Human Services, *Budget in Brief FY 2003* (2002); U.S. Dept. of Health and Human Services, *Budget in Brief FY 2004* (2003); U.S. Dept. of Health and Human Services, *Budget in Brief FY 2005* (2004).

<sup>101</sup> *Analytical Perspectives*, *supra* note 98, at Table 24-4.

<sup>102</sup> Jennifer Mezey, Sharon Parrott, Mark Greenberg & Shawn Fremstad, "Reversing Direction on Welfare Reform: President's Budget Cuts Child Care for More than 300,000 Children," *CLASP Update*, Feb. 10, 2004, available at [http://www.clasp.org/DMS/Documents/1078759091.58/Mar04\\_Update.pdf](http://www.clasp.org/DMS/Documents/1078759091.58/Mar04_Update.pdf), and unpublished calculations by the Center on Policy Priorities and Center for Law and Social Policy, Feb. 2004 (on file with the National Women's Law Center).

<sup>103</sup> See, e.g., Pamela Loprest, Urban Institute, "Fewer Welfare Leavers Employed in Weak Economy," *Snapshots of America's Families 3*, Aug. 2003, available at [www.urban.org/uploadedpdf/310837\\_snapshots3\\_no5.pdf](http://www.urban.org/uploadedpdf/310837_snapshots3_no5.pdf). In 2002, about 42% of welfare leavers were working, compared with 50% of welfare leavers who were working in 1999. The median wage of the 2002 welfare leavers was \$8.06 an hour in 2002 dollars. (With steady work of 40 hours per week, 50 weeks per year – which many did not have – this wage would produce an annual income of \$16,120, nearly \$2,000 below the 2002 poverty guideline for a family of four – \$18,100.) One-third of employed welfare leavers worked part-time, more than two-thirds lacked employer health insurance, over one-quarter had irregular or night schedules, and one-quarter returned to TANF within the two years of the study period.

<sup>104</sup> The Administration announced that it "would strongly oppose any amendment" to increase child care funding in the welfare reauthorization bill. Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy on H.R. 4*, March 29, 2004. A bipartisan amendment to increase child care funding by \$6 billion over five years was nonetheless adopted by the Senate by a vote of 78-20. Robert Pear, "Defying Bush, Senate increases child care funds for poor," *New York Times*, Mar. 31, 2004.

<sup>105</sup> Calculations based on data from the U.S. Dept. of Health and Human Services, Head Start Bureau and data from U.S. Census Bureau, "Table POV34," *Current Population Survey, Annual Social and Economic Supplement, Single Year of Age-Poverty Status 2002*.

<sup>106</sup> In April 2002, the Administration announced "Good Start, Grow Smart," an initiative consisting of strategies to bolster the quality of early childhood programs. It included a controversial test for Head Start students (see n. 107 below); a limited training program for Head Start teachers in early literacy; a call for states to develop voluntary early learning guidelines and professional development systems; an effort to provide information to teachers, caregivers, and parents about early childhood; and a new research initiative to identify effective pre-reading and language curricula. This initiative, however, offered no new resources to help states or programs carry out these efforts or otherwise improve the quality of care for children.

<sup>107</sup> At the same time, the Administration has implemented a controversial test of all 500,000 four-year-olds in Head Start despite serious concerns raised by early childhood experts about the design of the test and how it will be used. The test could deter local programs from serving children who need help the most,

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including those who live in extreme poverty as well as those with significant developmental delays or limited English proficiency.

<sup>108</sup> The House bill reauthorizing Head Start includes a pilot program that would allow eight states to operate the Head Start program without meeting Head Start's federal performance standards. It passed by one vote. The Senate version of the bill, which has not yet been voted on by the full Senate, does not include a similar state role for Head Start.

<sup>109</sup> U.S. Census Bureau, "Table 4," *Who's Minding the Kids? Child Care Arrangements: Spring 1999, Detailed Tables*, available at <http://www.census.gov/population/www/socdemo/child/ppl-168.html>.

<sup>110</sup> Estimates from the Afterschool Alliance, Feb. 2003 (on file with the National Women's Law Center).

<sup>111</sup> Estimates from the Afterschool Alliance, Feb. 2004 (on file with the National Women's Law Center).

<sup>112</sup> Al Hunt, "A fiscal nightmare," *The Wall Street Journal*, July 24, 2003.

<sup>113</sup> Mark Wegner, "House Leadership – DeLay promises early floor battles, downplays deficit," *CongressDailyAM*, Jan. 28, 2004.

<sup>114</sup> Isaac Shapiro & Nicholas Johnson, Center on Budget and Policy Priorities, *Total Revenues from All Levels of Government Drop to Lowest Share of Economy since 1968*, at Appendix 2, Jan. 15, 2004.

<sup>115</sup> "The non-taxpaying class: those lucky duckies!" *The Wall Street Journal*, editorial, Nov. 20, 2003.

<sup>116</sup> See U.S. Office of Management and Budget, *Budget of the United States Government FY 2005* (Washington, D.C.: U.S. Government Printing Office, Feb. 2004), available at <http://www.gpoaccess.gov/usbudget/fy05/browse.html> [hereinafter Budget FY 2005]. Costs include net revenue loss from the Administration's proposed tax cuts and revenue-generating proposals and the increased outlay costs of proposed changes in the Child Tax Credit and Earned Income Tax Credit. The costs include only the limited relief from the Alternative Minimum Tax proposed by the Administration (if AMT relief were extended, the full cost of the tax cuts would be \$191 billion over the next five years, and over \$2 trillion over the next ten years). William Gale & Peter R. Orszag, Tax Policy Center, "Should the President's Tax Cuts Be Made Permanent," *Tax Notes*, at Table 2, March 8, 2004, available at <http://www.brook.edu/dybdocroot/views/articles/gale/20040308.pdf>. The costs of the Administration's tax proposals are much higher in the second five years than the first, because the bulk of the costs of making the tax cuts permanent occurs after 2010, when most of these tax cuts are scheduled to expire.

<sup>117</sup> Center on Budget and Policy Priorities, *Administration's Budget Would Cut Heavily into Many Areas of Domestic Spending after 2005*, March 5, 2004, available at <http://www.cbpp.org/2-27-04bud2.pdf>.

<sup>118</sup> *Id.*

<sup>119</sup> Jacqueline E. King, American Council on Education, Center for Policy Analysis, *2003 Status Report on the Pell Grant Program*, at Table 3b, available at [http://www.acenet.edu/bookstore/pdf/2003\\_pell\\_grant.pdf](http://www.acenet.edu/bookstore/pdf/2003_pell_grant.pdf).

<sup>120</sup> The College Board, *Trends in College Pricing 2003*, available at

[http://www.collegeboard.com/prod\\_downloads/press/cost03/cb\\_trends\\_pricing\\_2003.pdf](http://www.collegeboard.com/prod_downloads/press/cost03/cb_trends_pricing_2003.pdf).

