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## Toward Facilitating a Voice for Politically Marginalized Minorities and Enhancing Presidential Public Accountability and Transparency in Foreign Health Policymaking

Nina J. Crimm

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## **Toward Facilitating a Voice for Politically Marginalized Minorities and Enhancing Presidential Public Accountability and Transparency in Foreign Health Policymaking**

*Nina J. Crimm\**

### **ABSTRACT**

*Residents of underdeveloped countries who belong to ethnic, racial, sexual, and political minorities usually endure relatively ineffective political voices. More than any other world population segment, these marginalized people are vulnerable to, and suffer from, compromised health and life expectancies. Their immense human tolls have spawned severe global humanitarian, economic, social, political, and security dilemmas contrary to the strategic interests of the United States. Despite recognition of these devastating harms here and abroad, the president as de facto primary U.S. foreign policymaker continues to formulate foreign health policy in an insular policymaking environment. The insularity enables the president to design policy without broad input, transparency, or public scrutiny. This Article suggests the alteration of the presidential policymaking apparatus. It proposes a concrete structure to facilitate a voice for politically marginalized minorities and to*

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\* Professor of Law, St. John's University School of Law; LL.M. in Taxation, Georgetown University (1982); J.D. and M.B.A., Tulane University (1979); A.B., Washington University (1972). I wish to thank my research assistant, Kerry Jardine, for her assistance.

*enhance public accountability and transparency in presidential foreign health policymaking, thereby collaterally imbuing the process with a new legitimacy.*

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*A popular government, without popular information, or the means for acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives. – James Madison\*\**

## I. INTRODUCTION

Residents of underdeveloped countries<sup>1</sup> who belong to ethnic, racial, sexual, and political minorities usually endure relatively ineffective or nonexistent political voices. More than any other world population segment, these people are vulnerable to, and suffer from, compromised health and life expectancies. These marginalized people have received increased international visibility since the onset of globalization and worldwide recognition that their immense human tolls have spawned enormous fractures in “critical infrastructures that sustain the security, stability, and viability of modern nation-states,”<sup>2</sup> contrary to the strategic interests of developed countries, including the United States.<sup>3</sup> Nonetheless, in the de facto role of

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\*\* Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON, at 103 (Gaillard Hund ed., 1910), quoted in *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 52 (D.D.C. 2002).

1. Economically underdeveloped “Third World” countries, including those in Africa, Asia, Oceania, and Latin America, are characterized by economic dependence on advanced countries, widespread poverty, high birth rates, large populations living in rural areas, and rural social structures. See, e.g., Gerard Chaliand, *Third World*, definitions and descriptions, [http://www.thirdworldtraveler.com/Travel/Def\\_Third\\_World.html](http://www.thirdworldtraveler.com/Travel/Def_Third_World.html) (last visited Sept. 3, 2006).

2. MARK SCHNEIDER & MICHAEL MOODIE, *THE DESTABILIZING IMPACTS OF HIV/AIDS 1* (2002). For further discussion of the global damages, see *infra* note 71 and accompanying text.

3. As a general matter, unless U.S. strategic interests are served, foreign policies will not be developed and implemented to address concerns of interest groups. See, e.g., LEE H. HAMILTON, *A CREATIVE TENSION: THE FOREIGN POLICY ROLES OF THE PRESIDENT AND CONGRESS 44* (2002); Eric M. Uslander, *Cracks in the Armor? Interest Groups and Foreign Policy*, in *INTEREST GROUP POLITICS* 355, 357 (Allan J. Cigler &

primary foreign policymaker,<sup>4</sup> U.S. presidents have failed to act adequately to forestall these groups' health crises and to avert consequential damaging global outcomes.

Perhaps it should be no surprise that U.S. presidents have been mightily deficient in tackling the health needs of such Third World countries' marginalized residents. In the United States, it is well documented that even during the past fifty years, the overall health and life expectancies of politically under-represented ethnic, racial, and sexual groups—women, gays, African-Americans, Hispanic-Americans, Asian-Americans, Pacific-Americans, American Indians, and Native Alaskans—have been below those of the U.S. population as a whole.<sup>5</sup> Nonetheless, the medical hardships of these Americans pale in comparison to the substandard health status of underdeveloped countries' ethnic, racial, sexual, and political minorities.

Statistical data regarding health conditions of Third World women and children confirms this disparity: despite the growth of gender-targeted healthcare programs available to some

Burdett A. Loomis, eds., 2002). For a discussion on U.S. strategic interests affected by global health matters, see *infra* note 71 and accompanying text.

4. See *infra* Parts II, III.

5. See generally U.S. Department of Health and Human Services, The Office of Minority Health, <http://www.omhrc.gov> (last visited Sept. 15, 2006). These groups' political under-representation has stemmed from a variety of factors. Some groups, such as women, share common gender-specific health issues, such as reproductive health problems and breast and ovarian cancers. Nonetheless, until the women's liberation movement of the 1960s, women generally had accepted (and if not bowed to or were subjugated by) the prevalent paternalistic healthcare attitude of their professional medical provider, who was often a male. Where women's healthcare interest groups existed, they largely operated as a multitude of small, discrete, and unattached or loosely connected cadres that lacked funding; aggressive, strong, and entrepreneurial leadership; and a collective and unified political voice. See Maureen Casamayou, *Collective Entrepreneurism and Breast Cancer Advocacy*, in INTEREST GROUP POLITICS, *supra* note 3, at 79, 80–83. Moreover, society perceived women's gender-related medical problems as sexually intimate and therefore socially and publicly unacceptable discussion topics.

There are many reasons for the generally sub-optimal medical welfare of America's ethnic groups, such as African-Americans, Hispanic-Americans, Asian-Americans, Pacific-Americans, American Indians, and Native Alaskans. The groups' socioeconomic status has played a role, as has their ancestry. Moreover, as a general matter the interests of each group are fragmented, as are their political voices. Some of the health problems from which a particular ethnic or racial group suffers are not common to all citizens and residents of the United States, making them easier for the broad populace, the medical establishment, and politicians to ignore. Thus, until recently domestic health policies and health programs largely have not addressed their particular needs. *Id.*

Homosexual men, whose sexual preferences for many years were unacceptable to mainstream society and thus were relegated to hiding, were and continue to be a marginalized political group. They have been burdened by HIV/AIDS more than any other population cohort in America.

underprivileged women residing in underdeveloped countries,<sup>6</sup> these women continue to be particularly plagued by high levels of complications from pregnancy or delivery, many of which result in lifelong disabilities. Indeed, more than 80,000 women residing in poor countries annually develop fistula, which leaves them permanently incontinent and socially ostracized.<sup>7</sup> Women in the Third World also are particularly susceptible to death from disease and maternal difficulties. Reports reveal that around the world more than 500,000 women die every year—that is, one woman every minute—from pregnancy and childbirth complications, such as delays or failures in obtaining obstetrical care, unsafe abortions, and the lack of access to drugs.<sup>8</sup> Ninety-nine percent of these deaths occur in low-income countries.<sup>9</sup> The World Health Organization (WHO) reported in 2005 that more than 500,000 women in underdeveloped countries have demonstrated particular vulnerability to contagious diseases.<sup>10</sup> They contract malaria, tuberculosis, and HIV/AIDS in disproportionately elevated numbers.<sup>11</sup> As of 2005, women comprised 45% of all people (women, men, and children) worldwide living with HIV/AIDS.<sup>12</sup> Women's deaths from contagious diseases are notably high. For example, on a worldwide basis, tuberculosis accounts for 9% of women's deaths annually.<sup>13</sup>

Children residing in Third World countries are another group sorely under-represented by political voice who disproportionately

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6. International nongovernmental organizations dedicated to women's human rights issues and the media have been effective in raising awareness of women's health issues.

7. Global Health Council, *Women's Health*, [http://www.globalhealth.org/view\\_top.php?id=225](http://www.globalhealth.org/view_top.php?id=225) (last visited Sept. 15, 2006). Fistula is a tear in the birth canal causing leakage from the bladder or rectum. *Id.*

8. *Id.*; see also World Health Organization, *New Global Partnership Will Take Immediate Action to Help Women and Children Survive*, Sept. 12, 2005, <http://www.who.int/mediacentre/news/releases/2005/pr41/en/>. In 2000, there were approximately 68,000 deaths from unsafe abortions, almost half (30,000) of which occurred in Africa. WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2000, at 13 (4th ed. 2004), available at [http://www.who.int/reproductivehealth/publications/unsafe\\_abortion\\_estimates\\_04/estimates.pdf](http://www.who.int/reproductivehealth/publications/unsafe_abortion_estimates_04/estimates.pdf).

9. WORLD HEALTH ORG., *supra* note 8; Global Health Council, *supra* note 7.

10. See Avert.org, *Worldwide AIDS & HIV Statistics*, <http://www.avert.org/worldstats.htm> (last visited Sept. 15, 2006).

11. *Id.*

12. UNAIDS, 2006 REPORT ON THE GLOBAL AIDS EPIDEMIC, Core Epidemiology Slide 1 (2006), [http://data.unaids.org/pub/GlobalReport/2006/2006\\_GR-Epicore\\_en.ppt](http://data.unaids.org/pub/GlobalReport/2006/2006_GR-Epicore_en.ppt); Avert.org, *supra* note 10. Fifty-nine percent of the Sub-Saharan African population living with HIV/AIDS were women. *Id.* African women are more than 1.4 times as likely as men to be infected with HIV/AIDS. *Id.*

13. The Henry J. Kaiser Found., *TB Largest Infectious Cause of Death Among Women Worldwide, Conference Attendees Say*, Sept. 27, 2005, [http://www.kaisernet.org/daily\\_reports/rep\\_index.cfm?hint=4&DR\\_ID=32790](http://www.kaisernet.org/daily_reports/rep_index.cfm?hint=4&DR_ID=32790).

suffer from preventable or treatable health issues.<sup>14</sup> For example, each day approximately 6,000 girls, often between the ages of four and eight living in eastern, central, and western African communities, the Middle East, and in immigrant communities in Asia, the Pacific, Latin America, and Europe, are subject to female genital mutilation.<sup>15</sup> This practice has led to grave psychological and physical health problems such as organ damage, serious long-term infection, HIV/AIDS, infertility, and death for an estimated 135 million females.<sup>16</sup> Across the world, approximately 1,500 children contract HIV/AIDS every day,<sup>17</sup> and those living primarily in poor countries now account for one-half of all new HIV/AIDS sufferers worldwide.<sup>18</sup> At the end of 2005, more than 2.3 million children under age fifteen lived with HIV/AIDS,<sup>19</sup> and most of these children resided in the Third World.<sup>20</sup> Strikingly, HIV/AIDS afflicts young girls in certain countries to a larger measure than boys. For instance, 76% of youths with HIV/AIDS in Sub-Saharan Africa between ages fifteen and twenty-four are girls.<sup>21</sup> All of these youngsters are plagued by severe physical and emotional consequences of the disease.

Children in underdeveloped countries also experience high mortality rates.<sup>22</sup> The Global Health Council reports that “[e]very minute of every day, 20 children die somewhere in the world, and two-thirds of these deaths could be readily averted by existing preventive and therapeutic strategies.”<sup>23</sup> Moreover, of “the 10.8 million children under age five who die each year, 10 million (more

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14. The weak political status of children is attributable in some part to the inability of children to form international human rights groups to represent their interests. Accordingly, even compared to women, their health issues stemming from poverty, poor nutrition, lack of education, and inferior healthcare are hugely burdensome. UNAIDS & WORLD HEALTH ORG., AIDS EPIDEMIC UPDATE 2 (2004), available at [http://www.reliefweb.int/rw/lib.nsf/db900SID/LHON-69TDCG/\\$FILE/AIDS\\_Update\\_UNAIDS\\_Dec\\_2004.pdf?OpenElement](http://www.reliefweb.int/rw/lib.nsf/db900SID/LHON-69TDCG/$FILE/AIDS_Update_UNAIDS_Dec_2004.pdf?OpenElement).

15. Amnesty Int'l, *What is female genital mutilation?*, <http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm> (last visited Sept. 7, 2006).

16. *Id.* Two million girls a year are at risk of genital mutilation. *Id.*

17. UNAIDS, *supra* note 12, at Core Epidemiology Slide 10.

18. UNAIDS & WORLD HEALTH ORG., *supra* note 14, at 4.

19. Avert.org, *supra* note 10. The number of AIDS orphans is horrific; in 2005 there were 12 million in Africa alone. *Id.*

20. *Id.*

21. UNAIDS & WORLD HEALTH ORG., *supra* note 14, at 4.

22. The troublesome childhood mortality in underdeveloped countries results from conditions associated with poverty, including unsafe drinking water, malnutrition, poor sanitation, absence of prenatal care, inadequate diets, and lack of healthcare to prevent or treat infectious diseases. Global Health Council, *Child Health*, <http://www.globalhealth.org/printview.php3?id=226> (last visited Sept. 7, 2006).

23. *Id.* Recently, the Bill and Melinda Gates Foundation announced that it donated \$84 million to two charities that work to prevent needless deaths of infants within the first several days of their births. See Donald G. McNeil, Jr., *The Gateses Give \$84 Million To Help Prevent Infant Deaths*, N.Y. TIMES, Dec. 2, 2005, at A12.

than 92 percent) resided in the lower-income countries."<sup>24</sup> Childhood mortality from HIV/AIDS, largely acquired from mothers during birthing or breast feeding,<sup>25</sup> is exceedingly high. By 2000, about 4.3 million children younger than age fifteen had died from HIV/AIDS.<sup>26</sup> In 2005 alone, estimates reveal that between 290,000 and 500,000 children under fifteen years old died of HIV/AIDS.<sup>27</sup>

These small glimpses into just two politically under-represented population segments living in underdeveloped countries suggest the magnitude of various health maladies that impact numerous such groups. They beg us to ask how our nation's leading foreign policymaker permits such tragedies to continue unabated despite U.S. strategic interests to the contrary.<sup>28</sup> The story of the HIV/AIDS pandemic is revealing.

The HIV/AIDS pandemic reared its ugly head in Africa and the Caribbean more than two decades ago<sup>29</sup> before striking politically under-represented minorities of developing and developed countries, including the United States.<sup>30</sup> President Ronald Reagan was aware of the mounting HIV/AIDS problem at home and abroad as early as 1983.<sup>31</sup> Nonetheless, he and his administration discounted the evidence, denied the disease's potentialities, and failed to react.<sup>32</sup> For almost two decades thereafter, presidents (and other policymakers) largely ignored the rapidly growing HIV/AIDS crises.<sup>33</sup> The reasons for their inaction are based on attitudes, information, and politics. Initially, in the U.S. HIV/AIDS was viewed as a disease primarily affecting the domestic gay population, a minority affinity group with little political clout in the early 1980s. Moreover, the disease was then considered exclusively sexually transmitted.<sup>34</sup> Persons who contracted HIV/AIDS were viewed as foolishly having engaged in risky behavior

24. Global Health Council, *supra* note 22.

25. *Id.* Blood factors, such as hemophilia and blood transfusions, account for some cases of HIV/AIDS. Avert.org, Can you get AIDS from . . . ?, <http://www.avert.org/howcan.htm> (last visited Sept. 7, 2006).

26. Nat'l Inst. of Allergy and Infectious Diseases, *The Evidence That HIV Causes AIDS*, Feb. 27, 2003, <http://www.niaid.nih.gov/factsheets/evidhiv.htm>.

27. UNAIDS, *supra* note 12, at Core Epidemiology Slide 8.

28. See GREG BEHRMAN, *THE INVISIBLE PEOPLE: HOW THE U.S. HAS SLEPT THROUGH THE GLOBAL AIDS PANDEMIC, THE GREATEST HUMANITARIAN CATASTROPHE OF OUR TIME* 5-8, 11-13 (2004).

29. See *infra* note 35 and accompanying text.

30. BEHRMAN, *supra* note 28, at 5-8, 11-13.

31. *Id.*

32. *Id.*

33. *Id.* Domestic and foreign policy regarding HIV/AIDS are inextricably connected, as are many policy areas. See, e.g., Ernest J. Wilson, III., *Interest Groups and Foreign Policymaking: A View from the White House*, in *THE INTEREST GROUP CONNECTION* 238, 243 (Paul S. Herrnson et al. eds., 1998).

34. Later, it was learned that transmission of HIV/AIDS also occurred by tainted blood supplies, birthing or breastfeeding by an infected mother, and other means. Avert.org, *supra* note 25.



preventable by sexual abstinence or precautionary measures. In other words, a prevalent attitude was that these individuals got what they deserved. As the drug-addicted population became victims of the disease as a result of their use of contaminated needles, stigmatization mounted. Superimposing these stigmas on top of racial and ethnic biases associated with the disease's probable African origin<sup>35</sup> further tainted perspectives of the populations affected by HIV/AIDS abroad. Some African leaders reinforced U.S. presidents' ignorance about the epidemic proportions of HIV/AIDS by denying that HIV/AIDS was a major health issue among both heterosexuals and homosexuals.<sup>36</sup> Additionally, presidents faced with constituents' opinions and perhaps a desire for reelection conceivably felt paralyzed.<sup>37</sup> Thus, presidents' personal homophobic, ethnic, and racial biases; their sentiments about drug addiction; their lack of knowledge;<sup>38</sup> and their desires for the electorates' votes clouded their perceptions of HIV/AIDS and contributed to policymaking inaction.<sup>39</sup> Unfortunately, their disregard contributed to an immense and persistent human toll in the United States and abroad and to unprecedented global humanitarian, economic, social, political, and security dilemmas contrary to U.S. strategic interests.<sup>40</sup>

The active engagement of the White House in politically under-represented minorities' emerging and recognized world health challenges is imperative to the creation and implementation of appropriate foreign health policies.<sup>41</sup> As one government official

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35. BEHRMAN, *supra* note 28, at 15–16. *But see* Rebecca Voelker, *HIV/AIDS in the Caribbean: Big Problems Among Small Islands*, 285 J. AM. MED. ASS'N 2961, 2962 (2001) (indicating reports of the Caribbean Epidemiology Center suggest that HIV/AIDS first emerged in Jamaica in 1982).

36. *See* BEHRMAN, *supra* note 28, at 206 (indicating that African leaders finally broke their silence around 2001).

37. *But see* ERIC ALTERMAN, *WHO SPEAKS FOR AMERICA? WHY DEMOCRACY MATTERS IN FOREIGN POLICY* 4 (1998) (suggesting that elections occur too infrequently to greatly affect much foreign policy decision-making).

38. Some transmission of HIV/AIDS occurred as a result of tainted blood supplies, birthing, or breastfeeding by infected mothers. Avert.org, *supra* note 25.

39. Unlike the innocent Tsunami victims, to whom the U.S. government reacted rather quickly in 2004, the sufferers of HIV/AIDS may have been viewed as bringing their own fates upon themselves by inappropriate and avoidable sexual activities. For a discussion of the U.S. government's initial funding offer to assist the Tsunami victims and the outside pressures brought on the U.S. government to increase its financial support, see, for example, Elizabeth Becker, *U.S. Nearly Triples Tsunami Aid Pledge, to \$950 Million*, N.Y. TIMES, Feb. 10, 2005, at A3; Alan Cowell, *Pressure Grows for Rich Nations to Redouble Effort to Aid Africa*, N.Y. TIMES, Jan. 28, 2005, at A3; Celia W. Dugger, *U.N. Proposes Doubling of Aid to Cut Poverty*, N.Y. TIMES, Jan. 18, 2005, at A1.

40. *See infra* note 71 and accompanying text.

41. Domestic and foreign policies are inextricably entangled; what the president does with foreign policy easily might affect aspects of domestic policy. *See, e.g.*, Wilson, *supra* note 33, at 238, 243. For example, Americans are acutely aware that

stated in 2003, the HIV/AIDS story makes it clear that “the government cannot do it alone. Not only do we have limited resources, but we don’t always have the best answers and solutions. Indeed, people and nongovernmental organizations [NGOs] can often best address the many challenges [together] here at home and throughout the world.”<sup>42</sup> The government official’s admission that the government is not omnipotent and cannot be effective in accomplishing crucial policy tasks alone underscores the vital need for structural changes in presidential foreign health policymaking processes.<sup>43</sup>

In *A Voice for Nonprofits*,<sup>44</sup> John M. Berry and David F. Arons analyze the potential effectiveness of the joint production of policy by U.S. policymakers and nonprofit interest groups and organizations. Drawing from the research of other scholars,<sup>45</sup> they view nonprofits as “service bureaus” that can assist the government by anticipating needs, providing research and information, offering perspectives, and giving technical and financial support.<sup>46</sup> This has long been borne out. U.S.-based public charities and domestic private foundations have an extensive history of facilitating U.S. interests and of serving under-represented groups in the United States and abroad.<sup>47</sup> They have championed new ideas and programs and have been instrumental in recognizing and responding to sudden, as well as ongoing, needs of marginalized people when the U.S. government has failed to do so, sometimes despite national interests to the contrary.<sup>48</sup> Thus, through their missions, economic support, and activities, domestic nonprofits have privately designed unofficial foreign policy that profoundly has impacted foreign affairs.<sup>49</sup>

foreign trade policy impacts jobs at home and that foreign policies of varying natures affect national security policy. *Id.*

42. Paula Dobriansky, *Under Secretary for Global Affairs, Remarks to the Fund for American Studies*, Jan. 18, 2003, <http://www.state.gov/g/rls/rm/2003/17895.htm>.

43. There are other areas of concern, such as the environment, in which U.S. foreign policymaking processes might benefit from structural changes. *Id.*

44. JEFFREY M. BERRY WITH DAVID F. ARONS, *A VOICE FOR NONPROFITS* 130–45 (2003).

45. *Id.* at 143 (citing RAYMOND A. BAUER, ITHIEL DE SOLA POOL & LEWIS ANTHONY DEXTER, *AMERICAN BUSINESS AND PUBLIC POLICY* 350–57 (1972)).

46. *Id.* at 137–45.

47. See Nina J. Crimm, *Through a Post-September 11 Looking Glass: Assessing the Roles of Federal Tax Laws and Tax Policies Applicable to Global Philanthropy by Private Foundations and Their Donors*, 23 VA. TAX REV. 1, 17–18 (2003) [hereinafter Crimm, *Through a Post-September 11 Looking Glass*]; Nina J. Crimm, *A Case Study of a Private Foundation’s Governance and Self-Interested Fiduciaries Calls for Further Regulation*, 50 EMORY L.J. 1093, 1095–96 (2001). Additionally, it is common for I.R.C. § 501(c)(4) advocacy organizations to represent interests of minority groups.