<sup>121</sup> U.S. Dept. of Educ., *Fiscal Year 2005 Budget Summary*, Feb. 2, 2004, available at

<http://www.ed.gov/about/overview/budget/budget05/summary/index.html>.

<sup>122</sup> Iris Lav, Center on Budget and Policy Priorities, *Decline in Federal Grants Will Put Additional Squeeze on State and Local Budgets*, Feb. 3, 2004, available at <http://www.cbpp.org/2-3-04sfp.htm>.

<sup>123</sup> Iris Lav, Center on Budget and Policy Priorities, *Federal Policies Contribute to the Severity of the State Fiscal Crisis*, Dec. 2003, available at <http://www.cbpp.org/10-17-03sfp.htm>.

<sup>124</sup> Center on Budget and Policy Priorities, *A Brief Overview of State Fiscal Conditions and the Effects of Federal Policies on State Budgets*, Feb. 27, 2004, available at <http://www.cbpp.org/10-22-03sfp4.htm>.

<sup>125</sup> Nicholas Johnson, Jennifer Schiess, & Joseph Llobrera, Center on Budget and Policy Priorities, *State Revenues Have Fallen Dramatically: Tax Increases So Far Have Failed to Fill the Gap*, Nov. 25, 2003, available at <http://www.cbpp.org/10-22-03sfp.htm>.

<sup>126</sup> Robert Greenstein & Richard Kogan, Center on Budget and Policy Priorities, *Analysis of the President's Budget*, March 5, 2004, available at <http://www.cbpp.org/2-2-04bud.htm>.

<sup>127</sup> Tax Policy Center, "Table T03-0164," *Combined Effect of EGTRRA and JGTRRA: Percent of Tax Units by Size of Income Tax Cut*, 2003, available at <http://www.taxpolicycenter.org/TaxModel/tmdb/TMTemplate.cfm>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

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- <sup>130</sup> Christina Smith FitzPatrick, National Women's Law Center, *Single Mothers, Stay-At-Home Moms Left Behind by Child Tax Credit Stalemate*, July 17, 2003, available at <http://www.nwlc.org/pdf/CTCRefundabilityFactSheet2003.pdf>.
- <sup>131</sup> *Id.*
- <sup>132</sup> Tax Policy Center, "Table T03-0123," *Combined Effect of EGTRRA and Conference Agreement on the Jobs and Growth Tax Relief Reconciliation Act of 2003: Distribution of Income Tax Change by AGI Class* (2003), available at <http://www.taxpolicycenter.org/TaxModel/tmdb/TMTemplate.cfm>.
- <sup>133</sup> U.S. Census Bureau, "Table FINC-03: Presence of Related Children Under 18 Years Old – All Families by Total Money Income in 2002," *Current Population Survey, 2003 Annual Social and Economic Supplement*, available at [http://ferret.bls.census.gov/macro/032003/faminc/new03\\_028.htm](http://ferret.bls.census.gov/macro/032003/faminc/new03_028.htm).
- <sup>134</sup> *Should the President's Tax Cuts Be Made Permanent*, *supra* note 116.
- <sup>135</sup> For the Administration's proposals for changing the budget rules, see *Analytical Perspectives*, *supra* note 98, at 215-219; for an analysis of these proposals, see, *Analysis of the President's Budget*, *supra* note 126.
- <sup>136</sup> Lois Shaw & Catherine Hill, *The Gender Gap in Pension Coverage: What Does the Future Hold?* (2001), available at <http://www.iwpr.org/pdf/d447.pdf>.
- <sup>137</sup> Social Security Administration, *Income of the Population 55 or Older, 2000*, at Table 6.B2, Feb. 2002, available at [http://www.ssa.gov/policy/docs/statcomps/income\\_pop55/2000/](http://www.ssa.gov/policy/docs/statcomps/income_pop55/2000/).
- <sup>138</sup> *Id.* at Table 8.3.
- <sup>139</sup> U.S. Census Bureau, "POV01: Age and Sex of All People, Family Members and Unrelated Individuals Iterated by Income-to-Poverty Ratio and Race: 2002 Below 100% of Poverty – All Races," *Current Population Survey, 2003 Annual Social and Economic Supplement*, available at [http://ferret.bls.census.gov/macro/032003/pov/new01\\_100\\_01.htm](http://ferret.bls.census.gov/macro/032003/pov/new01_100_01.htm).
- <sup>140</sup> Social Security Administration, *2004 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds*, March 23, 2004, available at <http://www.ssa.gov/OACT/TR/TR04/tr04.pdf>.
- <sup>141</sup> "Greenspan urges cuts to Social Security to rein in deficit," *New York Times*, Feb. 25, 2004.
- <sup>142</sup> Richard Stevenson, "The hot potato of issues is dropped anew," *New York Times*, Feb. 26, 2004.
- <sup>143</sup> Peter Diamond & Peter Orszag, *Saving Social Security: A Balanced Approach*, at 31 (Washington, D.C.: Brookings Institution Press, 2004).
- <sup>144</sup> President George W. Bush, *2004 State of the Union Address*, Jan. 20, 2004, available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.
- <sup>145</sup> See generally, National Women's Law Center, *Women and Social Security Reform: What's At Stake*, May 2002, available at <http://www.nwlc.org/details.cfm?id=250&section=social%20security>.
- <sup>146</sup> In 2001, the Commission appointed by President Bush to develop a plan for creating private accounts in Social Security presented three options, one of which ("Model 2") was highlighted in the 2004 *Economic Report of the President* as an illustration of a plan meeting its two goals for Social Security "reform": cutting benefits for future retirees and establishing personal retirement accounts. Council of Economic Advisers, *Economic Report of the President*, at 142 (2004), available at [http://a257.g.akamaitech.net/7/257/2422/09feb20040900/www.gpoaccess.gov/usbudget/fy05/pdf/2004\\_erp.pdf](http://a257.g.akamaitech.net/7/257/2422/09feb20040900/www.gpoaccess.gov/usbudget/fy05/pdf/2004_erp.pdf).
- <sup>147</sup> Stephen C. Goss, Chief Actuary, and Alice W. Wade, Memorandum to Daniel Patrick Moynihan and Richard D. Parsons, Co-Chairs, President's Commission to Strengthen Social Security, "Estimates of Financial Effects for Three Models Developed by the President's Commission to Strengthen Social Security," Jan. 31, 2002.
- <sup>148</sup> *Id.* at 75.
- <sup>149</sup> Tabulations by Peter Orszag for the National Academy of Social Insurance, using the 2001 Survey of Consumer Finances, 2003.
- <sup>150</sup> Female-headed households represent just 18% of all families, but make up 41% of the families in the lowest income quintile. They represent less than 4% of the families in the top income quintile. U.S. Census Bureau, "FINC-06, Percent Distribution of Families, by Selected Characteristics Within Income Quintile and Top 5 Percent in 2002," *Current Population Survey, 2003 Annual Social and Economic Supplement*, available at [http://ferret.bls.census.gov/macro/032001/faminc/new06\\_000.htm](http://ferret.bls.census.gov/macro/032001/faminc/new06_000.htm).
- <sup>151</sup> Tabulations by Peter Orszag, *supra* note 149.