48. See BERRY WITH ARONS, *supra* note 44, at 130–45.

49. Much of the literature focuses on domestic private foundations. See EDWARD H. BERMAN, *THE INFLUENCE OF THE CARNEGIE, FORD, AND ROCKEFELLER FOUNDATIONS ON AMERICAN FOREIGN POLICY: THE IDEOLOGY OF PHILANTHROPY* 41–55

Nonetheless, there has never been an official role for nonprofits in a president's foreign health policymaking apparatus.<sup>50</sup> The lack of such a formal structure effectively has maintained the two sectors' independence. While sector autonomy has important advantages,<sup>51</sup> this Article's subsequent tale of the lengthy road to constructing U.S. foreign policy for HIV/AIDS and its discussion of the presidential policymaking structure highlight downsides.<sup>52</sup>

The Article focuses on presidential foreign policymaking structures largely because in modern times the president has been the dominant foreign policymaker.<sup>53</sup> And, whether involving global health or another policy area, the president rather easily can maintain insular perspectives and inalterable policy positions without broad public accountability and transparency.<sup>54</sup> Thus, absent structural changes to the presidential foreign policymaking approach, the president is vulnerable to making foreign policy that does not satisfy national interests.

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(1983); WALDEMAR A. NIELSEN, *THE BIG FOUNDATIONS* 54–57, 60–61, 80 (1972); JOAN ROELOFS, *FOUNDATIONS AND PUBLIC POLICY* 3–5, 38–40, 52–53, 139–43, 157–206 (2003); RENE WORMSER, *FOUNDATIONS: THEIR POWER AND INFLUENCE* 200, 204–205, 209 (1958); Crimm, *Through a Post-September 11 Looking Glass*, *supra* note 47, at 17–18; Gary R. Hess, *Waging the Cold War in the Third World: The Foundations and the Challenges of Development*, in *CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY* 319, 319–39 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003). *See infra* note 209 and accompanying text (regarding the private design of foreign policy).

50. One Filer Commission Research Paper suggests logical reasons that private philanthropic institutions should be involved in public affairs. Adam Yarmolinsky, *Philanthropic Activity in International Affairs*, in 2 *RESEARCH PAPERS: PHILANTHROPIC FIELDS OF INTEREST* 761, 817–19 (Commission on Private Philanthropy and Public Needs, 1977) (suggesting a defined relationship with the government can reduce government costs and aggravations; speed responses to crises when necessary; operate as a means of incubating new ideas and processes; and provide a conscience, viewpoint, or reasoning otherwise not part of the governmental structure).

51. *See* Nina J. Crimm, *Democratization, Global Grant-Making, and the Internal Revenue Code Lobbying Restrictions*, 79 *TUL. L. REV.* 587, 593–94 (2005) (describing private foundations' outreach efforts and financial aid for human rights and humanitarian causes, health and education initiatives, economic development programs, and other foreign affairs matters during the Cold War and post-Cold War periods); Yarmolinsky, *supra* note 50, at 775–76 (noting that private foundations as private funding sources may meet with less resistance by foreign countries than funding from the U.S. government).

52. *See infra* Part II.

53. *See infra* Part III.

54. Foreign policymaking depends not only on the formal government structures formulated under the U.S. Constitution and on the exercise of those powers by the executive and legislative branches, but also on the particular individuals involved in the processes. The literature is replete with stories of the impact of various presidents; Secretaries of State, such as John Foster Dulles; and Congressional leaders on the making of U.S. foreign policy. While personalities significantly influence the formulation and development of foreign policy, this Article focuses instead on institutional and governmental relationships.

The Article suggests alteration of the presidential foreign policymaking system to address global health matters affecting the well-being and very existence of marginalized minorities throughout the world. To illustrate why structural changes are required, Part II reviews the two decades of lost opportunities for inclusion of HIV/AIDS as a U.S. foreign policy priority. Thereafter, Part III provides a brief overview of the official foreign policy decision-making structure. The Article next presents in Part IV practical reasons for formally adding domestic nonprofit organizations as official actors in the presidential foreign health policymaking processes. In Part V, the Article reviews several existing paradigms that provide formal arrangements for the participation of NGOs in various international bodies charged with rule making and policymaking authority, such as the International Labor Organization formal NGO "association" structure,<sup>55</sup> the Organization for Economic Cooperation and Development formal advisory committee system,<sup>56</sup> and the consultative status of NGOs to the United Nations (U.N.) Economic and Social Council.<sup>57</sup> These paradigms feature certain attractive attributes that the Article identifies as important to incorporate in a presidential foreign health policymaking arrangement. The Article attempts to fit these qualities into a constitutionally acceptable structure that will permit domestic nonprofits to be official voices of politically marginalized minorities in presidential foreign health policymaking. To this end, the Article proposes a pair of new structures. In brief, the Article first suggests the president's establishment of a Presidential Advisory Committee on U.S. Foreign Health Policy, composed of representatives from the nonprofit sector. It then proposes the creation of an Assembly on Nonprofit Entities to give broad voice to nonprofits with expertise and experience in global health matters and to present to presidential advisors on a new Presidential Advisory Committee the nonprofits' insights, research, and recommendations.

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55. See *infra* Part V.A.4.

56. See HENRY G. AUBREY, ATLANTIC ECONOMIC COOPERATION: THE CASE OF THE OECD 131 (1967) (OECD has formal relationships with nongovernmental organizations in the form of advisory committees, including its Business and Industry Advisory Committee (BIAC) and Trade Union Advisory Committee (TUAC)). For further discussion, see *infra* Part V.A.5.

57. Article 71 of the United Nations Charter to the Economic and Social Council (ECOSOC) provides authority for consultative status of nongovernmental organizations. U.N. Charter art. 71; see E.S.C. Res. 1996/31, U.N. Doc. E/RES/1996/31 (July 25 1996). For further discussion, see *infra* Part V.A.6.

## II. THE HIV/AIDS PANDEMIC

## A. Overview

As HIV/AIDS<sup>58</sup> gripped the world, U.S. government policy-makers were not prepared for, and did not readily react to, its appearance.<sup>59</sup> Twenty-five years later, HIV/AIDS had “already killed more people than all the soldiers killed in the major wars of the twentieth century, and equals the toll taken by the bubonic plague in 1347.”<sup>60</sup> Since its known inception 25 years ago, the AIDS causing virus, HIV, has infected in excess of 65 million people, and AIDS has killed approximately 25 million people worldwide (that is, an average of 1 million individuals annually).<sup>61</sup> While there is a sense that the spread of HIV/AIDS appears under control in affluent countries,<sup>62</sup> the pandemic currently continues without apparent abatement in poor and developing countries,<sup>63</sup> despite the global funding response to the HIV/AIDS crisis since 2001.<sup>64</sup> Approximately 38.6 million individuals live with HIV/AIDS, and between 3.4 million and 6.2 million people were newly infected with HIV in 2005.<sup>65</sup> The United Nations AIDS (UNAIDS) 2006 report reveals that approximately 65% of all global

58. Human Immunodeficiency Virus (HIV) is a retrovirus recognized as the etiologic agent of its most severe disease manifestation, Acquired Immunodeficiency Syndrome (AIDS). See AIDSINFO, GLOSSARY OF HIV/AIDS-RELATED TERMS 57 (5th ed. 2005), available at [http://www.aidsinfo.nih.gov/ContentFiles/GlossaryHIV-related\\_Terms\\_Fifth\\_Edition\\_en.pdf](http://www.aidsinfo.nih.gov/ContentFiles/GlossaryHIV-related_Terms_Fifth_Edition_en.pdf).

59. For further discussion of the U.S. government’s response to AIDS, see *infra* Part II.B.

60. INT’L CRISIS GROUP, HIV/AIDS AS A SECURITY ISSUE 1 (2001), available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400321\\_19062001.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400321_19062001.pdf) (citing David Gordon, U.S National Intelligence Council, Remarks at a Briefing at the United States Institute of Peace (May 8, 2001) and providing data up to mid-2001).

61. See BEHRMAN, *supra* note 28, at xi. In 2001 alone, 3 million people died from AIDS and 5 million more were infected by HIV/AIDS. UNITED NATIONS FOUND., PHILANTHROPY FOR HIV/AIDS 1 (2003), available at <http://www.global-philanthropy.org/briefguides/hiv.pdf>. The infection rate in Botswana alone is nearly 40% of the adult population. *Id.*

62. See Catherine Boone & Jake Batsell, *Politics and AIDS in Africa: Research Agendas in Political Science and International Relations*, 48.2 AFR. TODAY 3, 4 (2001).

63. John C. Gannon, *The Global Infectious Disease Threat and Its Implications for the United States*, Jan. 2000, <http://permanent.access.gpo.gov/websites/www.cia.gov/www.cia.gov/cia/reports/nie/report/nie99-17d.html>; GlobalHealthReporting.Org, Facts at a Glance, <http://www.globalhealthreporting.org/diseaseinfo.asp?id=23> (last visited Sept. 7, 2006) (reporting that globally 38.6 million people lived with HIV/AIDS at year end 2005, 4.1 million adults and children were newly infected by HIV/AIDS in 2005, and 2.8 million adults and children died in 2005, the largest percentage of which occurred in Sub-Saharan Africa and South/Southeast Asia).

64. UNAIDS & WORLD HEALTH ORG., *supra* note 14, at 5.

65. UNAIDS, *supra* note 12, at Core Epidemiology Slides 1–2.

victims infected with HIV live in Africa.<sup>66</sup> A 2004 U.N. report found that the number of people living with HIV in East Asia rose nearly 50% between 2002 and 2004.<sup>67</sup> Despite antiretroviral therapies, the range of daily deaths worldwide attributed to the disease is 7,600-8,000 individuals,<sup>68</sup> a statistic that dwarfs the number of human fatalities from war or other causes.<sup>69</sup>

The HIV/AIDS threat to world development and security exceeds all other known hazards, "with the possible exceptions of use of nuclear weapons in densely populated areas or a devastating global pandemic similar to the 1917-18 influenza episode."<sup>70</sup> It has profoundly harmed human capital, health systems, family structures, social stability, labor productivity, natural resource development, business investments, national economies, political leadership, and political and military security throughout the world that now are perceived as directly connected to key strategic U.S. national interests.<sup>71</sup> To avoid similar devastating repercussions from

66. See *id.* at Core Epidemiology Slide 3.

67. UNAIDS & WORLD HEALTH ORG., *supra* note 14, at 2.

68. See UNAIDS, *supra* note 12, at Core Epidemiology Slide 1; UNAIDS & WORLD HEALTH ORG., *supra* note 14, at 1; BEHRMAN, *supra* note 28, at xi.

69. See INT'L CRISIS GROUP, *supra* note 60, at 1.

70. Dean T. Jamison, *Investing in Health*, in DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 3, 13 (Dean T. Jamison et al. eds., 2d ed. 2006).

71. Global disease is seen as central to U.S. national security, U.S. global reach as a result of military deployment, U.S. trade relations, and domestic public health. See INT'L CRISIS GROUP, *supra* note 60, at i-ii, 2-4, 9-12, 17, 21-23; INT'L LABOUR OFFICE, GENEVA, HIV/AIDS: A THREAT TO DECENT WORK, PRODUCTIVITY AND DEVELOPMENT 7-22 (2000), available at <http://www.ilo.org/public/english/protection/trav/aids/publ/threatdecent/workeng.pdf>; JORDAN S. KASSALOW, COUNCIL ON FOREIGN RELATIONS, WHY HEALTH IS IMPORTANT TO U.S. FOREIGN POLICY (2001), available at <http://www.cfr.org/content/publications/attachments/Why-Health-Is-Important-To-Foreign-Policy.pdf>; SCHNEIDER & MOODIE, *supra* note 2, at 1, 3-12; JEREMY M. WEINSTEIN ET AL., ON THE BRINK: WEAK STATES AND U.S. NATIONAL SECURITY 1-3, 14-16 (2004); Paul V. Applegarth, *Capital Market and Financial Sector Development in Sub-Saharan Africa*, in RISING U.S. STAKES IN AFRICA: SEVEN PROPOSALS TO STRENGTHEN U.S.-AFRICA POLICY 23, 26 (Ctr. for Strategic and Int'l Studies, 2004); Erica Barks-Ruggles, *Meeting the Global Challenge of HIV/AIDS*, in POLICY BRIEF 1-5 (The Brookings Inst., No. 75, 2001), available at <http://www.brookings.edu/comm/policybriefs/pb75.pdf>; Erica Barks-Ruggles et al., *The Economic Impact of HIV/AIDS in Southern Africa*, in CONFERENCE REPORT 1-6 (The Brookings Inst. Policy Brief, No. 9, 2001), available at <http://www.brookings.edu/comm/conferencereport/cr09.pdf>; Barbara Boxer, *Providing Basic Human Security*, 26 WASH. Q. 199, 200-03 (2003); Funders Concerned About Aids, *Innovative Partnerships in the Fight Against Global HIV/AIDS*, in CORPORATE UPDATE 1 (2003); Gannon, *supra* note 63, at 1, 5-7, 31-34; Jeff Gow, *The HIV/AIDS Epidemic in Africa: Implications for U.S. Policy*, 21 HEALTH AFF. 57, 66-67 (2002); Amar A. Hamoudi & Jeffrey D. Sachs, *The Economics of AIDS in Africa*, in AIDS IN AFRICA 676, 676-82 (Max Essex et al. eds., 2002); Alan Ingram, *The New Geopolitics of Disease: Between Global Health and Global Security*, 10 GEOPOLITICS 522, 522-41 (2005); J. Stephen Morrison, *The African Pandemic Hits Washington*, 24 WASH. Q. 197, 197-98 (2001); Robin Wright & Edwin Chen, *Bush Turns His Attention to Africa*, L.A. TIMES, July 8, 2003, at A1.

George Tenet, former Director of the Central Intelligence Agency, captured the AIDS crises in his testimony before Congress:

inadequate or symbolic responses to other global health issues that impact ethnic, racial, sexual, and other political minorities, it is worth reviewing how the global HIV/AIDS problem reached its epic proportions.<sup>72</sup>

### B. *The Story of HIV/AIDS*

#### 1. In the Beginning, Response Avoidance

As early as 1981, U.S. government health officials knew the HIV virus had infected African and American populations.<sup>73</sup> Records of the Center for Disease Control (C.D.C.) indicate that HIV plagued hundreds of Americans at that time;<sup>74</sup> as many as 339 cases were diagnosed in the United States in 1981 alone.<sup>75</sup> As of February 1983, the C.D.C. had reported 1,000 AIDS victims in the United States.<sup>76</sup> Avert.org, an international AIDS charity, reports that between 1981 and the end of 1983 in the United States 4,793 cases of AIDS had been diagnosed and 2,137 individuals had died from AIDS, a fatality

[F]or a continent like Africa, the devastating quality of what [AIDS] does to civil life: How it undermines leadership structures, how it just basically takes generations out of play, can't be understated. . . .

And then you have refugee flows, and then you have economic disasters, and then you have civil wars that . . . require exfiltration and some kind of involvement whether you choose to or not.

And while we all believe we're immune from all this, we're not immune from all this. . . . [A]t some point, somebody has to be responsible for [it].

*Current and Projected National Security Threats to the United States: Hearing Before the S. Comm. on Intelligence*, 107th Cong. 63 (2001) (testimony of George Tenet, Director of Central Intelligence, Central Intelligence Agency).

72. Symbolic governmental responses could raise ethical issues, such as whether the government's actions were taken to mislead the public rather than to sincerely address the health issues and whether such government behavior spawns public distrust of the government that can be damaging both in the short- and long-terms.

73. BEHRMAN, *supra* note 28, at 5. Most reports suggest that HIV/AIDS emerged in the Caribbean in the 1970s or early 1980s. Voelker, *supra* note 35, at 2962.

74. BEHRMAN, *supra* note 28, at 6.

75. Avert.org, United States AIDS Cases & Deaths by Year, <http://www.avert.org/usastaty.htm> (last visited Sept. 7, 2006).

76. BEHRMAN, *supra* note 28, at 6. Avert.org reports that in 1983 there were 3,153 new cases of AIDS diagnosed and 1,511 deaths from AIDS. Avert.org, *supra* note 75. In the U.S., there were nearly 151,400 diagnosed cases of AIDS and 90,628 deaths from AIDS by the end of the 1980s. *See id.* But see BEHRMAN, *supra* note 28, at 25 (reporting approximately 115,000 diagnosed cases in the United States and more than 70,000 deaths from AIDS by the end of the 1980s).

rate of approximately 44%.<sup>77</sup> By contrast, the widely publicized outbreak of Legionnaires' Disease in 1976 in Philadelphia, Pennsylvania, infected 221 people and killed 34, a fatality rate of less than 15%.<sup>78</sup>

Global surveillance by the WHO revealed a real international epidemic by 1983. HIV/AIDS cases were known in Canada, fifteen European countries, Haiti, Zaire, seven Latin American countries, Australia, and Rwanda.<sup>79</sup> Despite President Reagan's awareness of the HIV/AIDS crisis here and abroad, in 1983 his administration refused to acknowledge the dimensions of the HIV/AIDS global crisis.<sup>80</sup> No steps were taken to develop domestic or foreign policy to address the HIV/AIDS predicament.<sup>81</sup>

## 2. The Mid- to Late-1980s

By the end of 1986, eighty-five countries reported a total of 38,401 HIV/AIDS-identified cases.<sup>82</sup> Of these cases, 2,323 were in Africa, 31,741 were in the Americas, 3,858 were in Europe, 395 were in Oceania, and 84 were in Asia.<sup>83</sup>

As the number of HIV/AIDS cases rose in the mid-1980s, gay activist groups and other nonprofit organizations,<sup>84</sup> as well as the media,<sup>85</sup> were instrumental in raising public awareness of the disease but perhaps not extensive sympathy for the activists' cause or for

77. See Avert.org, *supra* note 75. Another source reported that by the end of 1983 the number of AIDS cases in the United States had risen to 3,064 and of these, 1,292 had died. See Avert.org, The History of Aids: 1981-1986, [www.avert.org/his81\\_86.htm](http://www.avert.org/his81_86.htm) (last visited Sept. 7, 2006).

78. See Legionnaires' Disease, <http://www.multiline.com.au/~mg/legion5.html> (last visited Sept. 17, 2006).

79. See Avert.org, *supra* note 77. Additionally, two suspected cases of HIV/AIDS had been reported in Japan. *Id.*

80. BEHRMAN, *supra* note 28, at 13.

81. *Id.*

82. Avert.org, *supra* note 77.

83. *Id.* The number of reported cases of HIV/AIDS in Africa today far exceeds those in the Americas. Compared to 1986, this reversal may be the result of the underreporting of cases in Africa in the 1980s and the lesser availability of medical treatments to African populations today as compared to people residing in North America, Central America, South America, and the Caribbean. *Id.*

84. The nonprofit sector initially was not cohesive in its support. By and large, universities and think tanks, the traditional grantees of elite and rich private foundations, were not requesting grants for AIDS research and studies, and most private foundations were not comfortable with funding AIDS initiatives. The discomfort was largely grounded in personal homophobic biases of the philanthropic institutions' leaders or concern about how homophobia would affect outsiders' perceptions of their philanthropies. See Martha B. Gibbons, *Who Funded AIDS? The Role of Funders Concerned About AIDS - Grantmakers as Advocates and Activists*, NONPROFIT SECTOR RES. FUND WORKING PAPER SERIES, Spring 1999, at 2, available at [http://www.nonprofitresearch.org/usr\\_doc/15874.pdf](http://www.nonprofitresearch.org/usr_doc/15874.pdf).

85. *Id.*



those individuals infected. Nonetheless, several private foundations, such as the Robert Wood Johnson Foundation and the foundations of Michael Milken and David Geffen, began to support AIDS initiatives.<sup>86</sup> Gay activist nonprofits prominently funded research and other HIV/AIDS initiatives.<sup>87</sup> In 1987,<sup>88</sup> some professional staff members of elite private foundations were motivated to increase philanthropic resources and “to mobilize philanthropic leadership, ideas and resources, domestically and internationally, to eradicate the HIV/AIDS pandemic and to address its social and economic consequences.”<sup>89</sup> Thus, they formed a new nonprofit organization, the Funders Concerned About AIDS (F.C.A.A.). In 1988, the Ford Foundation created a collaborative funding pool for AIDS initiatives; the National Community AIDS Partnership (now known as the National AIDS Fund), which raised large sums from community, corporate, and national foundations for AIDS projects in cities and states across the United States over the following eight years.<sup>90</sup>

Without the support of these nonprofit organizations, HIV/AIDS initiatives would have been largely devoid of aid. The U.S. government lacked interest in policy development with respect to HIV/AIDS and failed to fund<sup>91</sup> HIV/AIDS efforts either domestically or globally.<sup>92</sup> The Department of State appeared relatively unconcerned about the HIV/AIDS problem abroad.<sup>93</sup> Similarly, the Surgeon General did not demonstrate serious interest in the domestic or global HIV/AIDS crisis.<sup>94</sup> In 1986, Congress appropriated a paltry \$2 million to address the worldwide impact of HIV/AIDS.<sup>95</sup> Although in 1987 President Reagan appointed a Presidential Advisory Council on AIDS, it purportedly amounted to an “empty political gesture,”<sup>96</sup>

86. *Id.* at 2, 17. In 1986, the Robert Wood Johnson Foundation committed \$17.1 million to fund the AIDS Health Services Program, and in 1988 it contributed \$16.7 million to fifty-four AIDS projects in twenty-six states. *Id.* at 17.

87. *Id.* at 16.

88. *Id.* at 2–3.

89. Funders Concerned About AIDS, About FCAA, [http://www.fcaids.org/about/About\\_Mission.htm](http://www.fcaids.org/about/About_Mission.htm) (last visited Sept. 3, 2006).

90. Gibbons, *supra* note 84, at 18. The National Community AIDS Partnership was a powerful national-local partnership involving community foundations and other funders. *Id.*

91. The \$2 million was allotted through the United States Agency for International Development (USAID) to the World Health Organization’s Special Program on AIDS (SPA), which adopted, but did not implement, a Global Strategy for Prevention and Control of AIDS. BEHRMAN, *supra* note 28, at 44, 47–48.

92. For discussion of the influence of private foundations generally on governmental policymakers, see *infra* Part V.

93. BEHRMAN, *supra* note 28, at 18.

94. *Id.* at 28.

95. *Id.* at 16–17.

96. *Id.* at 28. President Reagan spoke of AIDS as the number one domestic public health problem, but neither forcefully pushed for solutions nor suggested that it was a global health problem. *Id.* Although Vice President Bush attended the Third

symbolic at best.<sup>97</sup> Thus, essentially during the first decade of the HIV/AIDS onslaught, governmental officials largely ignored the growing magnitude of the health epidemic and its need for a place on the policymaking agenda.

### 3. The Early- to the Mid-1990s

As Presidential candidate William J. Clinton campaigned across the United States in 1992, he declared HIV/AIDS a domestic crisis but was silent as to its global impact.<sup>98</sup> By the time of his January 21, 1993 inaugural speech, he proclaimed that the HIV/AIDS crisis abroad presented a challenge to the United States.<sup>99</sup> In 1994, President Clinton appointed Patricia Fleming as national AIDS policy director.<sup>100</sup> Despite President Clinton's speeches and appointments, no real White House policymaking action followed.<sup>101</sup> Nonprofit organizations, such as F.C.A.A. and New York City's ACT UP, attempted to further elevate the HIV/AIDS pandemic in the consciences of the U.S. public and government officials.<sup>102</sup> Some F.C.A.A. internationally oriented funders, including the Rockefeller,

Annual International AIDS Conference in 1987, during his subsequent candidacy for, and his subsequent term as, President, he did little to address AIDS as a global problem. *See id.* at 29, 30 (stating that AIDS as a global problem was largely ignored by the Bush administration).

97. *See supra* note 72 (mentioning the ethics of symbolic governmental response).

98. *See* BEHRMAN, *supra* note 28, at 97–98 (discussing Mr. Clinton's focus on HIV/AIDS as a domestic issue during his presidential campaign).

99. *Id.* at 100.

100. *See* Marlene Cimons, *Clinton Appoints AIDS Policy Director; Health: Patricia Fleming Sees Added Difficulties in Getting Ample Funds From Congress. President Vows to Make Fight Against the Ailment a High Priority*, L.A. TIMES, Nov. 11, 1994, at A34.

101. *See* BEHRMAN, *supra* note 28, at 100 (discussing President Clinton's lack of interest in foreign policy, and criticizing the selection of his foreign policy team); *see also infra* Part III.A.2. (commenting on the failure of persons in executive branch agencies to persuade President Clinton to place HIV/AIDS on the foreign policy agenda).

Although President Clinton did not formulate a domestic or foreign policy for dealing with the HIV/AIDS epidemic, his failure certainly did not result from a personal bias toward homosexuals. Indeed, in 1993, President Clinton attempted to lift the ban on gays to serve openly in the U.S. military. Eric Schmitt & Thom Shanker, *A General Talks to Bush: 'Yes, Sir! But,'* N.Y. TIMES, May 15, 2005, § 4, at 4. The Joint Chiefs of Staff, with General Colin L. Powell as a leading advocate, blocked President Clinton's proposal which, they asserted, threatened "good order and discipline" in the ranks. *Id.* Ultimately, the "don't ask, don't tell" policy emerged. *Id.* *See also* Editorial, *Pursue the Gay-Baiting Commanders*, N.Y. TIMES, May 10, 1994, at A22 (criticizing the "don't ask, don't tell" policy as falling short of President Clinton's goal).

102. *See* BEHRMAN, *supra* note 28, at 122–23; Gibbons, *supra* note 84, at 14–15, 20. New York City's gay and lesbian activist organization, ACT UP, engaged in brain storming sessions and protests with other global activist organizations to bring attention to the AIDS pandemic. BEHRMAN, *supra* note 28, at 122–23.

Ford, and MacArthur foundations, supported global AIDS related issues and programs.<sup>103</sup> The National Community AIDS Partnership raised substantial amounts of funding for domestic community AIDS projects.<sup>104</sup> Nonetheless, there was little appreciation by key governmental policymakers that HIV/AIDS should be a crucial ingredient in U.S. domestic and foreign policies.<sup>105</sup>

#### 4. The Mid- to Late-1990s and the New Millennium

It was not until the beginning of the new millennium that U.S. domestic and foreign policy advanced full throttle to include HIV/AIDS. The confluence of many factors and the efforts of many individuals in the mid- and late-1990s spurred the movement. In the mid- and late-1990s, political activism aimed at pushing domestic HIV/AIDS policies surged.<sup>106</sup> The domestic private philanthropic community widely appreciated HIV/AIDS as a global crisis.<sup>107</sup> A particularly important year was 1996: in that year, UNAIDS was formed, and it quickly became a leading authority on global HIV/AIDS.<sup>108</sup> It scored successes in stimulating U.S. and global responses to the HIV/AIDS crisis abroad.<sup>109</sup> Also in 1996, the medical world recognized anti-retroviral drugs as an effective therapy for HIV/AIDS.<sup>110</sup> The availability of this treatment helped to galvanize HIV/AIDS advocates who likely saw the therapeutic, albeit expensive, elixir as the hope for the many still living HIV/AIDS victims

103. See Gibbons, *supra* note 84, at 27 (noting that funding for international AIDS-related initiatives was the "least often funded type of grant reported in 1993").

104. See *id.* at 18 (stating that NCAP generated more than \$50 million).

105. BEHRMAN, *supra* note 28, at 74. A variety of reasons have been reported: the view that AIDS was initially a taboo homosexual sex issue that later extended to a taboo heterosexual intimate relations issue; the decline of AIDS in the United States; the disengagement of the United States in foreign affairs; the reduction in U.S. foreign aid generally and particularly to Africa, which did not figure greatly into the U.S. perception of strategic interests; the silence of African governmental leaders and political communities; which amounted to a denial of an AIDS problem; the failure of African-American leaders to actively voice concern; the lack of U.S. support for the United Nations (U.N.) and the U.N.'s disjointed programs; and the media's lack of serious coverage. See *id.* at 84–85, 88, 171, 178–85, 206.

106. *Id.* at 90–92; see also Gibbons, *supra* note 84, at 21–22 (discussing attempts of funders and activists to shape AIDS public policy).

107. An F.C.A.A. Gallup survey indicated domestic philanthropic institutions' awareness of, and concern for, the global HIV/AIDS crisis, but noted that there was limited funding by these organizations for the cause. FUNDERS CONCERNED ABOUT AIDS, PHILANTHROPY AND AIDS: ASSESSING THE PAST, SHAPING THE FUTURE 23–24 (1999).

108. See BEHRMAN, *supra* note 28, at 126, 166–69 (discussing the success of UNAIDS in drawing attention to AIDS as a global health problem).

109. *Id.*

110. *Id.* at 134.

worldwide.<sup>111</sup> Moreover, the Rockefeller Foundation launched the International Aids Vaccine Initiative.<sup>112</sup> The year ended well for those favoring a prominent place for HIV/AIDS on the domestic and foreign policy agendas. In December, Secretary of State Madeleine Albright commissioned a State Department report on the HIV/AIDS pandemic.<sup>113</sup>

Between 1999 and 2000, attention focused increasingly on the global HIV/AIDS crisis. In 2000, Vice President Al Gore presided over a special session on Africa and health at the U.N. Security Council.<sup>114</sup> There, armed with information that the HIV/AIDS pandemic was creating world instability and security crises,<sup>115</sup> Vice President Gore injected HIV/AIDS into the highest levels of political discourse.<sup>116</sup> As a result, the U.N. Security Council passed a resolution to press national leaders to become more engaged in the global HIV/AIDS catastrophe.<sup>117</sup>

In 2000 and 2001, nonprofit organizations and the U.S. government published studies and research papers that proclaimed the global HIV/AIDS pandemic neither to be confined to a narrow geographic area nor to a health issue.<sup>118</sup> These and subsequent publications suggested HIV/AIDS to be a destabilizing threat to the economic, political, social, and security interests of both developing and developed countries.<sup>119</sup> These publications prompted the attention of the U.S. government,<sup>120</sup> which then came to view

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111. *See id.* (stating that the availability of effective drug therapy was a catalyst for change in the activist community).

112. *Id.* at 129.

113. *Id.* at 213.

114. *See id.* at 163–64 (discussing Al Gore's part in the U.N. Security Council session).

115. Leon Fuerth, National Security Advisor to Al Gore when he was a presidential candidate, advised Mr. Gore of security problems attributable to the AIDS pandemic and suggested financial assistance for combating AIDS. *See id.* at 146–59, 229–36.

116. *Id.* at 164.

117. *Id.*

118. *See id.* at 179; *see, e.g.*, INT'L CRISIS GROUP, *supra* note 60; KASSALOW, *supra* note 71; Gannon, *supra* note 63.

119. *See* BEHRMAN, *supra* note 28, at 179. Although the worst of the HIV/AIDS epidemic was centered in Africa, HIV/AIDS threatened the economic stability of Asia and Russia as well. *See id.* at 191–93; *see also* WEINSTEIN ET AL., *supra* note 71, at 1–3, 14–16 (relating continuing U.S. security, human capacity, and other concerns resulting from global HIV/AIDS and recommending policy means for addressing the issues).

120. *See, e.g.*, Boxer, *supra* note 71, at 199–207; Gow, *supra* note 71, at 57–68; Morrison, *supra* note 71, at 197; Robert A. Rosenblatt, *Rich Nations Must Help Fight AIDS, Clinton Says; Britain: President Declares Drug Companies Need Funds to Develop Vaccines to Combat Diseases in Poor Countries*, L.A. TIMES, Dec. 15, 2000, at A21; Sheryl Gay Stolberg, *Congress Awakens to AIDS With a Convert's Zeal*, N.Y. TIMES, May 12, 2002, at 1.1; Robin Wright & Faye Fiore, *Clinton Touts Global Engagement; Foreign Policy: President Urges Americans to Support a More Active U.S.*

HIV/AIDS as a potential harm to development and democracy and a force possibly causing states' failures by destroying their infrastructures.<sup>121</sup> Multinational corporations<sup>122</sup> and corporate philanthropies<sup>123</sup> became increasingly attentive and responsive to the HIV/AIDS global crises. Of particular note, after previously making grants of \$1.5 million and \$25 million for global HIV/AIDS initiatives, in January 2001, the Bill and Melinda Gates Foundation committed a multi-year \$100 million challenge grant to the International AIDS Vaccine Initiative, a global nonprofit organization aimed at speeding the development and distribution of an AIDS vaccine.<sup>124</sup>

The year 2001 brought further significant changes. African leaders broke their former silence and called on the United States to assist in the global HIV/AIDS crisis.<sup>125</sup> The U.N. launched a new effort to focus international attention and resources on the global AIDS pandemic.<sup>126</sup> U.N. Secretary General Kofi Annan publicly outlined objectives for combating HIV/AIDS and called for leadership, resources, and openness to fight HIV/AIDS.<sup>127</sup> He proposed the creation of the Global Fund to Fight AIDS, Tuberculosis, and Malaria (Global Fund),<sup>128</sup> an independent organization formed with the endorsement of the U.N. and leaders of the G8 and African countries to attract and disburse funds to prevent and treat AIDS, tuberculosis,

*Leadership Role in Providing Direction and Funding and to Build New Alliances*, L.A. TIMES, Dec. 9, 2000, at A8.

121. See, e.g., INT'L CRISIS GROUP, *supra* note 60, at i-ii, 9, 12, 17, 21, 22; SCHNEIDER & MOODIE, *supra* note 2, at 1, 3-12; Applegarth, *supra* note 71, at 26.

122. See, e.g., Editorial, *Africa AIDS Funding Imperative*, L.A. TIMES, Jan. 18, 2000, at B6 (discussing the World Bank's efforts to stop the spread of AIDS). The economic consequences motivated multinational corporations (and corporate philanthropies) involvement because infection of their work force with HIV/AIDS affected their bottom line. See, e.g., THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS ET AL., *THE BUSINESS RESPONSE TO HIV/AIDS: IMPACT AND LESSONS LEARNED* 19-39 (2000).

123. See, e.g., FUNDERS CONCERNED ABOUT AIDS, REPORT ON HIV/AIDS GRANTMAKING BY U.S. PHILANTHROPY 3-14 (Nov. 2003); FUNDERS CONCERNED ABOUT AIDS, VOICES FROM THE FIELD: REMOBILIZING HIV/ADS PHILANTHROPY FOR THE 21st CENTURY 10, 12 (2001) [hereinafter VOICES FROM THE FIELD]; Karen DeYoung, *AIDS Warriors; Carter, Gates Sr. Find Hell and Hope in a Continent's Plague*, WASH. POST, Apr. 14, 2002, at F1; Editorial, *A Global Cause*, WASH. POST, May 6, 2001, at B6.

124. VOICES FROM THE FIELD, *supra* note 123, at 12.

125. BEHRMAN, *supra* note 28, at 206. Apparently P.W. Botha, former Prime Minister of South Africa from 1978 to 1984 and subsequently State President of South Africa from 1984 to 1989, a staunch supporter of apartheid, saw no benefit to himself in publicly revealing the HIV/AIDS problem in his country. It was not until the first black Africans, Nelson Mandela and Thabo Mbeki, became the first two democratically elected Presidents of the Republic of South Africa that the silence on their country's HIV/AIDS epidemic was broken. See *id.* at 199-206.

126. See VOICES FROM THE FIELD, *supra* note 123, at 12.

127. See *id.*; BEHRMAN, *supra* note 28, at 251.

128. See BEHRMAN, *supra* note 28, at 251; VOICES FROM THE FIELD, *supra* note 123, at 12.

and malaria.<sup>129</sup> Secretary General Annan obtained initial financial support commitments from the United States and others totaling between \$7 billion and \$10 billion.<sup>130</sup>

In 2002, then-former President Clinton publicly declared HIV/AIDS to be a humanitarian issue, and regretting that he had not furthered the cause more by making it a domestic and foreign policy priority during his presidency, he announced global HIV/AIDS as one of his post-presidential main concerns.<sup>131</sup> He perceived the HIV/AIDS cause as a means for the United States to become involved in helping the global community, leading him to propose a plan for developing nations to contribute sufficient funds to support the costs of HIV/AIDS drugs, care, and needed resources.<sup>132</sup>

As time progressed, more reports relayed the enormous impact of HIV/AIDS. Worldwide the number of individuals living with HIV/AIDS continued to rise in every region.<sup>133</sup> Through the new millennium, Sub-Saharan Africa remained the area most affected—nearly two-thirds of all of the world's infected people reside in Sub-Saharan Africa, and 76% of all HIV-infected women live there.<sup>134</sup> But at the same time, steep increases in individuals living with HIV/AIDS occurred in Eastern Europe, Central Asia, and Eastern Asia.<sup>135</sup>

Regardless of the region, infections and deaths increased among gay men, heterosexual married couples, and women,<sup>136</sup> leaving unprecedented numbers of orphaned children.<sup>137</sup> HIV/AIDS had

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129. See TODD SUMMERS, *THE GLOBAL FUND TO FIGHT AIDS, TB, AND MALARIA* 1–9 (Center for Strategic and International Studies, June 2002); *The Global Fund to Fight AIDS, Tuberculosis and Malaria, A Partnership to Prevent and Treat AIDS, Tuberculosis and Malaria* 1 (Feb. 2004), available at <http://www.theglobalfund.org>.

130. BEHRMAN, *supra* note 28, at 250–51. President George W. Bush pledged \$200 million to the Global Fund. *Id.* at 258. Bill Gates pledged \$100 million to the Global Fund. *Id.* at 259. The G8 countries pledged financial support to the Global Fund, but did not provide the funding until after the end of 2001. *See id.* at 259–60.

131. *Id.* at 224. When Bill Clinton was President, he failed to follow through immediately despite the advice of his Secretary of Health and Human Resources, Donna Shalala, to increase funding for the global AIDS cause. *See id.* at 214, 218. Finally, in 2000, President Clinton saw that U.S. funding for AIDS increased, but only by a fraction of the amount considered necessary by the State Department Assistant Secretary for African Affairs. *See id.* at 169, 212.

132. *Id.* at 224.

133. UNAIDS & WORLD HEALTH ORG., *supra* note 14, at 2.

134. *See id.*

135. *See id.*

136. Globally, an increasing proportion of HIV/AIDS infected individuals are female; nearly 50% of all people living with HIV/AIDS are female. *See id.* at 4. Over one-half (57%) of all individuals infected with HIV/AIDS in Sub-Saharan Africa are women. *See id.*

137. *See id.* An estimated 15 million children worldwide have been orphaned as a result of one or both parents' dying of AIDS, and as of 2003, about 12.1 million of these orphaned children (children under the age of 17) lived in Sub-Saharan Africa. Press Release, Charles F. McCormack, World AIDS Day 2005—Behind the Numbers, AIDS Has a Child's Face (Nov. 30, 2005), <http://www.savethechildren.org/health/>

become a cause celebre of various interest groups. The same conservatives that once called HIV/AIDS the punishment for sinning against God were now saying it was a moral imperative to get involved and help the people dying of HIV/AIDS.<sup>138</sup> This conservative religious interest group had changed its tune, and it had the ear of President George W. Bush.<sup>139</sup> President Bush began to publicly talk of funding the fight against HIV/AIDS in Africa.<sup>140</sup> This was a way for President Bush to placate his conservative base and to show the world the good citizenry of the United States. In other words, the United States had used up much of its political capital by going to war in Iraq, and taking the lead in committing funding to combat HIV/AIDS in Africa was a way for the United States to be seen in a different light. Also, a growing groundswell of diverse and influential individuals and government officials pressed President Bush to make global HIV/AIDS a “flagship issue” and to increase the U.S. financial support for the Global Fund.<sup>141</sup> Nonetheless, with Iraq on President Bush’s front burner, he had a difficult time making the HIV/AIDS cause a policy priority.

After the United States had been fully entrenched in Iraq for over a year, President Bush began to focus more attention on HIV/AIDS. At a time when the disease domestically was more under control, he declared intentions to increase governmental funds for fighting the disease abroad.<sup>142</sup> At his State of the Union Address on

[hiv\\_aids/ceo\\_statement.asp?stationpub=i\\_hpln\\_s44&ArticleID=&NewsID=](http://hiv_aids/ceo_statement.asp?stationpub=i_hpln_s44&ArticleID=&NewsID=). Millions of children worldwide live with HIV/AIDS or have been otherwise impacted by the disease through the loss of one or more parents. See Avert.org, HIV, AIDS and Children, <http://www.avert.org/children.htm> (last visited Sept. 3, 2006). Save the Children, USA estimates that approximately 25 million children will be orphaned by 2010 from parents dying from AIDS. MacCormack, *supra*. There are worldwide social, economic, and political problems that result from the large numbers of orphaned children.

138. See Elisabeth Bumiller, *Bush Pushes AIDS Plan Criticized by Some Conservatives*, N.Y. TIMES, Apr. 30, 2003, at A22; Elisabeth Bumiller, *Bush to Back Bill on AIDS and Abortion*, N.Y. TIMES, Apr. 29, 2003, at A24; Elisabeth Bumiller, *Evangelicals Sway White House on Human Rights Issues Abroad*, N.Y. TIMES, Oct. 26, 2003, at 1.1.

139. See BEHRMAN, *supra* note 28, at 250–51.

140. See, e.g., Geoff Dyer, *Bush to Focus on Tackling AIDS Crisis in Africa*, FIN. TIMES (London), May 30, 2003, at 10; Amy Goldstein & Dan Morgan, *Bush Signs \$15 Billion AIDS Bill; Funding Questioned*, WASH. POST, May 28, 2003, at A2; Dana Milbank, *Bush to Congress: Fund AIDS Fight; President Vows to Work for Peace in Africa*, WASH. POST, July 13, 2003, at A18.

141. See BEHRMAN, *supra* note 28, at 262–77, 287–95, 299. Among those pressuring President Bush were AIDS activists, faith-based community leader Billy Graham, Secretary of State Colin Powell, Secretary of Health and Human Resources Tommy Thompson, Bill Gates, Bono (Paul Hewson), Jesse Helms, Bill Frist, and U.N. Secretary General Kofi Annan. *Id.*

142. See Fact Sheet: The President’s Emergency Plan for AIDS, <http://www.whitehouse.gov/news/releases/2003/01/print/20030129-1.html> (last visited Sept. 3, 2006) [hereinafter Fact Sheet] (discussing President Bush’s initiative to increase commitment to international AIDS assistance).

January 28, 2003, President Bush acknowledged the vital importance to the United States of saving millions abroad from decimation by HIV/AIDS.<sup>143</sup> He announced the President's Emergency Plan for AIDS Relief Program (PEPFAR) directed at fifteen focus countries where half of the world's HIV/AIDS victims live.<sup>144</sup> He requested Congress to commit \$15 billion in funds for disease prevention and care and treatment of HIV/AIDS victims over five years.<sup>145</sup> Almost one-tenth of all PEPFAR funding was marked specifically for Africa for expenditure on children whose parents were HIV/AIDS victims.<sup>146</sup> It was reported that in its first eight months, PEPFAR supported treatment for approximately 155,000 HIV-infected children and adults in the target countries.<sup>147</sup> It also has been reported that, unfortunately, a large portion of the U.S. aid never actually reaches the identified beneficiaries.<sup>148</sup> Nonetheless, U.S. funding for HIV/AIDS appears to have gained a place on the U.S. global policy agenda. For fiscal year 2006, President Bush asked Congress for \$3.2 billion for international HIV programs, but Congress reduced that amount to less than \$2 billion.<sup>149</sup> For fiscal year 2007, President Bush requested a \$2.89 billion appropriation for global HIV/AIDS.<sup>150</sup> Most of this governmental money is to be channeled through the U.S. Agency for International Development (USAID).<sup>151</sup>

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143. *Id.*

144. *Id.*

145. *Id.* The goals of the President's Emergency Plan for AIDS Relief Program (PEPFAR) were: (1) prevent 7 million new infections in the target countries; (2) treat 2 million HIV/AIDS victims; and (3) care for 10 million HIV-infected individuals and AIDS orphans. *Id.*

This amount included \$10 billion in new money to fight AIDS in twelve African countries, two Caribbean countries, and one Asian country, of which \$1 billion was to go to the Global Fund and the remaining \$9 billion was to be directed by the United States in a bilateral capacity. See BEHRMAN, *supra* note 28, at 310. Overall, 80% of the new bilateral assistance is for AIDS treatment and care, with the remaining 20% directed toward AIDS prevention. Of the latter amount, one-third must be used for "abstinence until marriage programs." See POPULATION ACTION INT'L, WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE AND U.S. HIV/AIDS ASSISTANCE: AN UNOFFICIAL GUIDE 3, available at [http://www.populationaction.org/resources/publications/globalgagrule/GagRule\\_download.htm](http://www.populationaction.org/resources/publications/globalgagrule/GagRule_download.htm).

146. See Fact Sheet, *supra* note 142.

147. *Testimony on the President's FY 2006 Budget Request for the Emergency Plan for AIDS Relief: Hearing Before the H. Comm. on International Relations* (Apr. 13, 2005) (testimony by Ambassador Randall L. Tobias), available at <http://www.state.gov/s/gac/rl/rm/44619.htm>.

148. See Helen Epstein, *The Lost Children of AIDS*, 52 N.Y. REV. BOOKS, Nov. 3, 2005, available at <http://www.nybooks.com/articles/18399> (stating, among other criticisms, that 60% of U.S. foreign aid funding stays in the US).

149. See Guy Dinmore, *AID Organisations Hit Out at Bush Budget*, FIN. TIMES (London), Feb. 6, 2006, at 1, available at <http://news.ft.com/cms/s/6a472e32-9761-11da-82b7-0000779e2340.html>.