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- <sup>152</sup> Vickie Batjelsmit & Nancy Jianakoplos, Employee Benefit Research Institute, “Women and Pensions: A Decade of Progress?” *EBRI Issue Brief*, Nov. 2000.
- <sup>153</sup> Individuals with incomes below \$25,000, single heads-of-household with incomes below \$37,500, and married couples with incomes below \$50,000 are eligible for the Savers Credit.
- <sup>154</sup> See *Analytical Perspectives*, *supra* note 98, at 246. The Administration proposes to permanently extend certain provisions of the 2001 and 2003 tax cuts, including reductions in taxes on capital gains and dividends, increased expensing for small business, and all provisions expiring in 2010. However, the savers credit expires in 2006; thus, it would not be extended by the Administration’s proposal. See, *Analysis of the President’s Budget*, *supra* note 126.
- <sup>155</sup> See *Analytical Perspectives*, *supra* note 98, at 246-277. For an analysis of the proposals see Robert Greenstein & Richard Kogan, Center on Budget and Policy Priorities, *President’s Savings Proposals Likely to Swell Long-Term Deficits, Reduce National Saving, and Primarily Benefit Those with Substantial Wealth*, Feb. 2004, available at <http://www.cbpp.org/1-20-04tax.pdf>.
- <sup>156</sup> Shaw & Hill, *supra* note 136, at 8.
- <sup>157</sup> *Id.* at 11.
- <sup>158</sup> *Analytical Perspectives*, *supra* note 98, at 247.
- <sup>159</sup> See Robert Greenstein & Joel Friedman, Center on Budget and Policy Priorities, *Proposed “Savings Incentives” Would Cause Revenue Hemorrhage in Future Decades*, March 2003, available at <http://www.cbpp.org/2-5-03tax.htm> (analyzing similar provisions in the Administration’s budget for FY 2004).
- <sup>160</sup> *Id.*
- <sup>161</sup> Office of Disease Prevention and Health Promotion, *Healthy People 2010, Conference Edition* (Washington, D.C.: U.S. Dept. of Health and Human Services, 2000). See also, *Making the Grade on Women’s Health: A National and State-by-State Report Card* (Washington, D.C.: National Women’s Law Center, forthcoming), Chapter I [hereinafter *Making the Grade*].
- <sup>162</sup> Henry J. Kaiser Family Foundation, “State Estimates of Health Insurance Coverage of Women Ages 18 to 64, by State, 2001-2002,” Feb. 2004, available at <http://dpaweb.hss.state.ak.us/training/pdf/temp/getfile.pdf>.
- <sup>163</sup> Henry J. Kaiser Family Foundation, “Women’s Health in the United States: Health Coverage and Access to Care,” May 2002, available at <http://www.kff.org/womenshealth/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13969>.
- <sup>164</sup> American College of Physicians & American Society of Internal Medicine, “No Health Insurance? It’s Enough to Make You Sick: Scientific Research Linking the Lack of Health Coverage to Poor Health,” at 16, 2000, available at <http://www.acponline.org/uninsured/lack-contents.htm>.
- <sup>165</sup> See, *Making the Grade*, *supra* note 161 (citing 1999-2001 data showing that 154.8 women per 100,000 die from heart disease, 41 women per 100,000 die from lung disease, 58.5 women per 100,000 die from stroke, and 9.1 women per 100,000 die from AIDS).
- <sup>166</sup> Centers for Disease Control and Prevention, “HIV/AIDS Among US Women: Minority and Young Women at Continuing Risk,” May 2002, available at <http://www.cdc.gov/hiv/pubs/facts/women.htm>.
- <sup>167</sup> World Health Organization, *Country Estimates of Numbers of Maternal Deaths, Lifetime Risk, Maternal Mortality and Ranges of Uncertainty* (1995), available at [http://www3.who.int/whosis/mm/country\\_estimates\\_1995-mod.doc](http://www3.who.int/whosis/mm/country_estimates_1995-mod.doc).
- <sup>168</sup> Joyce A. Martin, et al., “Births: Final Data for 2002,” National Center for Health Statistics, *National Vital Statistics Reports*, vol. 52 no. 10, at 76, Dec. 17, 2003. The national number includes all 50 states and the District of Columbia.
- <sup>169</sup> *Healthy People 2010*, *supra* note 161.
- <sup>170</sup> The Alan Guttmacher Institute, “Title X: Three Decades of Accomplishment,” *Issues in Brief*, March 2001, at 2, available at [http://www.agi-usa.org/pubs/ib\\_1-01.pdf](http://www.agi-usa.org/pubs/ib_1-01.pdf)
- <sup>171</sup> Stanley K. Henshaw & Lawrence B. Finer, “The Accessibility of Abortion Services in the United States, 2001,” *Perspectives on Sexual and Reproductive Health*, vol. 35 no. 1, at 16 (Jan./Feb. 2003), available at <http://www.agi-usa.org/pubs/journals/3501603.pdf>.
- <sup>172</sup> Lawrence B. Finer & Stanley K. Henshaw, “Abortion Incidence and Services in the United States in 2000,” *Perspectives on Sexual and Reproductive Health*, vol. 35 no. 1, at 10 (Jan./Feb. 2003).
- <sup>173</sup> 70% of Medicaid beneficiaries ages 15 and older are women. See Henry J. Kaiser Family Foundation, “Medicaid’s Role for Women,” Nov. 2000, available at [http://www.kff.org/medicaid/upload/13466\\_1.pdf](http://www.kff.org/medicaid/upload/13466_1.pdf).

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Women account for 67% of beneficiaries with annual incomes below the poverty level. See Henry J. Kaiser Family Foundation, "Women and Medicare," at 12, July 2001, available at [http://www.kff.org/medicare/upload/13607\\_1.pdf](http://www.kff.org/medicare/upload/13607_1.pdf).

<sup>174</sup> Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108-173, 117 Stat. 2066 (2003).

<sup>175</sup> The Congressional Budget Office estimates that of the 5.9 million beneficiaries who will be eligible for this subsidized benefit, 3.4 million will avail themselves of it. Congressional Budget Office, "Cost Estimate for HR 1, 108<sup>th</sup> Congress," at Table 4, 2003.

<sup>176</sup> U.S. Census Bureau, *Women and Men in the United States*, at 4, March 2003, available at <http://www.census.gov/prod/2003pubs/p20-544.pdf>.

<sup>177</sup> Edwin Park, et. al., Center on Budget Policies and Priorities, "The Troubling Medicare Legislation," Dec. 8, 2003, available at <http://www.cbpp.org/11-18-03health2.htm>.