150. *Id.*

151. Michael M. Phillips, *Bush Ties Money for AIDS Work To a Policy Pledge*, WALL ST. J., Feb. 28, 2005, at A3. President Bush's request for domestic HIV/AIDS



Critics have pointed out that the government's support for fighting HIV/AIDS has been diluted by other health policies of President Bush.<sup>152</sup> Perhaps foremost was President Bush's reinstatement of the global gag rule on his inaugural day in office in January 2001.<sup>153</sup> The global gag rule prevents the principal bilateral conduit of U.S. funding, USAID, from financially supporting foreign NGOs that use their own funds to provide abortion services, counseling, referrals, and information about abortion, whether safe or unsafe, and to participate in legislative or grassroots lobbying on these topics.<sup>154</sup> In 2003, President Bush broadened the global gag rule to cover funding received by foreign NGOs from the U.S. Department of State.<sup>155</sup> President Bush also supported three conservative legislative amendments to PEPFAR that have damaged financial support for HIV/AIDS.<sup>156</sup> Under an amendment introduced by Congressman Joe Pitts, 33% of the PEPFAR funding available for prevention programs and services must be earmarked for "abstinence until marriage" programs.<sup>157</sup> This amendment reduces potential allocations of funds for programs in underdeveloped countries that would inform about the benefits of utilizing condoms to prevent HIV/AIDS and that might otherwise help politically marginalized females subjected to males' sexual and societal dominance.<sup>158</sup> The

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funding was significantly greater than for international funding of HIV/AIDS. See GlobalHealthReporting.Org, *supra* note 63 (reporting that President Bush requested \$21 billion in combined domestic and global funding of HIV/AIDS for fiscal year 2006, of which \$3 billion was for use in low and middle income countries).

152. See, e.g., Alan Ingram, *Global Leadership and Global Health: Contending Meta-narratives, Divergent Responses, Fatal Consequences*, 19 INT'L REL. 381, 390-92 (2005) (discussing the "unilateral orientation" of the Bush administration regarding global health initiatives).

153. See GEORGE W. BUSH, MEMORANDUM ON RESTORATION OF THE MEXICO CITY POLICY (Jan. 22, 2001), available at <http://www.whitehouse.gov/news/releases/20010123-5.html>. President Reagan had unveiled the global gag rule policy in 1984. President Clinton rescinded the policy on his first day in office, but seven years later, Congress statutorily revived the policy as a condition to an appropriation act for fiscal year 2000. President George W. Bush reinstated it on his first day in office. *Id.*

154. See *id.* (stating that nongovernmental organizations may not receive federal funds if they promote abortion).

155. See Edwin Chen, *Bush Further Limits Funds for Groups Counseling Abortion*, L.A. TIMES, Aug. 30, 2003, at A3 (stating that President Bush expanded the global gag rule to "all other family-planning grants funneled through the State Department").

156. E.g., United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711 (2003). See INT'L WOMEN'S HEALTH COAL., IDEOLOGY OVER PREVENTION: THE GLOBAL HIV/AIDS PANDEMIC AND THE BUSH ADMINISTRATION 1 (2004), available at [http://www.iwhc.org/global/uspolicy/hiv aids \[hereinafter THE IDEOLOGY\]](http://www.iwhc.org/global/uspolicy/hiv aids [hereinafter THE IDEOLOGY]) (last visited Sept. 3, 2006).

157. THE IDEOLOGY, *supra* note 156. Only 20% of the PEPFAR funding is available for HIV/AIDS prevention services. See *supra* note 145. Thus, approximately 6.6% of PEPFAR funds must be earmarked for programs that promote abstinence until marriage.

158. See 117 Stat. 711; THE IDEOLOGY, *supra* note 156.

“Smith Conscience Amendment” permits U.S. funded faith based organizations to refrain from providing information on condoms, even though condoms have been proved effective against contracting HIV/AIDS.<sup>159</sup> The third amendment requires NGOs that receive PEPFAR funds to certify their opposition to prostitution, sex trafficking, and the legalization of prostitution.<sup>160</sup> Although recently held unconstitutional by two federal district courts as applied to two domestic NGOs,<sup>161</sup> this amendment has undercut HIV/AIDS treatment and prevention efforts for sex workers.<sup>162</sup> Reports indicate that these legislative actions have resulted in reduced distributions of condoms and other contraceptive supplies, lessened spending on programs to prevent HIV/AIDS transmission, heightened allocations of AIDS relief funding to faith based organizations that traditionally support abstinence-only means of HIV/AIDS prevention and protection, and eliminated funding to international family planning programs that provide legal abortions or abortion counseling in addition to HIV/AIDS prevention programs.<sup>163</sup> These actions have undermined attempts to restrict the spread of the HIV/AIDS pandemic.<sup>164</sup> Thus, there is abundant cynicism with respect to, and criticism of, President Bush’s motives and means of implementing his chosen global HIV/AIDS policy.<sup>165</sup>

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159. THE IDEOLOGY, *supra* note 156.

160. 22 U.S.C. § 7631(f) (2006).

161. Alliance for Open Soc’y Int’l Inc. v. United States Agency for Int’l Dev., 430 F. Supp. 2d 222 (S.D.N.Y. 2006); DKT Int’l v. United States Agency for Int’l Dev., 435 F. Supp. 2d 5 (D.D.C. 2006).

162. THE IDEOLOGY, *supra* note 156.

163. See, e.g., ACCESS DENIED: U.S. RESTRICTIONS ON INT’L FAMILY PLANNING, THE IMPACT OF THE GLOBAL GAG RULE IN KENYA (2006), available at [http://www.globalgagrule.org/pdfs/case\\_studies/GGRcase\\_kenya\\_2006.pdf](http://www.globalgagrule.org/pdfs/case_studies/GGRcase_kenya_2006.pdf); GOVT ACCOUNTABILITY OFFICE, SPENDING REQUIREMENT PRESENTS CHALLENGES FOR ALLOCATING PREVENTION FUNDING UNDER THE PRESIDENT’S EMERGENCY PLAN FOR AIDS RELIEF, GAO 06-395 (Apr. 2006), available at <http://www.gao.gov/new.items/d06395.pdf> [hereinafter GAO REPORT]; POPULATION ACTION INT’L, *supra* note 145; Susan A. Cohen, *Global Gag Rule: Exporting Antiabortion Ideology at the Expense of American Values*, GUTTMACHER REP. ON PUB. POL’Y 1–3 (June 2001), available at <http://www.guttmacher.org/pubs/tgr/04/3/gr040301.html>; Susan A. Cohen, *U.S. Global AIDS Policy and Sexually Active Youth: A High-Risk Strategy*, GUTTMACHER REP. ON PUB. POL’Y 4–6 (Aug. 2005), available at <http://www.guttmacher.org/pubs/tgr/08/3/gr080304.html>; Celia W. Dugger, *U.S. Focus on Abstinence Weakens AIDS Fight, Agency Finds*, N.Y. TIMES, Apr. 5, 2006, at A9; Ingram, *supra* note 152, at 391; Jamison, *supra* note 70, at 14.

164. See GAO REPORT, *supra* note 163.

165. See, e.g., *id.*; BEHRMAN, *supra* note 28, at 310 (implying that political motivations of President Bush resulted in only one-tenth of the U.S. funding for combating global HIV/AIDS would go to the Global Fund); Dyer, *supra* note 140, at 10 (stating that the AIDS initiative is a “useful protection against criticism of the war in Iraq, other U.S. foreign aid policies or its position on issues such as global warming”); Epstein, *supra* note 148 (suggesting that PEPFAR is problematic in its execution); James K. Glassman, *No Good Deed Goes Unpunished*, TECHCENTRALSTATION, July 13, 2004 (criticizing and contrasting the U.S. position under PEPFAR that makes unavailable to needy countries HIV/AIDS drugs not approved by the U.S. Food and

## 5. Summary

In sum, as activist nonprofits and the media raised public awareness and private grantors funded HIV/AIDS initiatives, the U.S. government finally became mobilized to financially support the global fight against HIV/AIDS. Various initiatives and innovative partnerships formed and were funded.<sup>166</sup> More corporate and family private foundations shifted commitments to health in their international giving priorities.<sup>167</sup> In large part, the Bill and Melinda Gates Foundation<sup>168</sup> deserves credit not only for its tremendous contributions to projects for the prevention, treatment, and research

Drug Administration with the Global Fund to Fight AIDS, which will supply HIV/AIDS drugs manufactured in India that have been pre-qualified as safe and effective by the World Health Organization); Phillips, *supra* note 151, at A3 (reporting that the Bush administration had attached moral strings to U.S. financial assistance to domestic HIV/AIDS nonprofit organizations that provide overseas healthcare services); Editorial, *Preserving the Global AIDS Fund*, 52 N.Y. TIMES, May 19, 2005, at A26 (suggesting that President Bush's PEPFAR program is riddled with problems connected with business and political agendas and lauding the value of the Global Fund to Fight AIDS, Tuberculosis and Malaria). *But see* Mark Ottenweller & Marion Bunch, *The Lost Children of AIDS: An Exchange*, 52 N.Y. REV. BOOKS, Dec. 15, 2005, available at <http://www.nybooks.com/articles/18568> (responding to Epstein, *supra* note 148, which includes some factually incorrect conclusions).

166. See *supra* note 90 and accompanying text. Thus far, the most successful effort to fight HIV/AIDS has been the Bill and Melinda Gates Foundation's partnership with the government of Botswana. The Foundation and the Botswana government have worked together to make a viable paradigm to treat HIV/AIDS and have had more success than anyone else. See Global Health – Bill & Melinda Gates Foundation, <http://www.gatesfoundation.org/GlobalHealth> (last visited Sept. 3, 2006). For a discussion of public and private investment in AIDS prevention, treatment, and research and of public-private partnerships, see, for example, PRIYA ALAGIRI ET AL., GLOBAL SPENDING ON HIV/AIDS: TRACKING PUBLIC AND PRIVATE INVESTMENTS IN AIDS PREVENTION, CARE, AND RESEARCH 2–10 (July 2001); CORPORATE UPDATE, *supra* note 71, at 3–12; Peter A. Clark & Kevin O'Brien, *Fighting AIDS in Sub-Saharan Africa: Is a Public-Private Partnership a Viable Paradigm?*, 9 MED. SCI. MONITOR ET28, ET28-31, ET34 (2003).

167. Between 1998 and 2002, health's share of funding rose from one-seventh of all international funding by corporations and private foundations to nearly one-third, far out-distancing other funding areas. See LOREN RENZ, ET AL., INTERNATIONAL GRANTMAKING III: AN UPDATE ON U.S. FOUNDATION TRENDS 54 (2004).

168. The Bill and Melinda Gates Foundation (Gates Foundation) provided more than \$472 million for international health initiatives, including \$112.2 million for HIV/AIDS, schistosomiasis, and other diseases. *Id.* at 61. Additionally, the Gates Foundation made available \$72.4 million for research on HIV/AIDS and parasitic and tropical diseases. *Id.* In 2004 and 2005, for all global health programs the Gates Foundation grants exceeded \$4.1 billion, and for HIV, tuberculosis, and reproductive health initiatives, its grants exceeded \$1.4 billion. See Global Health – Bill & Melinda Gates Foundation, *supra* note 166.

By contrast, the second largest funder of HIV/AIDS was the Rockefeller Foundation, which provided grants totaling \$7 million for HIV/AIDS and other diseases. LOREN RENZ, ET AL., *supra* note 167, at 62. Other large funders of HIV/AIDS initiatives included Bristol Meyers Squibb, Carnegie, Doris Duke, Robert Wood Johnson, Merck Company, and Starr foundations. *Id.*

of HIV/AIDS (and other epidemics),<sup>169</sup> but also for spurring other funders. Indeed, between 1998 and 2002 financial support for disease prevention and treatment, the second largest health recipient category,<sup>170</sup> grew more than ten-fold to almost \$161 million, of which more than \$71 million was directed overseas.<sup>171</sup>

Despite the raised profile of HIV/AIDS in the late 1990s and the new millennium, the increased financial support, and the flurry of activity, the harsh reality is that the United States (and the world) missed many vital opportunities and years for developing foreign health policies that would help to contain the HIV/AIDS virus and avoid the multitude of global crises produced by proliferation of the disease. For nearly two decades, the president and other official policymakers were not receptive to messages of activist nonprofit organizations or the handful of established private foundations concerned about HIV/AIDS. Presidents' disregard and inaction<sup>172</sup> permitted HIV/AIDS to become a global pandemic of epic proportion, one that to date the global community has been unable to effectively control. Such a tragedy should not be permitted to be repeated as other threats to the health of politically marginalized people around the globe arise. This Article suggests that restructuring the presidential foreign health policymaking system can help avert other such tragic outcomes.

### III. FOREIGN POLICY DECISION-MAKING STRUCTURE—THE ACTORS

The making of foreign policy has always been a dynamic and complex process impacted by many events and actors. Scholars suggest that modern U.S. foreign policy can be divided into distinguishable time periods identified by historical motivating forces such as the Cold War and the war against terrorism.<sup>173</sup> They also

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169. See *id.* at 54. Other named epidemics include tuberculosis and malaria. *Id.*

170. Public health was the largest funding recipient category in the health field. See *id.* at 60.

171. See *id.* at 61.

172. Perhaps there was also dangerous symbolic response by President Reagan. For a brief discussion, see *supra* note 96.

173. The first recent period of foreign policymaking spans the Cold War. During that time, U.S. foreign relations and U.S. foreign policymaking were organized around, and reactive to, the tensions between the United States and the Soviet Union. In the mid-1990s, the United States entered a period that has been labeled a "holiday from history." See CHARLES KRAUTHAMMER, *DEMOCRATIC REALISM: AN AMERICAN FOREIGN POLICY FOR A UNIPOLAR WORLD* 17 (2004), available at [http://www.aei.org/docLib/20040227\\_book755text.pdf](http://www.aei.org/docLib/20040227_book755text.pdf) (suggesting that it felt like a period of peace, but was an "interval of dreaming between two periods of reality"); Charles Krauthammer, *History Will Not be Kind to Clinton*, TOWNHALL.COM, June 29, 2004, <http://frontpagemag.com/Articles/Printable.asp?ID=14001> (describing it as "our retreat from seriousness, our Seinfeld decade of obsessive ordinariness"); see also Owen Harries, *America's New Game Plan for*

indicate that U.S. foreign policy in part has stemmed from policymakers' reactive or proactive behavior to these events.<sup>174</sup> How some of those actors should participate in the future is at the heart of this Article.

The many actors involved in the U.S. foreign policymaking processes can be categorized as those having and those not having formal participatory authority. The U.S. Constitution confers on Congress and the president shared powers<sup>175</sup> over foreign affairs.

*Domination Rests on Success in Iraq*, SYDNEY MORNING HERALD, Nov. 21, 2003, available at <http://www.informationclearinghouse.info/article5269.htm>; Charles Krauthammer, *The Real New World Order*, JEWISH WORLD REV., Nov. 7, 2001, available at <http://www.jewishworldreview.com/1101/world.order.asp>. In contrast to many other times in the history of the United States, there was no perceived immediate foreign threat around which to organize foreign policy; it was a time of relative peace. Government policymakers considered the United States to be in a unique position as the world's only superpower, and they viewed that status as a means for fostering a better world. As a result of this perspective, these government officials proactively asserted broader principles around which they were interested in building coherent foreign policy to shape future relations of the United States to the world. See HAMILTON, *supra* note 3, at 18. The formulation of foreign policy revolved not around what was actually occurring, but rather upon concepts, values, and ideals for promoting domestic interests by improving the world for humankind. See Michael Mandelbaum, *Foreign Policy as Social Work*, 75 FOREIGN AFF. 16 (1996). The third, and current, period in foreign policymaking is post-September 11, 2001. The events of September 11 immediately became the galvanizing forces around which to organize foreign policymaking. As a result of the global threat from terrorism, national security once again became the motivating force behind, and the organizing principle in, the creation and implementation of U.S. foreign relations and foreign policymaking. It is during this period that HIV/AIDS was firmly placed on the U.S. foreign policy agenda because government officials had come to perceive it as a threat to national security interests. See *infra* note 178 and accompanying text.

174. James M. Scott & A. Lane Crothers, *Out of the Cold: The Post-Cold War Context of U.S. Foreign Policy*, in AFTER THE END: MAKING U.S. FOREIGN POLICY IN THE POST-COLD WAR WORLD 1, 2 (James M. Scott ed., 1998) [hereinafter AFTER THE END].

175. For example, pursuant to Article II of the U.S. Constitution and the gloss of history, the president assumes expansive roles as commander in chief, chief diplomat, and chief of state, all of which enable him to make a great deal of foreign policy constitutionally. Legislation also has contributed to presidential power in making foreign policy. For a brief discussion of examples of presidential power exercised under congressionally ratified legislation, see *infra* note 178.

Article I, § 8 of the U.S. Constitution grants members of Congress authority with respect to foreign affairs to provide for "the common Defence"; to regulate foreign commerce; to punish certain crimes committed on the high seas and offenses against "the law of Nations"; to declare war; to make rules of war; and to raise, support and regulate an army and navy. The Senate and the president share the power to make treaties. U.S. CONST. art. II, § 2.

While Congress and the president share powers, some presidential powers, such as the power to negotiate on behalf of the United States—cannot be exercised by Congress. James M. Lindsay, *From Deference to Activism and Back Again: Congress and the Politics of American Foreign Policy*, in THE DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY: INSIGHTS AND EVIDENCE 183, 185 (Eugene Wittkopf & James M. McCormick eds., 2004). Likewise, some congressional powers, such as the powers to appropriate funds, declare war and raise and equip the military, and control trade, do not reside in the president. Because Congress holds authority to authorize and appropriate funds, its judicious use of those rights can make it a powerful foreign

Nonetheless, in modern times,<sup>176</sup> particularly since the presidency of Franklin Delano Roosevelt, the president has been, and may well continue to be, the “imperial”<sup>177</sup> or dominant foreign policymaker.<sup>178</sup>

policymaking body. See Lindsay, *supra*, at 184; C. PETER MAGRATH ET AL., *THE AMERICAN DEMOCRACY* 638–39 (1973); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29 (1990). Six of the eighteen Constitutional powers delegated to Congress relate to foreign affairs. ALTERMAN, *supra* note 37, at 150. Over half of the thirty-six standing congressional committees are concerned with foreign policy. See MAGRATH, *supra*, at 639.

Congress and the president theoretically could be equally powerful constructive partners in directing foreign affairs. See *id.* at 637. Congress could control foreign policy through its appropriation powers. See *id.* Nonetheless, the formal structure creates tensions and consequently engenders opportunities for the president and Congress to fight for the privilege of guiding foreign policy. See *Introduction: The Domestic Sources of American Foreign Policy*, in *THE DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY: INSIGHTS AND EVIDENCE*, *supra*, at 1, 10 [hereinafter *Introduction*]; HAMILTON, *supra* note 3, at 6. Thus, since the birth of the United States, the relative power of Congress and the president in the foreign policy realm has fluctuated. History has demonstrated that the structure also creates possibilities that, at any given time, only one of these institutional parties will take an activist position while the other remains relatively passive or deferential. See Lindsay, *supra*, at 184. On a practical level, there are numerous factors that affect the degree to which it is the president or Congress that drives the development of foreign policy at any specific time. Among them are the personality and experience of presidents and their executive branch advisors; the level of involvement or lack of engagement of the United States in war or other national crisis; the relationship of Congress and the president; the fragmentation and decentralization of Congress, diplomatic interests, partisanship and other political pressures; and economic forces. See TERRY L. DEIBEL, *CLINTON AND CONGRESS: THE POLITICS OF FOREIGN POLICY* 7 (2000); KAY SCHLOZMAN & JOHN TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 324 (1986).

176. In *United States v. Curtiss-Wright Exp. Corp.*, involving a presidential arms embargo proclamation in 1934, the Supreme Court acknowledged the president’s broad powers to conduct foreign affairs. The unanimous opinion of the court, authored by Justice Sutherland, proclaimed: “[T]he President alone has the power to speak or listen as a representative of the nation. . . . As Marshall said in his great argument of March 7, 1800, in the House of Representatives, ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’” *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

177. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

178. See HAMILTON, *supra* note 3, at 6; Lindsay, *supra* note 175, at 187–190; Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 *IOWA L. REV.* 601 (2005).

Where national security is considered at stake, the president’s power over foreign affairs has been interpreted especially expansively. For example, in 1917, Congress enacted the Trading With the Enemy Act (TWEA), which conferred broad discretionary powers to the president in times of war to restrict or prohibit certain transactions considered potentially threatening to the United States. See Pub. L. No. 65–91, ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1–44 (2003)). To remedy President Franklin D. Roosevelt’s invocation of TWEA to declare a bank holiday in response to a run on bank funds after the beginning of the Great Depression, Congress extended the discretionary powers of the president to include the ability to impose economic sanctions during times of peace if the president declared a national emergency. Act of March 9, 1933, Pub. L. No. 73-1, ch. 1, § 2, 48 Stat. 1 (1933) (codified as amended at 50 U.S.C. app. § 5(b) (2003)). Later, when Congress enacted the

Executive branch agencies, some created in part to provide counsel to policy decisionmakers and to execute policy decisions,<sup>179</sup> also can be important institutional actors in the foreign policymaking system. Since the Vietnam War, an increasing multitude of individuals,<sup>180</sup>

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International Emergency and Economic Powers Act (IEEPA), it modified the president's peacetime economic sanction statutory authority. Trading With the Enemy Act Amendments, Pub. L. No. 95-223, § 101, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. app. § 5(b) (2003)). Section 1701(a) of IEEPA permits the president to impose sanctions under § 1702 "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a) (2003). Acting under this presidential power, President Carter issued an executive order in November 1979, freezing Iranian government assets in response to Iranians' seizure of the American Embassy in Tehran. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). Authority to seize assets and to detain individuals was expanded by the U.S. Patriot Act, passed in response to the September 11 terrorist attacks. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, tit. I, § 106, 115 Stat. 272 (2001). For further discussion, see Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1355-60 (2004).

Nonetheless, presidential powers, even when attributed to national security matters, are not without curbs. One such instance was the Supreme Court's restraint on President Truman, who issued an executive order for the seizure of the country's steel mills when he perceived an impending steel worker's strike to endanger national security. Exec. Order No. 10,340, 17 Fed. Reg. 3,139 (Apr. 8, 1952). The steel companies filed a lawsuit against the Secretary of Commerce, who was responsible under President Truman's executive order for the seizure. The case ended up before the Supreme Court. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Writing for the majority, Justice Black found no constitutional power as Commander in Chief, nor any statutory power, express or implied, for the President's seizure of the steel mills. *Id.* at 584-85. Justice Frankfurter, writing a concurring opinion, noted that as a result of Congress' express refusal to authorize the President's seizure of the steel mills, the President did not have seizure authority under the U.S. Constitution, prior seizure precedent notwithstanding. *Id.* at 593-615.

More recently, in the name of national security interests after September 11, 2001, President George W. Bush has purportedly acted under his constitutional powers and has been challenged for overreaching exuberance. See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). In *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), Justice O'Connor, writing the majority opinion, expressed that the president's war powers are not a "blank check." For media reports on President George W. Bush's expansive view of his presidential powers, see *infra* note 184.

179. Examples include the Departments of State, Defense, Treasury, Homeland Security, and Health and Human Services (H.H.S.), and the Central Intelligence Agency (C.I.A.). See Scott & Crothers, *supra* note 174, at 1, 9. H.H.S. in part fulfills its charge for "protecting the health of all Americans and providing essential human services" by providing, through its C.D.C., "a system of health surveillance to monitor and prevent disease outbreaks . . . , [to] implement disease prevention strategies," and to "guard against international disease transmission." H.H.S., What We Do, <http://www.hhs.gov/about/whatwedo.html> (last visited Sept. 3, 2006).

180. Foreign heads of state and international organizations often approach the president, executive branch bureaucrats, and members of Congress. See HAMILTON, *supra* note 3, at 23-26.

private sector businesses,<sup>181</sup> and nonprofits, all of which have no prescribed legal authority or other official position in the foreign policymaking apparatus, have actively vied to influence foreign policymaking.<sup>182</sup> As a result of this mixture, “foreign policy may emerge from shifting and uncertain interactions between the White House, Congress, bureaucratic agencies, and groups and individuals from the private sector.”<sup>183</sup>

#### A. *The President as the Primary Foreign Policymaker*

The president’s expansive visions of executive power<sup>184</sup> and a congressional ceding of its de facto constitutional powers over foreign policy during the first decade of the Cold War era and the current post-September 11th period<sup>185</sup> have enabled presidential dominance over the selection of U.S. foreign policy priorities and the formulation

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181. For-profit businesses with interests in trade and economic matters have been significant actors. See, e.g., Jeffrey E. Garten, *Business and Foreign Policy*, 76 FOREIGN AFF. 67 (1997) (commenting on the role of business as a foreign policy player). Additionally, the mass media plays a role unlike other outside forces. Through its coverage choices with respect to foreign affairs matters, the media can target topics, create or stimulate public debate, be a source of information or misinformation, and present policy options for public consideration. See *Introduction*, *supra* note 175, at 8.

182. See *infra* note 209 and accompanying text (regarding the modest influence of nonprofits on the president’s foreign policymaking).

183. Scott & Crothers, *supra* note 174, at 8. What some considered a relatively straightforward foreign policymaking environment before the Cold War has evolved in this time of globalization into a far more complex system. See *id.* at 7–8 (describing the policymaking environment as a shifting constellation); James M. Scott, *Interbranch Policy Making after the End*, in AFTER THE END, *supra* note 174, at 389, 404–405 (suggesting factors that impact the shifts in the policymaking constellation). Immigration and globalization have inextricably connected domestic and foreign policy concerns, which add to the complexities of the foreign policymaking system. See, e.g., HAMILTON, *supra* note 3, at 16 (commenting on the linkage of the U.S. economy to the global economy and on various concerns that have added complexity); Wright & Fiore, *supra* note 120, at A8 (quoting President Clinton as stating that there is “no longer a clear, bright line dividing America’s domestic concerns and America’s foreign policy concerns”); John W. Dietrich, *Interest Groups and Foreign Policy: Clinton and the China MFN Debates*, 29 PRESIDENTIAL STUD. Q. 280 (1999).

184. President Reagan and, more recently, President George W. Bush have been accused of rather grandiose visions of executive power. See e.g., Elisabeth Bumiller, *For President, Final Say on a Bill Sometimes Comes After the Signing*, N.Y. TIMES, Jan. 16, 2006, at A11; Cornelia Dean, *At a Scientific Gathering, U.S. Policies Are Lamented*, N.Y. TIMES, Feb. 19, 2006, at 1.28; Noah Feldman, *Who Can Check the President?*, N.Y. TIMES, Jan. 8, 2006, at 52; Eric Lichtblau & James Risen, *More Attacks and Meetings on a Program Under Fire*, N.Y. TIMES, Jan. 21, 2006, at A8; Adam Liptak, *A Quick Focus on the Powers of a President*, N.Y. TIMES, Jan. 10, 2006, at A1; Adam Liptak, *Court in Transition: The Legal Context*, N.Y. TIMES, Jan. 14, 2006, at A11. For further discussion on legislative and executive branch expansions of presidential power over foreign affairs, see *supra* note 178.

185. See *supra* note 178 and accompanying text.



of policy approaches.<sup>186</sup> Disconcertingly, limited transparency and public accountability of the president's official advisory structure have contributed to heightening the president's foreign policy powers. They may also effectively have prevented placement of global health matters on the president's foreign policy agenda. Elite presidential advisors and powerful confidants who have their own foreign policy agendas and biases may create an insular policymaking environment for the president. Because a president's direct contacts with nongovernmental foreign policy actors—individuals, businesses, nonprofit interest groups, and organizations—are initiated by the White House, it is possible for such gatekeepers to shield a president from them, particularly if their concerns are perceived as inconsistent with, or beyond the scope of, U.S. national interest.<sup>187</sup>

The history of the HIV/AIDS crisis is a testament to the insularity of presidents and the lack of transparency and public accountability of their foreign policymaking system.<sup>188</sup> Four presidents—Ronald Reagan, George H.W. Bush, Bill Clinton, and during his first term, George W. Bush<sup>189</sup>—largely ignored, or affirmatively rejected,<sup>190</sup> the need to attend to the HIV/AIDS pandemic and the worldwide humanitarian, health, economic,

186. See HAMILTON, *supra* note 3, at 9, 15, 42, 44; Jerel Rosati & Stephen Twing, *The Presidency and U.S. Foreign Policy after the Cold War*, in AFTER THE END, *supra* note 174, at 28, 35; MAGRATH, *supra* note 175, at 637 (commenting on the relative powers of Congress and the president during the Cold War period). As typical in wartime, during approximately the first decade of the Cold War ending with the Vietnam War and during the post-September 11 period, Congress as an institution essentially ceded its de facto constitutional powers, or at least deferred to, the president in foreign policy matters. ALTERMAN, *supra* note 37, at 150; HAMILTON, *supra* note 3, at 7–9, 42; Lindsay, *supra* note 175, at 187–90. Between 1985 and 1998, it had not passed a foreign aid authorization bill, which is its primary mechanism for making foreign policy. ALTERMAN, *supra* note 37, at 150; HAMILTON, *supra* note 3, at 7–9, 42; Lindsay, *supra* note 175, at 187–90. For further discussion on presidents' expansive views of executive power, see *supra* note 175.

187. See SCHLOZMAN & TIERNEY, *supra* note 175; ALEXANDER L. GEORGE, *PRESIDENTIAL DECISIONMAKING IN FOREIGN POLICY: THE EFFECTIVE USE OF INFORMATION AND ADVICE* 121-136 (1980).

188. See *supra* Part II.

189. President George W. Bush appears to be more concerned with the African problems, including AIDS, than his predecessors.

190. As one author has stated:

The White House has “negative” power—the power to say no. While this does not mean the president can determine foreign policy, it may mean that the president has the ability to determine what will *not* be foreign policy. In this sense, the other elements in the foreign policy arena have a difficult, if not impossible, time making foreign policy without the White House.

Scott, *supra* note 174, at 395.

political, and security crises it generated.<sup>191</sup> And their tragic inaction occurred despite formal organizational structures that enable presidents to receive from governmental advisors input on noteworthy foreign issues.<sup>192</sup>

### B. Executive Branch Agencies

Executive branch agencies are “expected to be the government’s ‘eyes and ears,’ searching for incipient global changes and assessing American needs and interests abroad.”<sup>193</sup> Leaders of such executive agencies as the Departments of State, Defense, Treasury, Homeland Security, and Health and Human Services (H.H.S.), as well as the Central Intelligence Agency are expected to provide expert and impartial counsel to the president in shaping foreign policy.<sup>194</sup>

Nonetheless, political and job-related pressures can affect the impartiality, scope, and nature of the advice that these government officials offer to a president for consideration in his foreign policy deliberations. Without publicly transparent processes, these governmental “eyes and ears” may fail to aggressively pursue matters unpopular to a president or may spin information to fit a president’s

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191. President George H.W. Bush has been widely considered a strong president in the foreign policy arena. Rosati & Twing, *supra* note 186, at 34. Nonetheless, he lost his bid for reelection in 1992.

192. Formal organizational structures give the president access to advice on foreign affairs from the Special Assistant for National Security Affairs, the National Security Council, the Director of the Central Intelligence Agency, as well as members of the president’s cabinet, including the Secretaries of State, Defense, Commerce, Agriculture, and Treasury. See MAGRATH, *supra* note 175, at 633–34. The Special Assistant for National Security Affairs, who is often the most important policy advisor to a president, is assisted by the National Security Council, the Bureau of the Budget, and the Office of Science and Technology. See *id.* at 633. The National Security Council is an “institutionalized” advisory group that acts like a “special foreign policy cabinet.” *Id.* Its members include the President, the Vice President, the Secretary of State, the Secretary of Defense, and the Director of the Office of Emergency Planning. See *id.*

For a discussion of the advisory role of the executive branch agencies, see *infra* Part III.A.2.

193. *The Institutional Setting*, in THE DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY: INSIGHTS AND EVIDENCE, *supra* note 175, at 129, 137.

194. See *id.* at 9; Christopher M. Jones, *The Foreign Policy Bureaucracy in a New Era*, in AFTER THE END, *supra*, note 174, at 57, 57–84 (outlining the budget, structure, and personnel of the foreign policy bureaucracy). It is not necessarily only an agency’s top officials that can influence the shape and character of foreign policy. As policy prioritization and implementation responsibilities are delegated down an agency’s hierarchical ladder, sometimes even lower level staff members may have a notable impact on foreign policy development. See Scott & Crothers, *supra* note 174, at 10–11 (arguing that some foreign policy is “conducted at mid- to lower-levels of the executive branch”).

Even if advisors from the executive branch agencies provide expert and impartial counsel to a president, the advice may be ignored due to the president’s own agenda or personality. As state in footnote 54, *supra*, however, that factor is not the subject of this Article.

own foreign policy agenda, perhaps leaving little room to represent those lurking dangers to U.S. interests precipitated by health privations endured by politically marginalized minorities abroad.

These failures appear to have contributed to presidents' policy inaction with respect to HIV/AIDS. Despite recognition in the early 1980s by the C.D.C., a division of H.H.S.,<sup>195</sup> of HIV/AIDS as a potential health threat of great magnitude domestically and abroad,<sup>196</sup> the leaders of H.H.S. did not demonstrate much interest in pushing the HIV/AIDS pandemic onto the presidents' foreign policy screens. There were a few minor exceptions. For example, more than a decade after HIV/AIDS was branded a potential public health threat, President Clinton appointed Donna Shalala Secretary of H.H.S. in 1993. Soon after her appointment, Ms. Shalala declared AIDS as the number one disease priority, both domestically and internationally.<sup>197</sup> During her six years as Secretary of H.H.S. she directed the process to reform the welfare system, made health insurance available to an estimated 3.3 million children through the approval of all State Children's Health Insurance Programs, raised child immunization rates to the highest levels in history, led major reforms of the Federal Drug Administration's drug approval process and food safety system, revitalized the National Institutes of Health, and directed a major management and policy reform of Medicare.<sup>198</sup> Despite these accomplishments, she was unable to generate sufficient interest to elevate AIDS to the president's domestic or foreign policy realm.<sup>199</sup>

Another executive branch appointee of President Clinton, Madeleine Albright, who assumed the position of Secretary of State in 1996, made some tentative efforts that year to raise public awareness of the HIV/AIDS problem. In December 1996, she addressed the World AIDS Day participants and thereafter commissioned a State Department report on the pandemic.<sup>200</sup> But, if she made any attempts in 1997 or 1998 to elevate HIV/AIDS as a possible presidential foreign policy matter, she was unsuccessful. The State Department's March 1999 issuance of its report, the "1999 U.S. International Response to HIV/AIDS," did not place the global

195. See *supra* note 179 (describing the mission of the C.D.C.).

196. See BEHRMAN, *supra* note 28, at 5-16 (relating various meetings and discussions among C.D.C. personnel about HIV/AIDS); *supra* note 173 and accompanying text.

197. BEHRMAN, *supra* note 28, at 74.

198. University of Miami, President Donna. E. Shalala's Biography, [http://www6.miami.edu/UMH/CDA/UMH\\_Main/1,1770,8548-1;8823-3,00.html](http://www6.miami.edu/UMH/CDA/UMH_Main/1,1770,8548-1;8823-3,00.html) (last visited Sept. 7, 2006).

199. See BEHRMAN, *supra* note 28, at 74-76 (stating that the president would never directly follow up on global AIDS and that for Ms. Shalala, "global AIDS was a subaltern agenda item").

200. *Id.* at 213.

pandemic onto the list of the president's foreign policy priorities.<sup>201</sup> Nor did Mrs. Albright's subsequent address to the U.S.-Africa Partnership Ministerial in Washington, D.C., indicate that she was successful, when she stated that "[w]e need to focus urgently on the devastating impact of HIV/AIDS, and make a commitment to address the disease as a national and international priority."<sup>202</sup>

The failure to advance HIV/AIDS to a position on President Clinton's foreign policy agenda may not be surprising. Although Ms. Shalala served as President Clinton's main health counsel and Mrs. Albright served as his principal foreign policy advisor, apparently neither Secretary forcefully and continuously emphasized her imperative conviction to forging solutions to the global HIV/AIDS problems.<sup>203</sup> Many political scientists, moreover, characterize President Clinton as a president who viewed "foreign policy as a 'distraction' from his domestic agenda and sought to delegate its formulation to others whenever possible."<sup>204</sup> If President Clinton's integral senior foreign policy expert with "unparalleled responsibilities at the apex of the U.S. foreign policy-making apparatus"<sup>205</sup> was not fully committed to combating global HIV/AIDS, and his top H.H.S. official failed to vociferously and repeatedly push for his attention to the disease, then inclusion of global HIV/AIDS on President Clinton's foreign policy agenda had zero to slim chance. Therefore, it appears that the government's "eyes and ears" are not necessarily protectorates of significant U.S. interests in the presidential foreign policymaking scheme.

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201. U.S. DEP'T OF STATE, 1999 INTERNATIONAL RESPONSE TO HIV/AIDS (March 1999).

202. James Rubin, Spokesman, State Dep't, HIV/AIDS Report Released at Africa Ministerial, (Mar. 16, 1999), <http://www.aegis.com/news/usis/1999/US990301.html>.

203. See BEHRMAN, *supra* note 28, at 214, 216 (noting that AIDS never "seemed to incite Albright's energies" and describing Ms. Shalala as "relenting on pressing" the matter of global AIDS).

204. Thomas Preston & Margaret G. Hermann, *Presidential Leadership Style and the Foreign Policy Advisory Process*, in THE DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY: INSIGHTS AND EVIDENCE, *supra* note 175, at 363, 373.

205. *The Changing Dynamics of U.S. Foreign Policy-Making: An Interview with Thomas R. Pickering, Under Secretary of State for Political Affairs*, 5 U.S. FOR. POLY AGENDA 5, 5 (2000), available at <http://usinfo.state.gov/journals/itps/0300/ijpe/pj51pick.htm> (speaking generally of the importance of the Secretary of State in the U.S. foreign policymaking structure).

C. *Nonprofits as Nongovernmental Actors*

Domestic nonprofit organizations and interest groups<sup>206</sup> have exploded in number in recent years.<sup>207</sup> They have represented various ethnic or religious constituencies, coalesced around specific causes, sought to direct public opinion on foreign policy matters, financed foreign policy studies,<sup>208</sup> and supported foreign policy initiatives. Although some have marshaled considerable financial and electoral forces, scholars have suggested that their activity levels must be distinguished from, and are not the equivalent of, a power to truly influence a president's actual formulation, selection, and adoption of U.S. foreign policy.<sup>209</sup> Indeed their overall influence on the president's foreign policymaking processes appears relatively minor.<sup>210</sup>

206. Interest groups are "organized associations that engage in activity relative to government decisions." Robert H. Salisbury, *Interest Groups*, 4 HANDBOOK OF POL. SCI. 175 (Fred I. Greenstein & Nelson W. Polsby, eds. 1975). The list is long and includes ethnic groups, human rights groups, and environmental groups.

207. See Dietrich, *supra* note 183, at 280 (there has been "a sharp increase in the number of interest groups").

208. Think tanks and private foundations have financed studies on various aspects of foreign affairs. *Id.*

209. These groups' influence on foreign policy can be handicapped by their lack of direct access to the president and by narrow focuses not perceived as serving U.S. interests in the broad international environment. See *id.* at 281 (describing interest group influence on foreign policy as "slight" or "diffuse" because of its narrow focus and small portion of the populace). But elite, established private foundations may have greater access to a president. Historically, some of their leaders have rotated between government and private foundations, effectively creating a "shadow cabinet world." DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 377 (1973); see also BERMAN, *supra* note 49, at 41-66, 127-59 (recounting the influence of the three large foundations on policymaking and the movement of prominent individuals between important governmental positions and leadership positions at private foundations).

Studies indicate that when public opinion has impacted presidents' foreign policy decision-making, its strongest influence was on constraining the selection of a particular policy option. DOUGLAS C. FOYLE, *COUNTING THE PUBLIC IN: PRESIDENTS, PUBLIC OPINION, AND FOREIGN POLICY* 269 (Robert Y. Shapiro, ed., Columbia Univ. Press 1999). Those presidents influenced by public opinion seemed to have been concerned with the sufficiency of public support for the implementation of select foreign policies and with sustaining an adequate electoral base. See *id.* at 19-20.

When Congress is instrumental in shaping foreign policy, these interest groups and nonprofit organizations may have more influence. See, e.g., JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* 1-33, 59-60 (1999) (detailing the rise of citizen groups as the foundation for modern liberalism); Scholzman & Tierney, *supra* note 175, at 324-26 (explaining the mutual political needs between the President and organized interest groups); HAMILTON, *supra* note 3, at 25-26 (describing the collaboration between members of Congress and the leaders of top officials of major international institutions); ROELOFS, *supra* note 49, at 3-5, 38-40, 52-53, 139-43, 157-206 (writing on the influence of private foundations on foreign affairs); Samuel P. Huntington, *The Erosion of American National Interests*, in *THE DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY: INSIGHTS AND EVIDENCE*, *supra* note 175, at 55, 63 (commenting on the growing role of ethnic groups in shaping U.S. foreign policy); Andrew Rich & R. Kent Weaver, *Advocates and Analysts: Think Tanks and the Politicization of Expertise*, in *INTEREST GROUP POLITICS*, *supra* note 3, at 235,

#### IV. PRACTICAL REASONS FOR A FORMAL POLICYMAKING ROLE FOR NONPROFITS

##### A. *Nonprofit Organizations as Unofficial Designers of Foreign Health Policy*

The modest influence of domestic nonprofits on presidential foreign policymaking is not without some counterbalance. For many years, domestic nonprofits privately, often quietly, and unofficially have designed a substratum of foreign health policy through their missions, economic support, and activities.<sup>211</sup> In efforts to contain and eradicate infectious and other diseases that afflict adults and children abroad, domestic private foundations and public charities have created and implemented new prevention, treatment, intervention, and relief programs.<sup>212</sup> They have financially supported and provided family planning services, prenatal care, and reproductive health initiatives worldwide.<sup>213</sup> These nonprofit

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235–50 (describing various think tanks and concluding that they have become “contentious advocates in balkanized debates over the direction of public policy”); Scott, *supra* note 174, at 395–397 (remarking on the cross-pressures that the public creates for congressional policymakers that constrain sustained and coherent foreign policy); Eric M. Uslaner, *All in the Family? Interest Groups and Foreign Policy*, in INTEREST GROUP POLITICS *supra* note 3, at 365–83 (describing the influence of interest groups, and ethnic groups in particular, on foreign policy); *The FP Interview*, FOREIGN POLY 26, 38 (2001) (reporting that a top U.S. diplomat, Thomas Pickering, commented that nonprofit organizations are “a huge and important force in many issues of American policy . . . NGOs are in fact the driving force”).

210. See, e.g., Dietrich, *supra* note 183, at 283–84 (remarking that although interest groups have considerable access to the policy system, their policy influence remains limited).

211. See *supra* note 23.

212. For example, the Gates Foundation financially supports children’s vaccination programs, projects aimed at preventing and treating infectious diseases, and initiatives for combating HIV/AIDS in developing countries. See *supra* note 23 and accompanying text (giving financial support data of the Gates Foundation). The International Medical Corps (IMC), established as a domestic 501(c)(3) organization in 1984, works with communities in urban and rural areas, isolated villages, refugee camps, disaster sites, and frontline hospitals to provide essential health services. In response to the HIV/AIDS pandemic, IMC has directly delivered medical services to victims abroad. International Medical Corps, [http://www.imcworldwide.org/whatwedo\\_hiv.shtml](http://www.imcworldwide.org/whatwedo_hiv.shtml) (last visited Sept. 7, 2006); see also The African Salvation Group, <http://www.asgroup.org/english/index.htm> (last visited Sept. 7, 2006) (describing ASG as a non-profit organization working to promote health education and prevention for under-served communities in New York City and Sub-Saharan Africa).

213. For example, the David and Lucile Packard Foundation and the Ford Foundation actively provide financing for reproductive health care and family planning. See The David and Lucile Packard Foundation, <http://www.packard.org/category/List.aspx?RootCatID=3&CategoryID=62> (last visited Sept. 2, 2006); The Ford Foundation, <http://www.fordfound.org/program/education.cfm> (last visited Sept. 2, 2006) (describing the Sexuality and Reproductive Health field, used to build knowledge

organizations have made grants and initiated health and medical education projects, healthcare training services to communities, and training programs for healthcare workers abroad.<sup>214</sup> Private foundations have funded research on drugs, gene therapy, and other medical treatments for combating diseases afflicting men, women, and children worldwide.<sup>215</sup> They have financially supported health policy issues aimed at promoting global health equity and international public health policy initiatives.<sup>216</sup> Frequently as first responsible responders, often impelled by inadequate U.S. government reaction, domestic nonprofits have formulated their contributions to and involvement in global health matters when major diseases and medical needs are detected and as overseas geographic areas and population segments requiring assistance are identified.