<sup>178</sup> *Id.*

<sup>179</sup> Rachel Benson Gold, "States Eye Medicaid Cuts As Cure for Fiscal Woes," *The Guttmacher Report on Public Policy*, vol. 6 no. 3, at 6, Aug. 2003, available at <http://www.guttmacher.org/pubs/journals/gr060306.html>.

<sup>180</sup> U.S. Office of Management and Budget, *Budget of the United States Government FY 2005: Department of Health and Human Services*, at 149 (Washington, D.C.: U.S. Government Printing Office, Feb. 2004), available at <http://www.gpoaccess.gov/usbudget/fy05/pdf/budget/hhs.pdf> [hereinafter HHS Budget FY 2005].

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 152. The full credit is available at incomes of \$15,000 for an individual and \$25,000 for a family of four. Smaller tax credits are available for people with somewhat higher incomes and are phased out at \$30,000 for an individual and \$60,000 for a two-parent family of four. See Edwin Park, Center on Budget and Policy Priorities, "Administration's Proposed Tax Credit for the Purchase of Health Insurance Could Weaken Employer-Based Health Insurance," April 2003, available at <http://www.cbpp.org/2-18-04health2.pdf>.

<sup>183</sup> Families USA, *A 10-Foot Rope for a 40-Foot Hole: Tax Credits for the Uninsured, 2002 Update* (Washington, D.C.: Families USA, May 2002), available at <http://www.familiesusa.org/site/DocServer/taxcreditsreport2002update.pdf?docID=281>; Sara R. Collins, et al., *Health Insurance Tax Credits: Will They Work for Women?* (New York, NY: The Commonwealth Fund, Dec. 2002), available at [http://www.cmwf.org/programs/insurance/collins\\_creditswomen\\_589.pdf](http://www.cmwf.org/programs/insurance/collins_creditswomen_589.pdf).

<sup>184</sup> HHS Budget FY 2005, *supra* note 180, at 152.

<sup>185</sup> Edwin Park & Robert Greenstein, Center for Budget and Policy Priorities, "President Proposes to Make Tax Benefits of Health Savings Accounts More Lucrative for Higher-Income Individuals," Feb. 9, 2004, available at <http://www.cbpp.org/1-26-04health.htm>.

<sup>186</sup> 18 U.S.C. § 1531.

<sup>187</sup> 530 U.S. 914 (2000).

<sup>188</sup> Dan Eggen, "Doctors, hospitals challenge U.S. subpoenas: Justice Department seeks confidential medical records on banned late-term abortion procedure," *Washington Post*, Feb. 12, 2004; Steve Hyman, "U.S. subpoenas records of abortion recipients," *Los Angeles Times*, Feb. 27, 2004; Dan Eggen, "U.S. demands more abortion records," *Washington Post*, Feb. 27, 2004.

<sup>189</sup> Abortion Non-Discrimination Act of 2003, H.R. 3664, 108<sup>th</sup> Congress (2003); Abortion Non-Discrimination Act of 2003, S. 1397, 108<sup>th</sup> Congress (2003).

<sup>190</sup> 67 Fed. Reg. 61956 (Oct. 2, 2002).

<sup>191</sup> Unborn Victims of Violence Act of 2004, Pub. L. 108-212, 118 Stat. 568 (2004).

<sup>192</sup> Nicholas Wade, "Bush policy on human stem cells faces new challenges," *New York Times*, March 4, 2004; Marie Cocco, "Abortion drove Bush position on embryo research," *Newsday*, Aug. 14, 2001; Eric Cohen, "Bush's stem cell ruling: A Missouri compromise," *Los Angeles Times*, Aug. 12, 2001; Helen Thomas, "Stem cell issue puts Bush on the spot," *Denver Post*, July 15, 2001; Robin Toner, "Anti-abortion leaders pressure Bush to keep promise on stem cells," *San Diego Union Tribune*, July 12, 2001; Aaron Zitner, "Possible stem cell compromise cited by Bush Catholic advisors: President is torn between the religious vote and the medical community," *Los Angeles Times*, July 8, 2001.

<sup>193</sup> *Remarks by the President on Stem Cell Research*, Aug. 9, 2001, available at <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html>. As of March 2004, only 15 stem

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cell lines were available (and not the 78 the Administration said in 2001 were available), with only another eight likely to become available soon. Wade, *supra* note 192.

<sup>194</sup> Therapeutic cloning, also called somatic cell nuclear transfer (SCNT), transplants a patient's DNA into an unfertilized egg to grow stem cells that the patient's body will not reject. Coalition for the Advancement of Medical Research (CAMR), "Frequently Asked Questions about SCNT (Therapeutic Cloning)," available at <http://www.camradvocacy.org/fastaction/faqs.asp>. Therapeutic cloning is different from "reproductive cloning," which is used to create a child.

<sup>195</sup> The Panel on Scientific and Medical Aspects of Human Cloning (a joint panel of the National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council), after reviewing literature and hearing expert testimony, issued a report recommending that therapeutic cloning be permitted "because of its considerable potential for developing new medical therapies for life-threatening diseases." Committee on Science, Engineering and Public Policy & Board on Life Sciences, *Scientific and Medical Aspects of Human Reproductive Cloning*, at 99 (Washington, D.C.: National Academy Press, 2002), available at <http://www.nap.edu/books/0309076374/html/>. In a statement issued by the American Society for Cell Biology, 40 Nobel laureates said that, although reproductive cloning cannot currently be achieved safely, banning therapeutic cloning "would have a chilling effect on all scientific research in the United States." *Statement by 40 Nobel Laureates Regarding Cloning*, April 10, 2002, available at <http://www.ascb.org/publicpolicy/Nobelletter.html>.

<sup>196</sup> *President Bush Calls on Senate to Back Human Cloning Ban: Remarks by the President on Human Cloning Legislation*, April 10, 2002, available at <http://www.whitehouse.gov/news/releases/2002/04/20020410-4.html>.

<sup>197</sup> HHS Secretary's Advisory Committee on Human Research Protections Revised Charter, adopted Oct. 1, 2002, available at <http://ohrp.osophs.dhhs.gov/sachrp/charter.pdf>.

<sup>198</sup> Rick Weiss, "Bush ejects two from bioethics council: changes renew criticism that the President puts politics ahead of science," *Washington Post*, Feb. 28, 2004.

<sup>199</sup> *Id.* See also, Elizabeth Blackburn, "A 'full range' of bioethical views just got narrower," *Washington Post*, March 7, 2004 (the author is one of the removed members).

<sup>200</sup> Elizabeth Blackburn, "Bioethics and the Political Distortion of Biomedical Science," *New England Journal of Medicine* 350:14, at 1379 (April 1, 2004).

<sup>201</sup> National Cancer Institute, *Abortion and Breast Cancer*, March 6, 2002, available at [http://www.house.gov/reform/min/pdfs/pdf\\_inves/pdf\\_admin\\_hhs\\_info\\_abc\\_fact\\_sheet\\_orig.pdf](http://www.house.gov/reform/min/pdfs/pdf_inves/pdf_admin_hhs_info_abc_fact_sheet_orig.pdf).