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and develop policy of sexuality). Other foundations have provided grants for reproductive health and family planning projects abroad, including the William and Flora Hewlett Foundation and the John D. and Catherine T. MacArthur Foundation. See The William and Flora Hewlett Foundation, <http://www.hewlett.org/Programs/Population/> (last visited Sept. 2, 2006) (promoting voluntary family planning and good reproductive health); The John D. and Catherine T. MacArthur Foundation, [http://www.macfound.org/site/c.lkLXJ8MQKrH/b.932747/k.B59A/International\\_Grantmaking\\_Population\\_and\\_Reproductive\\_Health.htm](http://www.macfound.org/site/c.lkLXJ8MQKrH/b.932747/k.B59A/International_Grantmaking_Population_and_Reproductive_Health.htm) (last visited Sept. 2, 2006). Numerous public charities are involved in providing reproductive health and family planning services overseas. See, e.g., Centre for Development and Population Activities, <http://www.cedpa.org/section/whatwedo> (last visited Sept. 2, 2006) (detailing the various programs designed to improve the lives of women and girls around the world); EngenderHealth, Inc., <http://www.engenderhealth.org/mission/index.html> (last visited Sept. 2, 2006) (working to improve the lives of individuals by making reproductive and family planning services safe and available).

214. For example, IMC trains local workers and establishes quality, sustainable health and economic development systems in war-torn, impoverished regions of the world. It has trained local healthcare workers in Africa to care for HIV infected patients and has provided health education to African communities riddled by HIV/AIDS in order "to promote preventive practices and fight stigma and ignorance." International Medical Corps, [http://www.imcworldwide.org/whatwedo\\_hiv.shtml](http://www.imcworldwide.org/whatwedo_hiv.shtml) (last visited Sept. 2, 2006). The Academic Alliance Foundation for AIDS Care and Prevention in Africa also focuses on training, treating, and developing research strategies within the countries that are most affected by diseases. AAF: Enabling Innovative Solutions to the Global HIV/AIDS Crisis, <http://www.academicalliancefoundation.org/> (last visited Sept. 2, 2006).

215. See, e.g., Bristol Myers Squibb Foundation, <http://www.bms.com/sr/philanthropy/data/backgr.html> (last visited Sept. 2, 2006) (detailing its philanthropic efforts); Merck Company Foundation, [http://www.merck.com/cr/company\\_profile/philanthropy\\_at\\_merck/the\\_merck\\_company\\_foundation/](http://www.merck.com/cr/company_profile/philanthropy_at_merck/the_merck_company_foundation/) (last visited Sept. 2, 2006) (describing philanthropy at Merck, including product donations and development of medicines).

216. The Rockefeller Foundation has funded public health policy initiatives and global health equity projects. See Rockefeller Foundation, <http://www.rockfound.org/Grantmaking/Health> (last visited Sept. 2, 2006) (describing various programs and grants made to reduce differences in the health status of populations).

### B. Limitations of Unofficial Role

One thus might consider the world fortunate that our domestic nonprofits are such integral actors in foreign health policymaking and implementation. Nonetheless, there are distinct real or potential limitations to their informal role.

First, there is negligible public accountability for, and transparency by which, nonprofit organizations privately create a substratum of foreign health policy. While nonprofits freely develop many worthwhile global health initiatives for politically vulnerable minorities abroad, they generally do so with tax advantaged funds. This tax advantage carries with it a responsibility for openness and public accountability.

Second, where nonprofit organizations are the primary, or sometimes even the exclusive, unofficial responders to global health needs, the response conceivably can suffer from a lack of orchestration on several levels. On a macro foreign policy level, if and when nonprofit entities act without consultation with governmental policymakers, they may interfere inadvertently with unrelated foreign affairs and consequently create tensions or unanticipated problems. They may unintentionally impede certain diplomatic processes.<sup>217</sup> On a micro foreign policy level, where nonprofit entities do not consult with one another and do not orchestrate their plans, projects, and funding, their efforts can be duplicative and the potential impact of outcomes diluted.

Third, informal interaction of nonprofits with the president is subject to the previously discussed notable constraint of presidential advisors' and staff members' acting as gatekeepers. Those gatekeepers easily might exclude many knowledgeable nonprofit organizations in favor of the inclusion primarily of elite, rich,<sup>218</sup> established, sympathetic, financially supportive, and politically agreeable nonprofits.<sup>219</sup> The executive gate keeping mechanism

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217. This Article does not suggest that there should be harmony between the government and nonprofits with respect to all matters of foreign health policy. Indeed, often to the benefit of political minorities abroad, U.S. foreign policy formulation regularly has been marked by disharmonies between governmental officials and leaders of nonprofit organizations. For example, notwithstanding President Reagan's and President George W. Bush's imposition of the Mexico City Policy, also known as the global gag rule, U.S. nonprofits have financially supported reproductive health projects and family planning services that have benefited people in Third World countries. See, e.g., Centre for Development and Population Activities, *supra* note 213; EngenderHealth, Inc., *supra* note 213.

218. Political participation in the United States has long depended upon wealth and economic power, which have heavily biased political outcomes. See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 3-11 (1995).

219. See LEHMAN SCHLOZMAN & TIERNEY, *supra* note 175. For example, a conservative president may be more likely to initiate discussions with conservative



obviously has the ability to readily deny access by groups and entities that represent certain unpopular or politically risky views, causes, and people. Therefore, small nonprofit affinity groups generally are not granted direct contact with the president, despite the fact that they have the potential to be “an advance alert system’ . . . to raise the visibility of emerging social problems and policy issues.”<sup>220</sup> Overall, the system permits a distortion of information access and limits vigorous discussions of important concerns and large and perhaps innovative ideas with the nation’s primary foreign policy decisionmaker.

Finally, the public may speculate that interactions of the select few nonprofit representatives who directly interact behind closed doors with the president include more than exchanges of ideas and expertise. The absence of public scrutiny and accountability can damage confidence in the appropriateness of interests represented, information transmitted, terms of deals arranged, and subsequent satisfaction of negotiated obligations.<sup>221</sup>

### C. *Practical Reasons for an Official Role*

Providing an official institutionalized role for nonprofits at the president’s foreign health policymaking table could positively attend to the above identified limitations of the current system. A modified system could and should be structured to include a broader base of nonprofit “service bureaus” (and thus a wider range of people they represent).<sup>222</sup> It should enhance the flow of high quality information; directly bring greater expertise, analysis, and innovative ideas to long-range global health policy matters; provide a forum for the exchange of controversial proposals and for deliberate feedback;<sup>223</sup> and create vigorous discussion. Alteration must proceed with caution to ensure that the president’s foreign health policymaking process evolves into opportunities for constructive interchange on serious global health matters by responsible participants. It should include

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think tanks, and a liberal president may be more likely to initiate input from liberal think tanks.

220. Gibbons, *supra* note 84, at 11 (citing FUNDERS CONCERNED ABOUT AIDS, MEMORANDUM 2 (Oct. 1, 1991)).

221. A similar argument has been made for providing international nongovernmental organizations a formal role in international decision-making. Peter J. Spiro, *Essays: The Democratic Accountability of Non-Governmental Organizations: Accounting for NGOs*, 3 CHI. J. INT’L L. 161–69 (2002).

222. Nonprofit organizations can represent a broad spectrum of people who otherwise may be unrepresented, marginalized, or under-represented in policymaking. See Crimm, *supra* note 51, at 658 n.304 (2005).

223. See Kurt Wilk, *International Organization and the International Chamber of Commerce*, 55 Pol. Sci. Q. 231, 244–47 (1940) (suggesting a similar advantage for international groups with respect to international measures).

increased transparency of process and public accountability of all official participants who contribute to identifying the global health problems, determine risks and stakes of action and inaction, define policy options, and otherwise enable the president to set and implement an appropriate foreign health policy agenda.

Under a modified system, as U.S. foreign health policy is defined, adopted, and executed, all formal participants would have a stake in the outcome and be subject to public scrutiny. Thus, the institutional inclusion of nonprofits could offer a more transparent and balanced political enterprise, enhance the operative democratic principles of our nation,<sup>224</sup> restrain inordinate executive power through increased

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224. There is some philosophical support for a modified foreign policymaking system that could enhance the democratic workings of the nation. Philosophers have long extolled the virtues of the autonomy of both government and free associations, such as nonprofit organizations, that exist within civil society. Each has separate responsibilities that should be free from intervention by the other, and hence their independence must be maintained. But philosophers, such as Alexis de Tocqueville, Hegel, and John Mill, suggest in various fashions that a government's competencies are subject to limitations and thus can be enhanced by cooperation and interchange. Alexis de Tocqueville suggested that there must be cooperation between civil society and government to check the sovereign state's power. See HARVEY MITCHELL, *AMERICA AFTER TOCQUEVILLE* 242–43 (2002) (stating that to “check the sovereign state . . . might arise through a theory that fused civil society and state and ended the dichotomy” and the “centralization of a power by a regulatory administrative regime . . . was a harbinger of a democracy wrenched from its pristine moorings, ending in a new kind of despotism where choices would become illusory”). John Stewart Mill criticizes the ruler who takes it upon himself to make every decision without meaningful input by others. John Stewart Mill, *Considerations on Representative Government*, in *ON LIBERTY AND OTHER ESSAYS* 205, 238–42 (John Gray ed., Oxford Univ. Press 1991) (1861). Hegel claimed that if a nation's government, which he depicted as an animal organism, fails to work cooperatively as members but instead acts as distinct and separate “parts of the animal,” the “isolation and independence spell[s] disease.” T.M. KNOX, *HEGEL'S PHILOSOPHY OF RIGHT* 180 (1952) (interpreting Hegel's work published in 1821 regarding feudal states). John Rawls advised that to ward off such disease and eliminate the gravest forms of political injustices, just institutions and policies must be established. John Rawls, *The Law of Peoples*, in *The LAW OF PEOPLES* 7 (1999). Thus, for the democratic government machinery to best serve the interests of its people (and those common to people of other regimes), informed deliberation by decisionmakers is essential. Such informed deliberation is dependent on the inclusion of different perspectives and ideas. As John Rawls recognized, this may necessitate the establishment of new alliances or new institutions and practices to serve as a kind of confederative center and public forum. *Id.* at 3. Rawls considered that evils in society can be alleviated by creating just and decent institutions. *Id.* at 7. This Article suggests that it is consistent with this belief to reformulate the institutions now in place that permit U.S. global health policymakers to ignore the “evils” that threaten people overseas and that ultimately impact U.S. citizens' health, the nation's economic stability, and national security.

What Alexis de Tocqueville suggested centuries ago after his eighteenth century post-Revolutionary War visit to America is all the more applicable in the twenty-first century. The truly globalized world of the new millennium requires a whole new political science. See JOHN C. KORITANSKY, *ALEXIS DE TOCQUEVILLE AND THE NEW SCIENCE OF POLITICS: AN INTERPRETATION OF DEMOCRACY IN AMERICA* 3 (1986) (stating that Tocqueville “will present a ‘new political science for a world itself quite new’”).

accountability, imbue the presidential foreign policymaking processes with a new legitimacy, and further the interests of U.S. citizens and people across the globe.

## V. CONSTRUCTING AN APPROPRIATE POLICYMAKING STRUCTURE

### A. *Paradigms of Nongovernmental Organizations' Participation in International Bodies' Policymaking Processes*

There is no magical best structure for achieving the integration of domestic nonprofit organizations as official actors in the president's foreign health policymaking processes. Paradigms that provide formal arrangements for the participation of NGOs<sup>225</sup> in various international bodies charged with goals of rule making and policymaking authority incorporate qualities and some functions comparable to the one envisioned here. Therefore, six possible models, each with different features, are discussed below.

Because no one of the six paradigms presents an entirely suitable arrangement for the task at hand, formulation of a new structure should draw upon a composite of the models' most appropriate attributes. Each of the six models—the World Trade Organization (WTO), the NGO-World Bank Committee, the WHO, the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD), and the U.N.'s Economic and Social Council (ECOSOC)—contain negative and positive characteristics. Clearly, the pervasively weak traits of each paradigm should be avoided, and the structure of a paradigm considered as lacking overall operational effectiveness should not be adopted without considerable modification. In particular, the WTO paradigm does not recognize direct involvement by NGOs in the work

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Perhaps the world of today requires the official “wise men” of U.S. global health policymaking to adapt “to take advantage of the . . . good qualities which may at . . . [this] time exist, and make them instrumental to the right purposes.” Mill, *supra*, at 226 (referring to a meritorious element of a government that displays good qualities). In other words, it may be time to officially integrate nonprofit organizations, which can give a powerful and meaningful voice to a range of global health concerns and needs, into the U.S. foreign health policy decision-making apparatus. By undertaking this strategy, the world's image of the U.S. government might be enhanced. Through such implementation of “soft power,” the U.S. government might achieve more successes in world politics. See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 60–61 (2004) (claiming that the attractiveness of the United States depends in part on the values, substance, and style of U.S. foreign policy).

225. See generally Maura Blue Jeffords, *Turning the Protester into a Partner for Development: The Need for Effective Consultation Between the WTO & NGOs*, 28 BROOK. J. INT'L LAW 937, 940–44 (2003) (discussing the definition of NGOs).

of the WTO, an attribute to avoid. Such direct involvement is important in a new presidential foreign health policymaking structure for purposes of NGO public accountability and contributions of diverse and informed perspectives. Many, but not all, characteristics of the NGO-World Bank Committee and the WHO models are eschewed because these models have been forcefully criticized as overly complex and ineffective.<sup>226</sup> On the other hand, the ILO, the OECD, and ECOSOC have been considered largely effective and contain numerous positive attributes that should be imported into a new presidential foreign health policymaking structure.

After briefly outlining the various attributes of the six models, this Article suggests those characteristics that may help cure infirmities of the current processes. The Article then suggests how these attributes might be aggregated and utilized in a constitutionally acceptable and functionally appropriate structure that extends a significant official role to nonprofits.

### 1. World Trade Organization

The WTO is the only international organization dealing with the global rules of trade between nations dedicated to promoting economic globalization and free trade.<sup>227</sup> It currently includes 149 member countries.<sup>228</sup> The WTO has two major functions, one legislative and another judicial. It is a forum for member nations to negotiate and develop by consensus trade rules, policies, and agreements with the goal of helping “producers of goods and services, exporters, and importers conduct their business”<sup>229</sup> by reducing or eliminating international trade barriers.<sup>230</sup> The WTO also functions as a trade dispute resolution body, although it has no significant enforcement power other than sanctions.<sup>231</sup>

Upon its 1994 formation, the WTO adopted a formal consultative role for NGOs.<sup>232</sup> According to Article V of the Marrakesh Protocol,<sup>233</sup>

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226. See *infra* Parts V.A.2 and V.A.3.

227. The WTO in Brief, [http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm) (last visited Sept. 2, 2006).

228. *Id.*

229. *Id.*

230. See *id.* Development of rules and treaties by consensus has been criticized as permitting unfair influence by powerful nations and as resulting in favoritism for multinational corporations and wealthy countries. See Wikipedia, World Trade Organization, <http://en.wikipedia.org/wiki/WTO> (last visited Sept. 3, 2006) (offering criticisms of the WTO, including that the operation has a systematic bias toward rich countries and multinational corporations).

231. WTO – Understanding the WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ1_e.htm) (last visited Sept. 3, 2006).

232. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm#articleV](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleV).

233. *Id.*

the WTO General Council has discretion to “make appropriate arrangements for consultation and cooperation with nongovernmental organizations concerned with matters related to those of the WTO.”<sup>234</sup> Two years later, to establish that relationship the WTO General Council adopted “Guidelines for Arrangements on Relations with Non-Governmental Organizations” (Guidelines).<sup>235</sup>

The Guidelines acknowledge the importance of the public’s image of WTO activities and in this regard suggest that better communications with NGOs and greater organizational transparency are key to this end.<sup>236</sup> Nonetheless, the Guidelines adopt the view that NGOs should not be “directly involved in the work of the WTO or its meetings.”<sup>237</sup> Instead, the Secretariat should have more active interactions with NGOs, which, as a “valuable resource,” can contribute to public discourse and on an ad hoc basis might participate in some manner in symposia, present information helpful to delegates, and respond to requests for general information and briefings about the WTO.<sup>238</sup> The Guidelines authorize a WTO council or committee chairperson to interact with NGOs in an official capacity (as opposed to a personal capacity) only if the council or committee approves.<sup>239</sup>

Thus, the Marrakesh Protocol and the Guidelines established at most the illusion of an official role for NGOs in formal WTO processes.<sup>240</sup> These documents do not encourage NGOs, as voices for under-represented or unrepresented people, to formally, regularly, and reliably provide input to the member nations negotiating trade policies. This model, therefore, is inadequate for a new presidential foreign health policymaking structure.

## 2. The NGO-World Bank Committee

The World Bank, a development bank that provides loans, policy advice, and technical assistance to developing countries, states that its mission is “global poverty reduction and improvement of living

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234. *Id.* The Marrakesh Protocol establishing the WTO was the culmination of the 1986–1994 GATT negotiations of the Uruguay Round. Wikipedia, *supra* note 230.

235. Guideline for Arrangements on Relations with Non-Governmental Organizations, July 18, 1996, *available at* [http://www.wto.org/english/forums\\_e/ngo\\_e/guide\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/guide_e.htm).

236. *Id.* at art. II.

237. *Id.* at art. VI.

238. *Id.* at art. IV.

239. *Id.* at art. V.

240. See INT’L CTR. FOR TRADE AND SUSTAINABLE DEV., ACCREDITATION SCHEMES AND OTHER ARRANGEMENTS FOR PUBLIC PARTICIPATION IN INTERNATIONAL FORA 4–5 (1999) [hereinafter ACCREDITATION SCHEMES] (remarking that thus far the WTO has opted for an ad hoc management of the relationship between the WTO and nongovernmental organizations).

standards.”<sup>241</sup> It undertakes initiatives intended to foster job creation and empower the poor,<sup>242</sup> and it acknowledges the importance of NGOs in accomplishing these global goals.

In 1981, sixteen international NGOs and the World Bank formed the NGO-World Bank Committee in an effort to strengthen their relationship, dialogue, and exchange.<sup>243</sup> The NGO-World Bank Committee is intended as a vehicle for collaborative discussion of World Bank policies, programs, and projects.<sup>244</sup>

The NGO-World Bank Committee is composed of World Bank senior managers and a global steering committee, currently composed of fifteen international, national, and regional NGOs from countries around the world.<sup>245</sup> The global steering committee’s NGO participants are elected by the NGO Working Group on the World Bank (NGOWG), an autonomous group open to NGOs worldwide concerned about and involved in equitable and sustainable development.<sup>246</sup>

The NGOWG attempts to be globally focused, but it concentrates increasingly on establishing liaison capacity with networks of countries’ regional and local NGOs.<sup>247</sup> The current ambition to establish liaisons defines the NGOWG’s present priorities. To this end, NGOWG intends its research projects and information sharing to strengthen the World Bank’s dialogue with NGOs, the expansiveness of its regional work and meetings in developing countries, and the selection of diverse NGOs to serve on the NGO-World Bank steering committee.<sup>248</sup>

241. World Bank – About Us, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTAB/OUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited Sept. 3, 2006).

242. World Bank—About Us, Challenge, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040565~menuPK:1696892~pagePK:51123644~piPK:329829~theSitePK:29708,00.html> (last visited Sept. 3, 2006); see World Bank – About Us – Annual and Spring Meetings, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20042540~isCURL:Y~menuPK:58865~pagePK:34542~piPK:36600~theSitePK:29708,00.html> (last visited Sept. 3, 2006) (explaining that World Bank facilitates various fora to facilitate interaction among the government, the Bank, and NGOs).

243. NGO Working Group on the World Bank, <http://www.staff.city.ac.uk/p.willetts/NGOWG/INDEX.HTM#History> (last visited Sept. 3, 2006).

244. *Id.* The NGO-World Bank Committee meets twice per year, and its agenda is established jointly by the NGO Working Group on the World Bank (NGOWG) and the Bank. See ACCREDITATION SCHEMES, *supra* note 240, at 12.

245. *Id.* at 11.

246. *Id.*

247. *Id.* at 11–12; see NGO Working Group on the World Bank, <http://www.staff.city.ac.uk/p.willetts/NGOWG/INDEX.HTM> (last visited Sept. 3, 2006) (describing the decentralization of the Working Group, resulting in more regional meetings).

248. NGO Working Group on the World Bank, *supra* note 247.

For years, the NGOWG met annually to elect members of the NGO-World Bank steering committee and to recommend to the steering committee priorities for the annual NGO-World Bank Committee meeting. From 1995 through 1997, the NGOWG decentralized its approach, dividing the world into seven regions<sup>249</sup> and commencing regional meetings to elect members of the NGO-World Bank steering committee.<sup>250</sup> The NGOWG intended this restructuring to promote a broader range of NGO participation, foster regional versions of the NGO-World Bank Committee, utilize regional meetings to elect members of the global steering committee, and strengthen grassroots input into World Bank Initiatives.<sup>251</sup> Three years later, the NGO-World Bank Committee itself endorsed a joint resolution between the World Bank and the NGOWG to further enhance relations, promote involvement of a larger range of civil society organizations, and facilitate a wider range of regional activities.<sup>252</sup>

These complex participatory structures and stated ideals purport to involve a wide group of NGOs in issues and projects important to the World Bank and civil society around the world.<sup>253</sup> The broad inclusion of NGOs has advantages, and the inclusivity should foster collaboration among local and regional NGOs at regional conferences. But in reality collaboration among local and regional NGOs frequently occurs outside the formal processes, which critics regard as potentially rendering official processes less effective. The breadth of NGO representation also should bring diverse but well considered, persuasive, and informed perspectives to NGO-World Bank Committee meetings. Restricted public access to NGO-World Bank Committee meetings, however, may diminish the effectiveness of the NGO stakeholders relative to that of the World Bank

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249. The regions are: (1) Africa, (2) East Asia and Pacific, (3) Eastern Europe and Central Asia, (4) Latin America and the Caribbean, (5) Middle East and North Africa, (6) South Asia, and (7) West Europe and North America. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. The 1999 World Bank's annual report proclaimed:

Involvement is sought at all phases of the Bank's work—planning and design of projects, implementation, and impact evaluation—because participation improves the quality, effectiveness, and sustainability of development activities. Nongovernmental organizations (NGOs) and other civil society groups play an increasingly critical role in ensuring that Bank-supported projects are participatory in nature, through both their own involvement and their ability to reach out to other stakeholders—especially poor and excluded communities.

representatives.<sup>254</sup> Moreover, closed doors allow little transparency and limited public accountability about what transpires in those meetings. Despite the achievement of some significant initiatives as a result of the NGOWG and the NGO-World Bank Committee processes,<sup>255</sup> many NGOs have criticized these collaborative outcomes and have faulted the participatory structures as merely World Bank public relations tools.<sup>256</sup> These problems must be avoided in adopting a new structure for the president's foreign health policymaking.

### 3. U.N.'s World Health Organization

The WHO, the U.N.'s specialized agency for health created in 1948, seeks to enable people globally to attain a high level of health.<sup>257</sup> The World Health Assembly (WHA), the WHO's governing body, is composed of 192 member states.<sup>258</sup> Among the WHA's main responsibilities is the determination of the WHO's policies and programs.<sup>259</sup> The WHA appoints a Director-General, who serves as the head of the WHO.<sup>260</sup>

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254. The effectiveness of the NGO-World Bank Committee is called into question by occasional media reports on conflicts between the World Bank and the interests of poor people whom it serves. Several such illustrative reports indicate that, despite the involvement of NGOs in the NGOWG and the NGO-World Bank Committee, the World Bank advocates privatizing water rights, even where doing so would be diametrically opposed to the interests of villagers' needs for access to sanitary water. See Tim Kessler, *From Social Contract to Private Contracts: The Privatisation of Health, Education and Basic Infrastructure - A Review of the 2003 Social Watch Country Reports*, available at <http://www.socialwatch.org/en/informesTematicos/58.html> (last visited Sept. 3, 2006) (describing how privatization of essential services, such as water provision, has serious consequences for the world's poorest people); Joanne Green, *Water as a Human Right and the Commercialisation of Water*, available at [http://www.tear.org.au/resources/harambee/021/water\\_as\\_a\\_human\\_right.htm](http://www.tear.org.au/resources/harambee/021/water_as_a_human_right.htm) (last visited Sept. 3, 2006) (arguing that commercialization of water will result in high prices that will decrease access to it).

255. See NGO Working Group Proposal, <http://www.staff.city.ac.uk/p.willets/NGOWG/PROPTXT.HTM> (describing several initiatives, including participation, capacity building, concessional lending, and relations with other stakeholders).

256. See, e.g., *id.* (commenting that former World Bank President James Wolfensohn admitted that 30% of the World Bank initiatives to combat poverty have failed in their objectives); Choike.org, Civil Society Cooperation and the World Bank Reform, [http://www.choike.org/nuevo\\_eng/informes/1753.html](http://www.choike.org/nuevo_eng/informes/1753.html) (last visited Sept. 3, 2006) (commenting that NGOs often feel that they are being used merely as a public relations tool).

257. See WHO, about WHO, <http://www.who.int/about/en> (last visited Sept. 3, 2006) ("WHO's objective, as set out in its Constitution, is the attainment by all peoples of the highest possible level of health.").

258. See *id.*

259. WHO, Governance, <http://www.who.int/governance/en/> (last visited Sept. 3, 2006) (describing the WHA's primary functions as determining the policies of the WHO, supervising financial policies, and approving program budget).

260. *Id.*



In accordance with Article 1 of the WHO's Constitution, the WHO may make "suitable arrangements for consultation and cooperation" with NGOs.<sup>261</sup> The WHO's *Principles Governing Relations with Nongovernmental Organizations* (Principles), specify that such arrangements can be in the form of both official and informal relationships between the WHO and NGOs.<sup>262</sup> But any official relationship must be preceded by at least a two year informal collaborative working relationship.<sup>263</sup> The Principles provide that those NGOs that are eligible for official status are normally international organizations<sup>264</sup> with a federated composition (of national or regional groups or having individual members from different countries), foundations that raise financial resources for health development in different countries, and other bodies that promote international health.<sup>265</sup>

As of 2002, 189 NGOs had official status in the WHO.<sup>266</sup> That status entitles them, but not those NGOs with merely informal status, to appoint a representative to participate in WHO meetings, conferences, and committees.<sup>267</sup> In no event do official NGOs have voting rights.<sup>268</sup> In meetings, conferences, and committees, however, they may discuss items of particular interest to them and their constituencies, submit expository statements at the chairperson's invitation or upon agreement to an NGO's request, have access to non-confidential documents as the WHO Director-General permits, and present a memorandum to the Director-General for circulation as he permits.<sup>269</sup>

With the agreement of the WHO Director-General, the U.N.'s Civil Society Initiative commissioned a report to review the effectiveness of the NGO-WHO dual relationship system.<sup>270</sup> The 2002 report criticized several aspects of these relationships, including the

261. WHO, *Principles Governing Relations with Nongovernmental Organizations*, princ. 1.1, <http://www.who.int/civilsociety/relations/principles/en/index.html> [hereinafter Principles].

262. *See id.* at princ. 2.4 (identifying the types of relationships between NGOs and the WHO).

263. *See id.*

264. *See id.* at princ. 3.5 (stating that in exceptional circumstances, national NGOs can be considered for official relations with the WHO).

265. *See id.* at princ. 3.4.

266. CHRISTOPHER LANORD, A STUDY OF WHO'S OFFICIAL RELATIONS SYSTEM WITH NONGOVERNMENTAL ORGANIZATIONS 5, June 2002, available at <http://www.who.int/civilsociety/documents/en/study.pdf>.

267. Principles, *supra* note 261, at princ. 6.1

268. *See id.* (authorizing the right to participate without the right to vote).

269. *See id.* (describing the "privileges conferred by official relationship"). National NGOs generally submit their views through their government representatives or their affiliated official international NGOs. *See id.* at princ. 6.4. Nonetheless, national and regional NGOs may obtain participation privileges with WHO regional offices. *See id.* at princ. 6.3.

270. LANORD, *supra* note 266, at 4.

application process to obtain official NGO status as excessively arduous and bureaucratic,<sup>271</sup> the interests of some official NGOs' concerns as inappropriately political or commercial,<sup>272</sup> actual attendance of official NGOs at WHA meetings as under-representative of all official NGOs,<sup>273</sup> and the submission of written statements and receipt of non-confidential documents as unduly restrictive, minimizing meaningful NGO participation.<sup>274</sup> Again, such structurally related deficiencies must be avoided in formulating a new presidential foreign health policymaking system.

#### 4. International Labor Organization

The ILO is a specialized agency that the U.N. created to promote social justice and international recognition of human and labor rights.<sup>275</sup> Among its tasks, the ILO sets international labor standards.<sup>276</sup> Its annual International Labor Conference (ILC) has three official participants: NGOs representing employers, NGOs representing workers, and the 178 member governments.<sup>277</sup> The ILC is tasked with making policy, suggesting legislative and practical recommendations on labor matters, and proposing standards in the form of conventions for member states' ratification.<sup>278</sup>

To accomplish its goals, the ILO Constitution provides official means for participation of the employer and worker NGOs in ILO affairs. The constitution broadly provides that the ILO must cooperate with "any general international organization entrusted with the co-ordination of the activities of public international organizations having specialized responsibilities and with public

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271. See *id.* (describing the process for gaining official status as "long," "burdensome," and "cumbersome").

272. *Id.* at 5.

273. *Id.* at 5, 7.

274. *Id.* at 7. The report made recommendations for changes, which have been discussed at the WHA but not adopted to date. See WHO, Status of Proposal, [http://www.who.int/civilsociety/relations/new\\_policy/en/index.html](http://www.who.int/civilsociety/relations/new_policy/en/index.html) (last visited Sept. 3, 2006) (recounting extensive debate of the policy but ultimately postponing consideration of it); WHO, *WHA concludes: adopts key resolutions affecting global public health*, May 25, 2005, [http://www.who.int/mediacentre/news/releases/2005/pr\\_who06/en/index.html](http://www.who.int/mediacentre/news/releases/2005/pr_who06/en/index.html) (not reporting adoption of the recommended changes for official status at the May 25, 2005 WTA meeting).

275. ILO, About the ILO, <http://www.ilo.org/public/english/about/index.htm> (last visited Sept. 3, 2006).

276. *Id.*

277. See ILO, Alphabetical List of ILO Countries, <http://www.ilo.org/public/english/standards/reln/country.htm> (last visited Sept. 3, 2006).

278. See International Labour Standards, ILO Conventions and Recommendations, <http://www.ilo.org/public/english/standards/norm/introduction/what.htm> (last visited Sept. 3, 2006) (describing the legal instruments, either conventions and recommendations, drawn up by the ILO). The most recently adopted major convention was the Worst Forms of Child Labour Convention of 1999. *Id.*

international organizations having specialized responsibilities in related fields.”<sup>279</sup> The constitution further permits, but does not mandate, the ILO to allow public international organization representatives to participate without vote in ILO deliberations and to make arrangements for recognized international NGOs to consult with the ILO.<sup>280</sup> These general constitutional articles are given more specific practical application in other provisions that address the annual ILC.

At each annual ILC, member state representatives are entitled to vote on all matters taken into consideration by the conference.<sup>281</sup> Participation at the ILC by employer and worker NGOs, however, depends upon a state’s representative nominating an NGO as a delegate or advisor.<sup>282</sup> In particular, the constitution provides that, after complying with written procedures, a state’s representative may appoint worker and employer NGO agents as its deputy delegates.<sup>283</sup> The advisor, while acting as the deputy, is permitted to speak and vote at the ILC.<sup>284</sup> If, however, only one NGO agent is appointed, that NGO is allowed to speak at the ILC but not to vote.<sup>285</sup> Absent fulfillment of the requisite written procedures, an NGO may act solely in an advisory capacity to the representative.<sup>286</sup> In that situation, the NGO advisor is prohibited from speaking except on the representative’s request and by special authorization of the ILC president.<sup>287</sup> Such an advising NGO cannot vote at the ILC.<sup>288</sup>

This ILO constitutional structure thus extends to NGOs the potential for an official, formal role “approaching parity” to that of member states at an ILC in making policy, advancing legislative and practical recommendations on labor matters, and proposing labor standards.<sup>289</sup> Because NGOs are not merely engaged in hallway politics but assume a spokesperson role, a voter role, or both, their public accountability is reinforced. This attribute should be emulated in a new structure for presidential foreign health policymaking.

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279. Constitution of the International Labor Organization, art. 12(1) (Oct. 9, 1946), available at <http://www.ilo.org/public/english/about/iloconst.htm>.

280. *Id.* art. 12(2)–(3).

281. *Id.* art. 4(1).

282. *Id.* art. 3(5).

283. *Id.* art. 3(7).

284. *Id.*

285. *Id.* art. 4(2).

286. *Id.* art. 3(6).

287. *Id.*

288. *Id.*

289. Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL’Y SYMP. 19, 26 (1997).

## 5. Organization for Economic Cooperation and Development

The OECD,<sup>290</sup> an organization composed of thirty developed market member countries,<sup>291</sup> is committed globally to democratic government, promoting “the highest sustainable growth of their economies,” and improving “the economic and social well-being” of their citizens.<sup>292</sup> In consultation and cooperation with seventy non-member states,<sup>293</sup> predominantly emerging or developing countries, and civil society organizations, the OECD identifies and pursues policies and undertakes efforts to “foster prosperity and fight poverty through economic growth, financial stability, trade and investment, technology, innovation, entrepreneurship and development cooperation.”<sup>294</sup> The OECD generates international instruments,<sup>295</sup> decisions, and recommendations to promote countries’ growth and progress in the globalized economy.<sup>296</sup> It is an organization where exchanges and policy research on topics of mutual concern and interest occur.<sup>297</sup>

With the 1960 adoption of the Convention on the Organization for Economic Cooperation and Development, the OECD created its basic authority to establish and maintain relations with non-member states and organizations.<sup>298</sup> Two years later, the OECD’s ruling body, the Council, adopted a decision providing for consultation with NGOs.<sup>299</sup> This decision establishes three criteria for NGO official “consultative status”: the NGO must have (1) wide responsibility in general economic matters or in a specific economic sector, (2)

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290. The OECD originated as the Organization for European Economy Co-operation (OEEC), to assist in the administration of the Marshall Plan in reconstructing Europe following World War II. Its membership was extended later to non-European states. In 1961, the OEEC was reformed into the OECD. NationMaster Encyclopedia: The OECD, <http://www.nationmaster.com/encyclopedia/OECD> (last visited Sept. 1, 2006).

291. All thirty member countries are democracies and they share “a commitment to democratic government and the market economy.” OECD, About the OECD, <http://www.oecd.org/about> (last visited Sept. 2, 2006).

292. Convention on the Organisation for Economic Co-operation and Development, Dec. 14 1960, available at [http://www.oecd.org/document/7/0,2340,en\\_2649\\_201185\\_1915847\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html).

293. OECD, About the OECD, <http://www.oecd.org/about> (last visited Sept. 2, 2006).

294. OECD, Overview of the OECD, [http://www.oecd.org/document/18/0,2340,en\\_2649\\_201185\\_2068050\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html) (last visited Sept. 2, 2006).

295. See *id.* (noting member countries adopt, and non-member countries are invited to subscribe to, OECD agreements and treaties).

296. *Id.*

297. *Id.*

298. This authority is conferred on the OECD Council, which is composed of all member countries. Convention on the Organization for Economic Cooperation and Development, *supra* note 292, art. 12(b).

299. David A. Wirth, *Public Participation in International Processes: Environmental Case Studies and the National and International Levels*, 7 *COLO. J. INT’L. ENVTL. L. & POL’Y* 1, 20 (1996).

affiliated bodies belonging to all or most OECD member countries, and (3) substantial representation of nongovernmental interests.<sup>300</sup> Few nongovernmental organizations qualify under these standards; currently only five NGOs have consultative status with the OECD.<sup>301</sup> The two primary NGOs with consultative status are the Trade Union Advisory Committee (TUAC) and the Business and Industry Advisory Committee (BIAC).

In 1962, BIAC was created, and officially recognized by the OECD as an umbrella organization to actively represent the interests of its industrial and employer constituents drawn from the thirty member states of the OECD.<sup>302</sup> BIAC has its own standing committees that functionally mirror OECD committees. Therefore, each BIAC standing committee, as well as BIAC task forces and policy groups, can identify important emerging topics, address long-term issues, and develop positions important to its constituents and the OECD members.<sup>303</sup> BIAC positions are structured as consensus documents, enabling BIAC to speak with one voice for all members at OECD meetings, global forums, and in consultations with OECD leaders, government delegates, committees, and working groups.<sup>304</sup>

TUAC coordinates and represents policy views of trade unions from the industrialized member countries of the OECD.<sup>305</sup> Its constituents are fifty-six national trade unions, which together represent approximately 66 million workers.<sup>306</sup> TUAC does not have standing committees that mirror the OECD committees. Instead, it has working groups on economic policy, global trade and investment, and education, training and labor market policy that prepare TUAC positions for consultations with the OECD.<sup>307</sup>

BIAC's and TUAC's consultations with the OECD, for which the OECD chief administrative officer, the Secretary-General, is tasked to maintain and administer,<sup>308</sup> can occur through three separate means of formal exchange. First, communications and involvement can be through the OECD's NGO Liaison Committee, which is responsible directly to the OECD Council, the main acting body of the

300. *See id.*

301. *See id.* at 12 n.22.

302. BIAC, About the BIAC, <http://www.biac.org/aboutus.htm> (last visited Sept. 2, 2006).

303. BIAC, Policy Work and Advocacy, <http://www.biac.org/policywork.htm> (last visited Sept. 2, 2006).

304. *Id.*

305. TUAC, About TUAC, <http://www.tuac.org/about/cabout.htm> (last visited Sept. 2, 2006).

306. *Id.*

307. TUAC, How TUAC Works, <http://www.tuac.org/how/chow.htm> (last visited Sept. 2, 2006).

308. ACCREDITATION SCHEMES, *supra* note 240, at 12.

OECD.<sup>309</sup> Second, BIAC and TUAC can be participants at special meetings of OECD committees. If permitted, they may express views orally or through position papers, but gatekeepers may limit their participatory role to one of an observer.<sup>310</sup> And the NGOs do not have the right to propose agenda items for the meetings.<sup>311</sup> Finally, the consultative NGOs can be invited to participate at sessions of an OECD subsidiary body.<sup>312</sup> But in no situation does a consultative NGO have voting rights.<sup>313</sup>

OECD leaders as gatekeepers also can control BIAC's and TUAC's access to OECD documents. The consultative NGOs may request general information on the work of the OECD and may ask for OECD documents and summaries often unavailable to the public and other entities,<sup>314</sup> but there is no assurance that they will obtain access to requested materials.

In sum, there are established means for consultative NGOs, as representatives of their constituencies, to be official participants in the OECD policy consideration processes. Although this attribute is positive, there appears to be little regularization of ongoing participation levels.<sup>315</sup> A notably constructive feature of BIAC's and TUAC's formal roles is that functionally, on behalf of their respective constituents, each presents a united force and a singular view to the actual policy decisionmakers. Thus, certain characteristics of the OECD model should be imported into a restructured presidential foreign health policymaking structure, while others should be avoided.

## 6. U.N.'s Economic and Social Council

The U.N.'s ECOSOC is designed to promote social and economic progress, encourage respect for human rights, and identify solutions for health problems.<sup>316</sup> ECOSOC coordinates the work of its

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309. Convention on the Organization for Economic Co-operation and Development, *supra* note 292, at art. 7; see ACCREDITATION SCHEMES, *supra* note 240, at 12 (stating that the Council is chaired by the Secretary-General and composed of all permanent members). BIAC and TUAC can initiate the participation, as can the OECD Secretary-General. ACCREDITATION SCHEMES, *supra* note 240, at 12.

310. See ACCREDITATION SCHEMES, *supra* note 240, at 12 (stating that BIAC and TUAC can initiate the participation, as can committee officers).

311. *Id.* at 21.

312. The consultation invitation comes from the Secretary-General at the request of the chair of the OECD subsidiary body. *Id.* at 12.

313. *Id.* at 12, 21.

314. *Id.*

315. See Wirth, *supra* note 299, at 31 (stating that there are no objective standards and participation varies widely).

316. ECOSOC, Background, [http://www.un.org/docs/ecosoc/ecosoc\\_background.html](http://www.un.org/docs/ecosoc/ecosoc_background.html) (last visited Sept. 2, 2006).

specialized agencies,<sup>317</sup> programs, and commissions, and it issues policy recommendations to the U.N. General Assembly.<sup>318</sup>

Article 71 of the U.N. Charter provides for formal consultative status of NGOs to ECOSOC through "suitable arrangements."<sup>319</sup> The main purposes of consultative status arrangement are to benefit ECOSOC by NGOs sharing their expertise and to enable NGOs to express "important elements of public opinion" and other valuable perspectives.<sup>320</sup> NGOs also serve as technical experts and advisors, and they raise awareness of issues unknown, overlooked, or ignored by the U.N. with the aim of influencing diplomats' decisions.<sup>321</sup>

In practice, NGOs participate widely and extensively.<sup>322</sup> Currently, over 2,700 NGOs enjoy ECOSOC consultative status.<sup>323</sup> Each of these NGOs is recognized as having consultative status for "matters falling within the competence of the Economic & Social Council and its subsidiary bodies."<sup>324</sup> Each consultative NGO must

317. See Principles, *supra* note 261, at princ. 1.2 (last visited Sept. 2, 2006) (including the specialized U.N. agency, the WHO). For further discussion of WHO, see *supra* Part V.A.1.c.

318. Principles, *supra* note 261, at princ. 1.2.

319. U.N. Charter art. 71. Consultative arrangements are limited to "matters within its competence." *Id.*; see also CHIANG PEI-HENG, NON-GOVERNMENTAL ORGANIZATIONS AT THE UNITED NATIONS: IDENTITY, ROLE AND FUNCTION 45-48 (1981); ACCREDITATION SCHEMES, *supra* note 240, at 7 (stating NGOs participate in the U.N. via the ECOSOC as consultants).

Consultative status resulted from pressure imposed by U.S. NGOs, the World Trade Union Conference (W.T.U.C.), and smaller countries at the U.N. Conference on International Organization in 1945. See CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE U.N. SYSTEM 25-27 (Peter Willets ed., 1996). In a memorandum, W.T.U.C. requested participation rights at conferences and special status in ECOSOC and the U.N. Security Council. See *id.* This memorandum prompted other NGOs to request similar rights. See *id.* The issue was resolved with adoption of Resolution 4(l) of the General Assembly, dated February 14, 1946, which directed ECOSOC to provide for consultative relationships with certain NGOs. See PEI-HENG, *supra*, at 85.

320. E.S.C. Res. 1996/31, *supra* note 57, art. 20.

321. ECOSOC, NGO Related Frequently Asked Questions, <http://www.un.org/esa/coordination/ngo/faq.htm> (last visited Sept. 3, 2006); see also E.S.C. Res. 1996/31, *supra* note 57, art. 20 (describing the principles that guide the decisions on consultative arrangements).

322. One scholar who has studied the relationship of NGOs and the U.N. has described NGOs as "vital to U.N. work" and "virtually indispensable to the U.N. In particular, their 'expertise . . . diplomatic skills, good relationships and contacts, and a clear vision about objectives' have proven useful" to the U.N. Wendy Schoener, *Non-Governmental Organizations and Global Activism: Legal and Informal Approaches*, 4 IND. J. GLOBAL LEGAL STUD. 537, 550 (1997) (quoting Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 CAL. W. INT'L L.J. 207, 224 (1990)).

323. ECOSOC, NGO Related Frequently Asked Questions, *supra* note 321.

324. E.S.C. Res. 1996/31, *supra* note 57, art. 1-2; see also, PEI-HENG, *supra* note 319, at 62 (describing how the "aims and purposes of an NGO must conform to the spirit, purposes and principles of the Charter of the U.N."); CHARTER OF THE UNITED NATIONS: A COMMENTARY 1070 (Bruno Simma ed., 2d ed. 2002) (addressing controversy of consultative relationship and approval process).

conform to guidelines listed in Resolution 1996/31,<sup>325</sup> which requires the NGO to have “recognized standing” among organizations in the “field of its competence or of a representative character.”<sup>326</sup> For the most part, these NGOs are international NGOs; national NGOs qualify only in exceptional circumstances.<sup>327</sup> Each such NGO must have an established headquarters and a democratically adopted constitution with policymaking provisions.<sup>328</sup> In addition, the “basic resources” of a consultative NGO must be derived mainly from contributions of national affiliates or individual members.<sup>329</sup>

The extent of an NGO’s ability to contribute to, and participate in, the work of ECOSOC depends upon the level of accreditation granted by ECOSOC.<sup>330</sup> In other words, an NGO’s rights, as well as its obligations, are determined in accordance with a three-tier accreditation system. Pursuant to this tiered system, NGOs can be granted general consultative, special consultative, or roster consultative status.<sup>331</sup>

General consultative status provides the broadest prerogatives. To qualify, NGOs must demonstrate that they “have substantive and sustained contributions to make to the achievement of the objectives to the United Nations . . . and are closely involved with the economic and social life of the peoples of the areas they represent and whose membership, which should be considerable, is broadly representative of major segments of society.”<sup>332</sup> Generally, these qualifications limit general consultative status to “large, well established international NGOs with a broad geographic reach.”<sup>333</sup>

Special consultative status is limited to NGOs that “are concerned specifically with[] only a few of the fields of activity covered by the Council . . . and that are known within the fields for which

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325. E.S.C. Res. 1996/31 aims to be consistent with the principles and spirit of the U.N. Charter. E.S.C. Res. 1996/31, *supra* note 57, art. 2.