<sup>202</sup> Rep. Henry A. Waxman, Ranking Member, Committee on Government Reform, U.S. House of Representatives, "Breast Cancer Risks," *Politics and Science: Investigating the State of Science Under the Bush Administration* (Aug. 2003), available at

[http://www.house.gov/reform/min/politicsandscience/example\\_breast\\_cancer.htm](http://www.house.gov/reform/min/politicsandscience/example_breast_cancer.htm). See also the updated NCI website, [http://cis.nci.nih.gov/fact/3\\_75.htm](http://cis.nci.nih.gov/fact/3_75.htm). In March 2004, an Oxford University study of 83,000 women worldwide (including data from virtually all of the previous studies on abortion and breast cancer and some previously unpublished studies) found that miscarriages and induced abortions do not increase a woman's risk of developing breast cancer later in life. Lawrence K. Altman, "Study finds no link between abortion and breast cancer," *New York Times*, March 26, 2004.

<sup>203</sup> Rep. Henry A. Waxman, Ranking Member, Committee on Government Reform, U.S. House of Representatives, "Condom Effectiveness," *Politics and Science in the Bush Administration* (Aug. 2003), available at [http://www.house.gov/reform/min/politicsandscience/example\\_condoms.htm](http://www.house.gov/reform/min/politicsandscience/example_condoms.htm).

<sup>204</sup> 42 U.S.C.A. § 710(b)(2)(E).

<sup>205</sup> Letter from Tommy G. Thompson, Secretary, Dept. of Health and Human Services, to Rep. James C. Greenwood, U.S. House of Representatives, June 27, 2002 (clarifying, in response to a letter from Rep. Greenwood, that federally-funded abstinence-only programs may not provide instruction in or promote the use of contraceptive methods and, if a program participant asks about contraception, the program may only refer the participant to another agency) (on file with the National Women's Law Center).

<sup>206</sup> Douglas Kirby, *Emerging Answers: Research Findings on Programs to Reduce Teen Pregnancy*, The National Campaign to Prevent Teen Pregnancy, May 2001, at 8-9, available at <http://www.teenpregnancy.org/resources/data/pdf/emerswsum.pdf> (no reliable evidence supports the theory that abstinence-only programs reduce teen pregnancy while five comprehensive sex education programs – identified by the Centers for Disease Control as having strong evidence of success – have demonstrated positive behavioral effects including delaying sexual activity, reducing the frequency of sex,



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reducing the number of sexual partners, and increasing condom or other contraceptive use). Even the Secretary of Health and Human Services, Tommy Thompson, has expressed concern about the paucity of evidence of the effectiveness of abstinence-only programs. Laura Meckler, "Bush: for more abstinence programs," *Associated Press*, Jan. 31, 2002. Moreover, in 2001, the Surgeon General concluded that the only proven method for reducing unintended pregnancies and sexually transmitted diseases among teenagers is to provide them with comprehensive sexuality education programs, which combine the abstinence message with one that teaches young people how to protect themselves against pregnancy and disease. Office of the Surgeon General, U.S. Dept. of Health & Human Services, *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior*, at 11-12 (2001), available at <http://www.surgeongeneral.gov/library/sexualhealth/call.htm>.

<sup>207</sup> National Family Planning and Reproductive Health Association, "Oppose Dangerous, Unproven Abstinence-Unless-Married Education Programs," March 30, 2003.

<sup>208</sup> The Administration's FY 2005 budget proposes \$273 million in funding for abstinence-only programs, nearly double the FY 2004 funding of \$137 million. U. S. Dept. of Health and Human Services, *Budget in Brief: FY 2005*, at 4, available at <http://www.hhs.gov/budget/05budget/fy2005bibfinal.pdf>.

<sup>209</sup> The Alan Guttmacher Institute, "Title X: Three Decades of Accomplishment," *Issues in Brief*, March 2001, at 2, available at [http://www.agi-usa.org/pubs/ib\\_1-01.pdf](http://www.agi-usa.org/pubs/ib_1-01.pdf).

<sup>210</sup> National Family Planning and Reproductive Health Association, "Title X (Ten) National Family Planning Program: Critical Women's Health Program Struggles to Meet Increasing Need," Aug. 8, 2003, available at <http://www.nfprha.org/pac/factsheets/titlex.asp>.

<sup>211</sup> The Administration's FY 2002 budget proposed level funding for Title X; the FY 2003 proposal recommended a meager \$1 million increase over FY 2002 funding; the FY 2004 budget proposal recommended an \$8 million decrease over FY 2003 funding; and the FY 2005 budget proposal recommended level-funding Title X. This information was provided to the National Women's Law Center by the National Family Planning and Reproductive Health Association in February 2004 and is on file with the National Women's Law Center.

<sup>212</sup> National Family Planning and Reproductive Health Association, *supra* note 210.

<sup>213</sup> "Title X Program Announcement Articulates New Priorities for Nation's Family Planning Program," *The Guttmacher Report on Public Policy*, Dec. 2003, available at <http://www.guttmacher.org/pubs/journals/gr060513.pdf>.

<sup>214</sup> *Healthy People 2010*, *supra* note 161, at page 9-8.

<sup>215</sup> The U.S. Equal Employment Opportunity Commission has ruled that it is unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, for an employer-provided health plan to exclude prescription contraceptives while covering other prescription drugs and devices and preventive care. U.S. Equal Employment Opportunity Commission, *Commission Decision on Coverage of Contraception*, Dec. 14, 2000, available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>. In 2001, a federal court also ruled that an employer providing otherwise comprehensive health insurance to its employees, but failing to cover prescription contraceptives, was violating Title VII. *Erickson v. Bartell Drug Co.*, 141 F.Supp.2d 1266, 1277 (W.D.Wash. 2001).

<sup>216</sup> Letter from Janice R. Lachance, Director, United States Office of Personnel Management, to Marcia D. Greenberger, Co-President, National Women's Law Center, Jan. 16, 2001 (on file with the National Women's Law Center).

<sup>217</sup> *Time* magazine reported that two sources familiar with Dr. Hager's practice say that he refuses to prescribe contraceptives to unmarried women. "Jesus and the FDA," *Time*, Oct. 14, 2002. *Time* also reported that Dr. Hager recommends specific scripture readings and prayers for ailments like headaches and PMS in the book he wrote with his wife. See, W. David Hager & Linda Caruth Hager, *Stress and the Woman's Body* (Old Tappan, NJ: Felming H. Revell Co., March 1996).

<sup>218</sup> Task Force on Postovulatory Methods of Fertility Regulation, "Randomised controlled trial of levonorgestrel versus the Yupze regimen of combined oral contraceptives for emergency contraception," *The Lancet*, vol. 352, issue 9126, at 431 (1998) (finding that, with correct use, levonorgestrel can reduce the risk of pregnancy by up to 89%).

<sup>219</sup> U. S. Food and Drug Administration, Center for Drug Evaluation and Research, Nonprescription Drugs Advisory Committee (NDAC) in joint session with the Advisory Committee for Reproductive Health

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Drugs (ACRHD), transcript of meeting, Dec. 16, 2003, *available at* <http://www.fda.gov/ohrms/dockets/ac/03/transcripts/4015T1.htm>.

<sup>220</sup> “Barr says FDA extends Plan B emergency contraceptive PDUFA date: FDA reviewing additional Information on application for over the counter status,” Feb. 13, 2004, *available at* <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=105&STORY=/www/story/02-13-2004/0002109485> (announcement by Barr Pharmaceuticals, Inc. that the FDA had extended by 90 days the original 10 month deadline of February 20, 2004 under the Prescription Drug and User Fee Act (PDUFA) for review of the Plan B emergency contraception Supplemental New Drug Application).

<sup>221</sup> *Id.*

<sup>222</sup> U.S. FDA, *supra* note 219.

<sup>223</sup> *Id.*

<sup>224</sup> Memorandum of President George W. Bush for the Administrator of the United States Agency for International Development, Jan. 22, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/01/20010123-5.html>.

<sup>225</sup> Memorandum of President George W. Bush for the Secretary of State, Aug. 29, 2003, *available at* <http://www.whitehouse.gov/news/releases/2003/08/20030829-3.html>.

<sup>226</sup> The Global Gag Rule Impact Project, *Access Denied: U.S. Restrictions on International Family Planning*, Sept. 2003, *available at* [http://64.224.182.238/globalgagrul/pdfs/executive\\_summary/GGR\\_exec\\_summary.pdf](http://64.224.182.238/globalgagrul/pdfs/executive_summary/GGR_exec_summary.pdf); The Global Gag Rule Impact Project, *Access Denied: The Global Gag Rule and Contraceptive Supplies*, *available at* [http://64.224.182.238/globalgagrul/pdfs/issue\\_factsheets/GGR\\_fact\\_contraceptive.pdf](http://64.224.182.238/globalgagrul/pdfs/issue_factsheets/GGR_fact_contraceptive.pdf); “Swaziland records world’s highest HIV/AIDS prevalence, U.N. Envoy says,” *Kaiser Network Daily HIV/AIDS Report*, March 22, 2004, *available at* [http://www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=22788](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=22788).

<sup>227</sup> Colum Lynch & Juliet Eilperin, “Family planning funds withheld: Administration decides not to contribute to U.N. effort,” *Washington Post*, July 20, 2002.

<sup>228</sup> Thoraya Ahmed Obaid, Executive Director, UNFPA, *Statement on U.S. Funding Decision*, July 22, 2002, *available at* <http://www.unfpa.org/news/news.cfm?ID=146&Language=1>.

<sup>229</sup> U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, *Full Report of the Prevalence, Incidence and Consequences of Violence Against Women, Findings from the National Violence Against Women Survey*, at 26 (2000). This number does not include stalking; including victims of stalking would raise the total to 1.8 million.

<sup>230</sup> National Domestic Violence Hotline website, <http://www.ndvh.org>.

<sup>231</sup> National Network to End Domestic Violence, *The Need for Full Funding of the Violence Against Women Act* (2003), *available at* [www.nnedv.org/pdf/04CJS.pdf](http://www.nnedv.org/pdf/04CJS.pdf).

<sup>232</sup> Budget FY 2005, *supra* note 116, at appendix 699-700.

<sup>233</sup> Sharmila Lawrence, Research Forum on Children, Families, and the New Federalism, *Domestic Violence and Welfare Policy: Research Findings that Can Inform Policies on Marriage and Child Well-Being*, Dec. 2002. *See also*, National Coalition Against Domestic Violence, *Domestic Violence, Homelessness, and the Need for Housing*, Feb. 2003.

<sup>234</sup> U.S. Dept. of Housing and Urban Development, *Public Housing Occupancy Guidebook*, at 216 (Washington, D.C.: Dept. of Housing and Urban Development, June 2003).

<sup>235</sup> Betsy Hart, *supra* note 21.

<sup>236</sup> Anita Blair, Independent Women’s Forum, “The Fine Print of Federal Domestic Violence Laws,” Jan. 1, 2000, *available at* [http://www.iwf.org/media/media\\_detail.asp?ArticleID=396](http://www.iwf.org/media/media_detail.asp?ArticleID=396).

<sup>237</sup> *Id.*

<sup>238</sup> Brief of *Amicus Curiae* Independent Women’s Forum in support of respondents, *U.S. v. Morrison*, 529 U.S. 598 (2000).

<sup>239</sup> Independent Women’s Forum, *Agenda for Women 2003*, at 14, *available at* <http://iwfnw.civclients.com/pdf/iwfaqenda03.pdf> (emphasis added).

<sup>240</sup> David Enrich, “Justice Dept. ignoring violence against women law, lawmakers say,” *States News Service*, Feb. 6, 2003.

<sup>241</sup> Press Release of Senator Biden, “Biden Declares Important Victory for Victims of Domestic Violence: DOJ Abandons Plans to Do Away with Separate Violence Against Women Office,” March 25, 2003.

<sup>242</sup> U.S. Dept. of Health and Human Services, *Budget in Brief for Fiscal Year 2005*.