326. *Id.* art. 9.

327. *Id.* art. 8.

328. *Id.* art. 10, 12.

329. *Id.* art. 13.

330. *Id.* art. 24–32.

331. Requests for consultative status are made by application. ECOSOC’s Committee on NGOs reviews applications on a biannual basis. ECOSOC, How to Obtain Consultative Status with the ECOSOC, <http://www.un.org/esa/coordination/ngo/howtoapply.htm> (last visited Sept. 2, 2006). The Committee on NGOs has nineteen member states that recommend decisions to ECOSOC. NGO Related Frequently Asked Questions, *supra* note 321. Decisions are made by ECOSOC itself. See ACCREDITATION SCHEMES, *supra* note 240, at 8. Controversy, based on political issues, occasionally surrounds the recommendations and decisions on NGOs’ applications. See Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 114–16 (1996).

332. E.S.C. Res. 1996/31, *supra* note 57, art. 22.

333. ACCREDITATION SCHEMES, *supra* note 240, at 8.



they have or seek consultative status."<sup>334</sup> Roster consultative status is conferred on NGOs that "can make occasional and useful contributions to the work of the Council."<sup>335</sup>

These three tiers accord formal participatory rights. But regardless of the tier into which an NGO fits, an NGO does not have any right to vote on matters deliberated by ECOSOC.<sup>336</sup> Those NGOs granted general consultative status have the most extensive rights, including: (1) entitlement to receive ECOSOC provisional agendas;<sup>337</sup> (2) the ability to propose ECOSOC agenda items;<sup>338</sup> (3) the right to designate representatives and to sit as observers at public meetings of ECOSOC and its subsidiaries;<sup>339</sup> (4) entitlement to circulate statements of 2,000 words at ECOSOC meetings and meetings of its subsidiaries, with such statements published as U.N. documents and circulated by the Secretariat;<sup>340</sup> (5) the right to speak at ECOSOC meetings and those of its subsidiaries;<sup>341</sup> (6) entitlement to participate in U.N. conferences;<sup>342</sup> and (7) entitlement to consult with officers of sections of the Secretariat on matters of mutual concern or interest.<sup>343</sup>

NGOs granted special consultative status have many of the same rights as those granted general consultative status. Special

334. E.S.C. Res. 1996/31, *supra* note 57, art. 23; see ACCREDITATION SCHEMES, *supra* note 240, at 8 (providing that Amnesty International is one NGO with special status).

335. E.S.C. Res. 1996/31, *supra* note 57, art. 24. Roster status may include NGOs in consultative status with a specialized agency or another U.N. body. See ACCREDITATION SCHEMES, *supra* note 240, at 8 (on special status).

336. U.N. Charter arts. 69–70.

337. ACCREDITATION SCHEMES, *supra* note 240, at 8.

338. *Id.*

339. *Id.*

340. *Id.*

341. E.S.C. Res. 1996/31, *supra* note 57, art. 32.

342. Accredited NGOs may participate in formal meetings and may even participate in some informal meetings. See ACCREDITATION SCHEMES, *supra* note 240, at 11 (discussing the 1992 U.N. Conference on Environment and Development). Participation may include written presentations during a conference's preparatory process, but such presentation will not necessarily be issued as an official U.N. document. See E.S.C. Res. 1996/31, *supra* note 57, art. 52. Nonetheless, some conferences have adopted procedural rules that mandate distribution to all delegations of NGOs' written statements "in the quantity and language in which they are made available" at the NGOs' expense. Rules of Procedure of the International Conference on Population and Development, R. 65–66, U.N. Doc. A/CONF/171/2 (1994). Those NGOs accredited for a conference may designate representatives to sit as observers and "may make oral statements on questions [specifically offered to the NGOs by the presiding officer] in which they have 'special competence.'" *Id.* Where requests to speak exceed the number allowable, NGOs can form constituencies "to speak through spokespersons," thus assuring vocal representation. *Id.* At times, participating NGOs may be invited to make drafting inputs to official policy materials generated as a result of the conference. See ACCREDITATION SCHEMES, *supra* note 240, at 11 (discussing the 1992 U.N. Conference on Environment and Development).

343. See E.S.C. Res. 1996/31, *supra* note 57, art. 63.

consultative NGOs are denied, however, the rights to propose ECOSOC agenda items<sup>344</sup> and to speak at ECOSOC meetings (but they can speak at the meetings of ECOSOC subsidiary bodies).<sup>345</sup> Moreover, their statements circulated at ECOSOC meetings are limited to 500 words, and those circulated at meeting of ECOSOC's subsidiaries are limited to 1,500 words.<sup>346</sup>

More limited rights are conferred upon NGOs accorded roster consultative status. Such NGOs can (1) receive ECOSOC provisional agendas,<sup>347</sup> (2) designate representatives at a public meeting of ECOSOC or a subsidiary body if such meeting concerns matters within the NGO's particular area of competence,<sup>348</sup> (3) be invited to U.N. conferences,<sup>349</sup> and (4) be entitled to consult with officers of sections of the Secretariat on matters of mutual concern or interest.<sup>350</sup>

These rules have permitted NGOs with consultative status to regularly be a non-voting but integral public influence on global affairs. This positive attribute is tempered, however. Because the accreditation criteria imposed result in excluding national NGOs and in including largely Western NGOs, critics have suggested that these influences can be skewed.<sup>351</sup> Nonetheless, the consultative NGOs generally are perceived as a reliable and centralized source to which U.N. delegates and the public can turn for identification of issues, as well as education and technical advice with respect to those matters. Their published materials and oral statements become part of the public record and official dialogue, and thus they have significant public accountability.<sup>352</sup> The consultative NGOs' working relationships with sections of the Secretariat and section programs, as well as their participation in conferences and other official forums, help to shape not only the policy issues presented to U.N. delegates and the world but also the policy outcomes.<sup>353</sup> Such attributes should

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344. See *id.* art. 28 (on special consultative status of NGOs in proposing agenda items).

345. *Id.* art. 32.

346. ACCREDITATION SCHEMES, *supra* note 240, at 8.

347. E.S.C. Res. 1996/31, *supra* note 57, art. 27.

348. *Id.* art. 35.

349. *Id.* arts. 41–54.

350. *Id.* art. 64.

351. See, e.g., Otto, *supra* note 331, at 120 (burgeoning number of NGOs seeking to participate in U.N. conferences).

352. See E.S.C. Res. 1996/31, *supra* note 57, art. 61(c) (NGOs with general and special consultative status are also formally accountable to the U.N. They must file quadrennial reports with the Committee on NGOs).

353. For example, consultative NGOs involved in the U.N. Environmental Program have been credited with having significant impact on the production of the Montreal Protocol on Substances that Deplete the Ozone Layer. See Wirth, *supra* note 299, at 22–26.

be imported into a new presidential foreign health policymaking system.

*B. A Constitutionally Acceptable Revised Presidential Foreign Health Policymaking Structure*

The remainder of this Article focuses on proposing a formulation for a new presidential foreign health policymaking arrangement. The proposal conceives of using an existing structure, a Presidential Advisory Committee, as one part of the system. For reasons set forth below, an additional supplementary structure, an Assembly of Nonprofit Entities, is envisioned. The Article suggests that together these two components can enhance and strengthen the president's policymaking on global health matters through greater inclusiveness of voices at his policymaking table.

1. A Presidential Advisory Committee

Since nearly the birth of our nation, presidents have created advisory committees for the purpose of directly soliciting their members' specialized expert opinions, ideas, and recommendations.<sup>354</sup> In modern times, presidents have sought advice on a range of topics, including ecosystems and health care, and consequently have directly established advisory committees.<sup>355</sup> Since 1972, Presidential Advisory Committees have operated under the administrative procedural requisites and restrictions of the Federal Advisory Committee Act (FACA).<sup>356</sup>

FACA describes the term "Presidential Advisory Committee" as "an advisory committee that advises the President."<sup>357</sup> The Act more broadly defines "advisory committee" as a

354. 5 U.S.C. § 2(a) (2005); see Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 458 (1997) (stating that from the early days of the nation, presidents have formed advisory committees). In modern times, advisory committees have operated under every administration, and until 1972, their procedural requirements were not statutorily defined. See *id.* at 459–60 (discussing Exec. Order No. 11,007, 3 C.F.R. 182 (Feb. 26, 1962) issued by President Kennedy, and Exec. Order No. 11,671, 37 Fed. Reg. 11,307 (June 5, 1972) issued by President Nixon).

355. For example, President Clinton formed the Forest Ecosystem Management Team for ecological advice. *Nw. Forest Res. Council v. Espy*, 846 F. Supp 1009 (D.D.C. 1994). A Presidential Advisory Commission on Consumer Protection and Quality in the Health Care Industry exists, as does a Presidential Council on Bioethics. See Presidential Advisory Commission on Consumer Protection and Quality in the Health Care Industry, <http://www.hcqualitycommission.gov> (last visited Sept. 17, 2006); President's Council on Bioethics, <http://www.bioethics.gov> (last visited Sept. 17, 2006).

356. Pub. L. No. 92–453, 86 Stat. 770 (Oct. 6, 1972) (codified as amended at 5 U.S.C. §§ 1–15 (2005)).

357. 5 U.S.C. app. § 3(4) (2005).

committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is—

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.<sup>358</sup>

The Supreme Court described the term “advisory committee” as having “almost unfettered breadth.”<sup>359</sup> Nonetheless, FACA has several express exclusions from the definition of an “advisory committee.”<sup>360</sup> Moreover, the courts have held that a group that is principally operational and is not functionally a direct advisor to the president is not considered a Presidential Advisory Committee under FACA.<sup>361</sup> Thus, a Presidential Advisory Committee is solely advisory in function; it is not a decision-making body.<sup>362</sup>

Congress designed FACA to enhance governmental transparency and accountability.<sup>363</sup> Numerous provisions in FACA attempt to make such an advisory committee publicly accountable. Pursuant to FACA, the public and Congress must be kept apprised of a

358. § 3(2). Thus, FACA permits establishment of an advisory committee by a president, by federal legislation, or by an executive agency if in the public interest. §§ 2, 3(2), 9(a)(1)–(2). FACA does not permit the formation of an advisory committee by a federal court. §§ 2, 3(3); see *Aluminum Co. of Am. v. Nat’l Marine Fisheries Serv.*, 92 F.3d 902 (9th Cir. 1996) (committee established to assist the judiciary not an advisory committee as contemplated by FACA); *Washington Legal Found. v. U.S. Sentencing Comm’n*, 17 F. 3d 1446 (D.C. Cir. 1994) (committee created to advise judiciary on sentencing guidelines not an advisory committee as contemplated by FACA).

359. *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 453 n.8 (1989).

360. Section 3 of FACA excludes the Advisory Committee on Intergovernmental Relations (5 U.S.C.A. app. 2 § 3(2)(i) (West 2005)), the Commission on Government Procurement (5 U.S.C.A. app. 2 § 3(2)(ii) (West 2005)), any committee that is composed wholly of full-time, or permanent part-time officers and employees of the federal government, (5 U.S.C. app. § 3(2)(C) (West 2005)), and any committee created by the National Academy of Sciences or the National Academy of Public Administration (5 U.S.C. app. § 3(2)(C) (West 2005)). Additionally, FACA does not apply to any advisory committee established or utilized by the Central Intelligence Agency or the Federal Reserve System (5 U.S.C.A. app. 2 § 4(b) (West 2005)), to any local or civic group rendering a public service with respect to a federal program (5 U.S.C.A. app. 2 § 4(c) (West 2005)), or to any state or local committee established to advise or make recommendations to state or local officials or agencies (5 U.S.C.A. app. 2 § 4(c) (West 2005)).

361. *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232 (D.C. Cir. 1996).

362. 5 U.S.C. app. § 9(b) (2005). See *Metcalf v. Nat’l Petroleum Council*, 553 F.2d 176 (D.C. 1977) (standing and 5 U.S.C. app. § 9(b)).

363. Reacting to the Watergate scandals, Congress enacted the FACA to increase public confidence in executive agencies and the president by reducing public concerns about the interactions of these governmental officials and persons representing special interests. 5 U.S.C. app. § 2 (2005) (findings and purpose).

Presidential Advisory Committee's functional scope, objectives, membership, and activities.<sup>364</sup> Prior to its first meeting, a Presidential Advisory Committee must have a charter that states its purpose<sup>365</sup> and limits its duration to a two-year term<sup>366</sup> that may be renewable with proper justification.<sup>367</sup> FACA requires the meetings of an advisory committee generally to be open to the public<sup>368</sup> and to be chaired or attended by a designated federal government official.<sup>369</sup> Records of the advisory committee must be publicly disclosed and available,<sup>370</sup> subject to nine possible exemptions under the Freedom of Information Act.<sup>371</sup>

In addition to the focus on transparency and accountability, FACA attempts to ensure that a Presidential Advisory Committee is well rounded, and its advice is unbiased. Accordingly, the advisory committee's membership composition must be "fairly balanced in terms of the points of view represented,"<sup>372</sup> and the committee's

364. *Id.* § 2(5).

365. *Id.* § 9(c) requires:

Such charter shall contain the following information:

- (A) the committee's official designation;
- (B) the committee's objectives and the scope of its activity;
- (C) the period of time necessary for the committee to carry out its purposes;
- (D) the agency or official to whom the committee reports;
- (E) the agency responsible for providing the necessary support for the committee;
- (F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;
- (G) the estimated annual operating costs in dollars and man-years for such committee;
- (H) the estimated number and frequency of committee meetings;
- (I) the committee's termination date, if less than two years from the date of the committee's establishment; and
- (J) the date the charter is filed.

366. *Id.* § 14(a)(1).

367. *Id.* § 14(a)(2).

368. *Id.* § 10(a) (providing that open meetings are required unless the president determines national security requires otherwise).

369. *Id.* § 10(e). A Presidential Advisory Committee need not have its agenda approved by a government official prior to its meeting. *Id.* § 10(f).

370. Transcripts of advisory committee meetings must be made available to the public. *Id.* § 10 (b).

371. Records include committee reports, minutes, working papers, drafts, studies, agendas, etc. *Id.* § 10(b).

372. Pursuant to § 2(b)(2), any legislation establishing an advisory committee must require that the membership of such committee is "fairly balanced." The courts

advice must be free of inappropriate influences “by the appointing authority or by any special interest.”<sup>373</sup>

## 2. A New Presidential Advisory Committee on U.S. Foreign Health Policy

The major characteristics of a Presidential Advisory Committee—(1) its establishment by the president for the explicit purpose of his directly receiving informed opinions, advice, and recommendations of individuals having special expertise, who cumulatively are fairly balanced and whose advice will not represent any one special interest; (2) its transparency; and (3) its public accountability—fit several of the important criteria for placing the nonprofit sector in a meaningful official role in U.S. foreign health policymaking. The president could create and meaningfully utilize a new Presidential Advisory Committee on U.S. Foreign Health Policy, the membership of which should be representatives of domestic nonprofits that are involved in and have special knowledge of global health matters affecting marginalized minorities abroad. The Committee members, a small number by necessity, should represent the broad spectrum of global health grant-making institutions, U.S. based international health service oriented entities, and health policy and treatment research organizations—that is, private foundations, public charities, academic institutions, and think tanks.<sup>374</sup>

A Presidential Advisory Committee on U.S. Foreign Health Policy could help remedy the weaknesses described earlier. Such a knowledgeable group would have direct access to the president and could offer the president insights and counsel based on varied experiences, sources of information and data, and perspectives. The proposed Presidential Advisory Committee could provide a forum for sincere engagement, debate, and constructive interchange on emerging and ongoing global health issues impacting marginalized minorities abroad,<sup>375</sup> could reinforce the appropriate direction for

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have interpreted this requirement to extend to an advisory committee established by the executive branch. See *Nat'l Anti-Hunger Coal. v. Executive Cmty. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983); *Nat'l Nutritional Foods Ass'n v. Califano*, 603 F. 2d 327 (2d Cir. 1979).

373. 5 U.S.C. app. § 5(b)(3)–(c) (2005).

374. Although nonprofit organizations might prefer to select representatives to the Presidential Advisory Committee, of course the selection of its members is the president's decision. To attempt broad and unbiased representation, the president should seek to appoint Committee members representative of liberal and conservative, large and small, wealthy and more financially challenged nonprofit organizations that are critically involved in global health matters. The president might consider leaders from some of the nonprofit sector umbrella organizations, such as the Council on Foundations and the Independent Sector, for membership on the Committee. *Id.*

375. To be effective, a president would need to take the Presidential Advisory Committee seriously and meaningfully utilize its expertise. Unlike President Reagan's

foreign health policy, and could facilitate policy execution. Such a Committee also would give nonprofits a real stake in the process and, ultimately, in implementation of the final policy adopted by the foreign policy decisionmaker, the president. The suggested Presidential Advisory Committee on U.S. Foreign Health Policy also would provide a formal institutionalized means of enhancing democratic participation in policymaking on global health matters for at least an experimental period of two years, the initial statutory duration of a Presidential Advisory Committee.<sup>376</sup>

Nonetheless, the proposed Presidential Advisory Committee lacks an element crucial to a new presidential foreign policymaking regime. Although as conceived the Committee's membership would broadly represent nonprofits involved in, and concerned about, global health matters, it necessarily must be limited in number. Consequently, this suggested Presidential Advisory Committee structure alone cannot provide institutionalized opportunities for the broad spectrum of nonprofits to have input and exchanges on emerging and ongoing important global health matters, the outcomes of which should be shared with the president. Therefore, an additional vital facet must be designed and coupled with the proposed Presidential Advisory Committee to ensure that many nonprofit voices with relevant worldwide experience or knowledge are considered in the advice ultimately represented to the president.

### 3. An Assembly of Nonprofit Entities

Many of the paradigms discussed in Part V.A. above, including the ECOSOC, the OECD, the WHO, and the ILO, incorporate a means to engage NGOs in a consultative capacity and to harvest their expertise, experiences, and research to benefit policymaking processes. Some models, such as ECOSOC and the OECD, establish accreditation criteria to select a spectrum of representative NGOs to participate in the processes. For example, ECOSOC has an elaborate tiered system that confers participatory rights on NGOs in policymaking processes in accordance with their perceived ability to contribute to the processes.<sup>377</sup> Those NGOs conferred "general consultative" status as a result of their demonstrated substantive and

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Presidential Advisory Committee on HIV, formation of such a Presidential Advisory Committee cannot be an empty or symbolic gesture. *See supra* notes 31, 81 and accompanying text.

376. FACA limits the duration of a Presidential Advisory Committee to two years. 5 U.S.C. app. § 14(a)(1) (2005). The two-year duration, however, can be extended. *Id.* § 14(a)(2). Additionally, Congress could enact legislation to exempt a Presidential Advisory Committee on U.S. foreign health matters from FACA. *See supra* note 360 (listing some advisory committee exemptions from FACA).

377. *See supra* Part V.A.6 (U.N.'s Economic & Social Council).

sustained contributions to U.N. objectives are accorded the broadest prerogatives. Their privileges include rights to attend ECOSOC meetings and conferences, circulate statements for publication and consideration, speak at ECOSOC meetings, participate at U.N. conferences, and consult with ECOSOC leaders on matters of mutual concern. Those NGOs granted "special consultative" status because of their ability to make occasional and useful contributions to the U.N.'s goals are allowed more limited rights, but they can participate, without speaking, at ECOSOC meetings and can circulate limited statements at those meetings. Finally, "roster consultative" NGOs are permitted more limited privileges, but they, too, have formal participatory rights at ECOSOC meetings and U.N. conferences.

A new presidential foreign health policymaking structure should engage a broad spectrum of domestic nonprofit organizations that make grants; undertake research; organize or perform field work; or otherwise directly support, advocate for, or impact global health matters affecting marginalized minorities abroad. It is essential that their expertise, concerns, and insights inform the president. This flow of information can be accomplished indirectly through the president's advisors on a Presidential Advisory Committee for Foreign Health Policy. In other words, the nonprofits must meet formally with, be considered advisors to, and be represented by the members on such a Presidential Advisory Committee.<sup>378</sup> To this end, appropriate forums and procedures must be developed.

The paradigms of international policymaking bodies offer a potentially effective approach. Forums for discussion, debate and presentation, meetings, and conferences can be held both among the nonprofits and between those entities and the Presidential Advisory Committee members. Over time, at these meetings and conferences incipient and intensifying health concerns may be shared, global health matters ripe for inclusion on a U.S. foreign health policy agenda should be identified, formulations of responsive health policy could be suggested, and advice on implementation could be communicated.

To select a representative array of nonprofits to participate in such forums, accreditation standards might be developed. Like the accreditation standards used in several paradigms, a tiered approach might be created to ensure the greatest participatory privileges to those nonprofits with the most direct or broadest involvement in global health matters.

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378. These NGOs would not be considered an advisory committee within FACA because the members would not be direct advisors to the president or an executive branch agency. It would not be established by either the president or an executive branch agency. It would function as an informational source and in an advisory capacity to members of the proposed Presidential Advisory Committee on U.S. Foreign Health Policy.



The exact contours and parameters of such an Assembly of Nonprofit Entities must be considered in far greater detail than this Article can present. There are many particulars that need addressing—the selection criteria for nonprofits' participation, the formal operational structure of the Assembly, whether the nonprofits should present consensus positions to members of the Presidential Advisory Committee, etc. Nonetheless, there are existing models, some of which are discussed in Part V.A. above, that could be quite helpful in developing the necessary structural and procedural details. The ultimate structure should enable many nonprofit entities with specialized experiences, insights, knowledge, and capabilities to valuably contribute to the president's foreign health policymaking endeavor.

## VI. CONCLUSION

This Article suggested that the constraints and weaknesses of the current presidential foreign health policymaking process warrant its alteration. Seeking to foster greater public accountability and bring a new legitimacy to presidential foreign policymaking, it advocated the adoption of a structure offering a more transparent, better informed, and balanced enterprise. And, attempting to ensure that strategic U.S. concerns and global humanitarian, economic, social, political, and security interests are adequately and appropriately served, the Article promoted adoption of an approach that enhances the inclusiveness of concerned voices represented at the president's foreign policymaking table. Based on several paradigms offering valuable attributes, the Article suggested two new structures: a Presidential Advisory Board on U.S. Foreign Health Policy, composed of nonprofit organization representatives and an Assembly of Nonprofit Entities. This arrangement is proposed as a meaningful approach to officially integrating into the president's foreign health policymaking processes U.S. nonprofits that can assist in identifying incipient and intensifying global health problems and needs, in recommending responsive formulations and policy options, and in protecting vital U.S. interests.