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- <sup>243</sup> Most recent studies find a much higher incidence of domestic violence among women on welfare. *Domestic Violence and Welfare Policy*, *supra* note 233.
- <sup>244</sup> See, e.g., Family Violence Prevention Fund, “Bush Marriage Promotion Plan Could Endanger Victims of Abuse, Advocates Say,” Feb. 6, 2004, available at <http://endabuse.org/programs/printable/display.php3?NewsFlashID=495>; NOW Legal Defense and Education Fund, “Domestic Violence: The Hidden Peril of Marriage Promotion,” May 6, 2003, available at <http://www.nowldef.org/html/issues/wel/hiddenperil.pdf>.
- <sup>245</sup> See, e.g., Evangelical Lutheran Church in America, “Strengthening Families Through Healthy Marriage,” 2003, available at <http://www.loga.org/familiesmarriage.htm>; NOW Legal Defense and Education Fund, “Why NOW Legal Defense Opposes Federal Marriage Promotion in TANF Reauthorization,” 2003, available at <http://www.nowldef.org/html/issues/wel/MarriageBackgrounder.pdf>.
- <sup>246</sup> Violence Policy Center, “Women and Firearms Violence Factsheet,” [http://www.vpc.org/fact\\_sht/womenfs.htm](http://www.vpc.org/fact_sht/womenfs.htm) (last viewed April 7, 2004).
- <sup>247</sup> Americans for Gun Safety Foundation, *The Enforcement Gap: Federal Gun Laws Ignored*, at 5, May 2003, available at <http://w3.agsfoundation.com/media/AGS-enf.pdf>.
- <sup>248</sup> Women’s Research and Education Institute, *Women in the Military: Where They Stand* (2003).
- <sup>249</sup> *Id.*
- <sup>250</sup> Defense Manpower Data Center, *Armed Forces 2002 Sexual Harassment Survey* (Nov. 2003).
- <sup>251</sup> Lee Hockstader & T.R. Reid, “Academy culture blamed in handling of rapes: Air Force school is male-dominated ‘family,’” *Washington Post*, March 10, 2003 (reporting that women who alleged sexual assaults frequently felt ostracized or were punished for underage drinking or fraternization).
- <sup>252</sup> “Air Force agrees to expand Sheppard base rape inquiry,” *Ft. Worth Star Telegram*, Feb. 28, 2004.
- <sup>253</sup> Eric Schmitt, “Reports of rape in Pacific spur Air Force steps,” *New York Times*, March 9, 2004.
- <sup>254</sup> “Pentagon faulted for sex attacks on female GIs” *The Los Angeles Times*, Feb. 26, 2004.
- <sup>255</sup> Miles Moffeit & Amy Herdy, “Soldier: Army offering exit if she drops rape complaint,” *The Denver Post*, Jan. 14, 2004.
- <sup>256</sup> The Denver Post has written extensively on the problem of sexual assault in the military and the inadequacy of military support for victims. See e.g., Miles Moffeit & Amy Herdy, “Military’s response to rape, domestic abuse falls short,” *The Denver Post*, Nov. 18, 2003; See also, e.g., Schmitt, *supra* note 253.
- <sup>257</sup> Center for Military Readiness, *Summary and Overview: Dismantling the DACOWITS*, Jan. 2002.
- <sup>258</sup> *Id.*
- <sup>259</sup> DACOWITS website, [http://www.dtic.mil/dacowits/membrs\\_SubCom.html](http://www.dtic.mil/dacowits/membrs_SubCom.html).
- <sup>260</sup> When the Bush Administration allowed the DACOWITS charter to expire, there were 34 members serving on the committee. Rowan Scarborough, “Women moved away from combat,” *Washington Times*, March 6, 2002.
- <sup>261</sup> Ilana Mercer, “Osama’s Snickering at our Military,” *World Net Daily*, quoting Catherine L. Aspy, available at [www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=28381](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=28381).
- <sup>262</sup> Rowan Scarborough, “Women moved away from combat,” *Washington Times*, March 6, 2002.
- <sup>263</sup> Mike Soraghan, “Some fear AFA inquiry bias: panel leader fought coed training; backers say she supports women,” *Denver Post*, June 2, 2003.
- <sup>264</sup> *Id.*
- <sup>265</sup> Gabrielle Crist, “Panelist in AFA inquiry resigns,” *Rocky Mountain News*, June 18, 2003.
- <sup>266</sup> *Report of the Panel to Review Sexual Misconduct Allegations at the U.S. Air Force Academy*, at 1, Sept. 22, 2003, available at <http://www.usafa.af.mil/d20030922usafareport1.pdf>.
- <sup>267</sup> *Id.* at 4.
- <sup>268</sup> *Id.* at 3.
- <sup>269</sup> Opening statement of Senator John Warner, Senate Armed Services Committee hearing on prevention of sexual assault, Feb. 25, 2004.
- <sup>270</sup> Opening statement of Senator Ben Nelson, Senate Armed Services Committee hearing on prevention of sexual assault, Feb. 25, 2004.
- <sup>271</sup> *McSally v. Rumsfeld*, No. 1:01CV02481 (D.D.C. complaint filed Dec. 13, 2001).
- <sup>272</sup> *Id.*
- <sup>273</sup> “Military eases policy; But Muslim-dress flap continues for U.S. women,” *Newsday*, Jan. 24, 2002.
- <sup>274</sup> *McSally* complaint, *supra* note 271.

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<sup>275</sup> Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 563, 116 Stat. 2458 (2002).

<sup>276</sup> Pub. L. No. 98-525, Title XIV, § 1401(e)(5)(A), 98 Stat. 2492, 2618 (1985), amended by Pub. L. No. 104-106, Div A, Title VII, Subtitle D, § 738(a), (b)(1), 110 Stat. 186, 383 (1996).

<sup>277</sup> *Id.*

<sup>278</sup> Jodi Enda, “Military Women Prevented from Having Abortions Overseas,” *Women’s ENews*, July 27, 2003, available at <http://www.womensenews.org/article.cfm/dyn/aid/1464/context/archive> (quoting an email from a Pentagon spokesperson stating that “[t]he Administration supports the law”).

<sup>279</sup> In a letter to Congress dated May 7, 1999, then-Assistant Secretary of Defense Dr. Sue Bailey stated, “[t]he Department [of Defense] believes it is unfair for female service members, particularly those members assigned to overseas locations, to be denied their constitutional right to the full range of reproductive health care.”

<sup>280</sup> The Constitution authorizes the President to make appointments during Senate recesses – albeit temporary appointments that expire at the end of the next Congressional session – without the advice and consent of the Senate. This power, however, is rarely used for appointing federal judges, let alone for judicial nominees lacking broad, bipartisan support in the Senate, and it has never before been used for judicial nominations the Senate has refused to confirm. Moreover, no federal judge had ever been given a recess appointment during a short holiday recess in the middle of a Congressional session, yet William Pryor was named to the Eleventh Circuit during an intra-session recess that lasted only five business days; he was appointed on Friday, February 20, 2004 and the Senate returned the following Monday, February 23. This is inconsistent with the generally understood purpose of the recess appointment power, which is to guard against long vacancies that might result if the Senate is out of session for a long period and therefore unable to perform its “advice and consent” role.

<sup>281</sup> Leon and Susan Holmes, “Gender Neutral Language,” *Arkansas Catholic*, April 12, 1997.

<sup>282</sup> James Leon Holmes, “The Scary New Argument for Abortion,” *The Arkansas Gazette*, Sept. 28, 1982.

<sup>283</sup> “Fueling the Fight,” *Washington Post*, editorial, Oct. 30, 2003 (referring to D.C. Circuit nominee Janice Rogers Brown).

<sup>284</sup> *In re Doe 1 (II)*, 19 S.W.3d 346, 365 (Tex. 2000) (Gonzales, J. concurring) (referring to the opinion written by fellow Justice, and Fifth Circuit nominee, Priscilla Owen).

<sup>285</sup> David Savage & Janet Hook, “Stakes are high in push for Latino court nominee,” *Los Angeles Times*, April 11, 2002 (quoting former Deputy Solicitor General Paul Bender about D.C. Circuit nominee Miguel Estrada).

<sup>286</sup> William Pryor, *supra* note 20.

<sup>287</sup> *U. S. v. Virginia et al.*, 518 U.S. 515 (1996).

<sup>288</sup> Brief of Mary Baldwin College as *Amicus Curiae* in support of respondents, *U. S. v. Virginia et al.*, 518 U.S. 515 (1996).

<sup>289</sup> *Aguilar v. Avis Rent A Car Systems, Inc.*, 980 P.2d 846 (Cal. 1999) (Brown, J. dissenting).

<sup>290</sup> Michael McConnell, “The Supreme Court in 1998,” *First Things*, at 38, Nov. 1998.

<sup>291</sup> Judge Pickering testified in his February 7, 2002 hearing before the Senate Judiciary Committee that he believed the Equal Opportunity Employment Commission resolves all meritorious job discrimination claims, so they never reach the federal courts. In fact, the EEOC typically litigates only 3.5% of the charges in which it finds reason to believe that discrimination has occurred, and most victims of discrimination have little choice but to pursue their claims in court. See Marcia D. Greenberger, “Judge Pickering’s Past,” *The Washington Post*, Feb. 14, 2002 (letter to the Editor).

<sup>292</sup> *U.S. v. North Carolina*, 914 F.Supp. 1257 (E.D.N.C. 1996).

<sup>293</sup> *U.S. v. North Carolina*, 180 F.3d 574, 582 (4<sup>th</sup> Cir. 1999).

<sup>294</sup> Tony Mauro, “An unlikely high court specialist,” *Legal Times*, Nov. 2, 1998.

<sup>295</sup> Brief filed for the State of Alabama as *Amicus Curiae* in support of respondents, *U.S. v. Morrison*, 529 U.S. 598 (2000).

<sup>296</sup> *Nevada v. Hibbs*, 538 U.S. 721 (2003).

<sup>297</sup> Third Circuit appointee D. Brooks Smith, for example, has characterized VAWA as a “promiscuous invocation of the Commerce Clause” that went beyond Congress’ power, and dubbed VAWA “perhaps the most significant legislative challenge to this original understanding of federalism today.” Remarks before the Federalist Society, Pittsburgh, 1993. Jay Bybee, now on the Ninth Circuit, not only has argued that VAWA was unconstitutional because it exceeded Congress’s power under the Commerce Clause and

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Section 5 of the 14<sup>th</sup> Amendment, but has also advanced the novel proposition that it violates Article VI, Section 4 of the Constitution, which he claims reserves the right to pass most criminal legislation to the states. Brief of the Clarendon Foundation as *Amicus Curiae* in support of Respondent, at 1, *U.S. v. Morrison*, 529 U.S. 598 (2000).

<sup>298</sup> Janice Rogers Brown, “Whiter Shade of Pale,” Remarks before the Federalist Society, April 20, 2000.

<sup>299</sup> Thirty-first Republican National Convention, *Remarks by Charles Pickering, Delegate from the State of Mississippi in Opposition to the Amendment Concerning Abortion*, Aug. 17, 1976; *Unborn Child Amendment Committee v. Ward*, 943 S.W.2d 591 (Ark. 1997).

<sup>300</sup> William Pryor, *supra* note 20.

<sup>301</sup> Michael W. McConnell, “Roe v. Wade at 25: Still Illegitimate,” *Wall Street Journal*, Jan. 22, 1998.

<sup>302</sup> Brief for the Respondent, at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>303</sup> Charles Fried, *Order and Law: Arguing the Reagan Revolution—A First-Hand Account*, 33-34 (New York, NY: Simon & Schuster, 1991) (describing Kuhl as the most “aggressive” advocate in the Justice Department urging reversal of *Roe v. Wade*).

<sup>304</sup> See, e.g., *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000); see also, e.g., *In re Doe I (II)*, 19 S.W.3d 346, 365 (Tex. 2000).

<sup>305</sup> For example, Claude Allen, nominated to the Fourth Circuit, has been called “the administration’s point man on abstinence-only programs.” NPR, “Abstinence-only Advocates Seek to Replace all Other Forms of Sex Education with Abstinence-only Education,” *All Things Considered*, Jan. 22, 2003. D. Michael Fisher, now on the Third Circuit, ran for Governor of Pennsylvania with a pledge that if elected he would oppose state funding of contraceptive services, advocate abstinence education, and oppose a requirement that health insurance policies that cover other prescription drugs include coverage of contraceptives.

“Pennsylvania Governor/Lt. Governor Survey, General Election 2002,” *Pennsylvania Catholic Conference*, available at [www.pacatholic.org/election%20archive/gen02gov.htm](http://www.pacatholic.org/election%20archive/gen02gov.htm).

<sup>306</sup> Memorandum from Brad Berry, U.S. Dept. of Justice, to Linda K. Davis, U.S. Dept. of Justice, Nov. 29, 1994.

<sup>307</sup> Charles W. Pickering, “Recent Decisions, Criminal Law – Miscegenation – Incest,” 30 *Mississippi Law Journal*, at 326 (1959).

<sup>308</sup> Anthony Lewis, “The Court says no,” *New York Times*, May 26, 1983.

<sup>309</sup> For example, Fourth Circuit nominee Terrence Boyle, as a district court judge, has twice been overruled by the Supreme Court for striking down a minority voting district. *Easley v. Cromartie*, 121 S.Ct. 1452 (2001).

<sup>310</sup> “Hunt continues to criticize Helms for connections to ‘Radical Right,’” *Greensboro News & Record*, Oct. 11, 1984. Jay Bybee, confirmed to the Ninth Circuit, has argued that laws protecting gays and lesbians from discrimination confer a “favored status” on these groups rather than equal rights. Jay S. Bybee, “The Equal Process Clause: A Note on the (Non)Relationship Between *Romer v. Evans* and *Hunter v. Erickson*,” 6 *William & Mary Bill of Rights Journal*, at 201 (1997).

<sup>311</sup> Janice Rogers Brown, nominated to the D.C. Circuit, testified at her confirmation hearing that she does not believe that the same “stigma” experienced by other victims of discrimination is experienced by older people, and suggested that there are good reasons to replace older workers with younger ones. Jeffrey Sutton, confirmed to the Sixth Circuit, went beyond asserting “federalism” arguments against the Americans With Disabilities Act (ADA), and said that the ADA is “not needed” to remedy discrimination against people with disabilities. Oral Argument Transcript at 24, *University of Alabama v. Garrett*, 531 U.S. 356 (2001).

<sup>312</sup> Anna Kornblut, “Shut office signals shift on women,” *Boston Globe*, March 28, 2001; Sandra Sobieraj, “Bush ends women’s office,” *Associated Press*, March 28, 2001.

<sup>313</sup> Mary Leonard, “Bush liaison courts support of women: office following Clinton approach,” *Boston Globe*, Dec. 20, 2001.

<sup>314</sup> Jodi Enda, “Bush welcomes women’s advocates,” *Philadelphia Enquirer*, Feb. 3, 2002.

<sup>315</sup> Leonard, *supra* note 313 (quoting Lori Cole, Executive Director of the Eagle Forum).

<sup>316</sup> “Women’s Labor Bureau Office won’t be closed,” *San Francisco Chronicle*, Jan. 15, 2002; Ruth Rosen, “Bush’s Political Payoff,” *San Francisco Chronicle*, editorial, Jan. 14, 2002.