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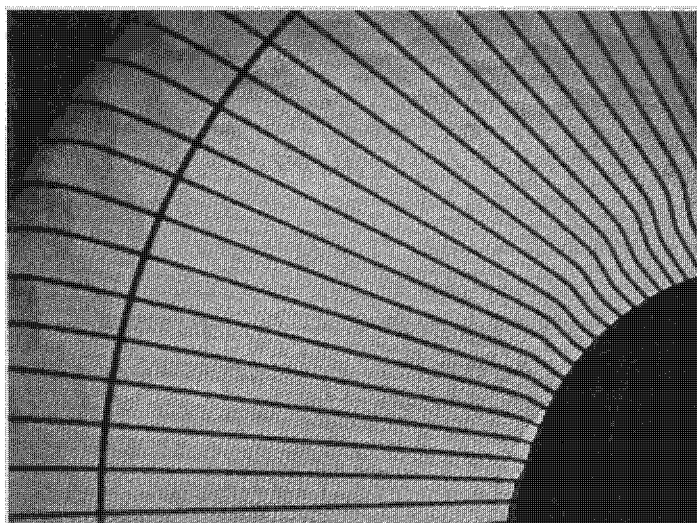
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Sharp Increase in Heating Prices and Limited Government Assistance Spark Concerns about Potential Home Heating Crisis

By Claire Mariano



While volatile energy prices have prompted the federal government to increase its funding of the Low-Income Home Energy Assistance Program, spending is still \$2 billion below the program's discretionary limit and does not serve over 25 million poor households.

High energy prices and continued debate over funding for the Low-Income Home Energy Assistance Program ("LIHEAP")¹ has led to an outcry from advocacy organizations, some elected officials and others concerned with affordability of winter heating bills for low-income families. The U.S. Department of Energy's Energy Information Administration ("EIA") estimates that households heating with natural gas will spend, on average, \$257 more in fuel costs this winter, about a 35 percent increase from last winter.² For households using heating oil, the EIA estimates that these households will average about \$275, or 23 percent, more in heating costs when compared to last winter.³

Behind these market shifts, the EIA cites weak natural gas production, decreased natural gas imports, high natural gas demand and high oil prices.⁴ In addition, Aviva Aron-Dine, representative of the Center for Budget and Policy Priorities, noted that "heating costs have increased for a variety of reasons this year,

but the disruptions caused by Hurricanes Katrina and Rita certainly have played a significant role."⁵

An Increased Energy Burden on Low-Income Households

Advocates for low-income families and public policy organizations argue for greater LIHEAP funding by analyzing the heavy energy burden on low-income households.⁶ LIHEAP provides basic bill payment assistance for heating and cooling costs, as well as some funding for weatherization programs.⁷ Despite the dramatically increased energy costs, LIHEAP funding is appropriated at essentially the same level this year, and current projections mean that the low-income households will likely pay the difference.⁸

According to Economic Opportunity Studies, families in poverty will spend about 25 percent of their Fiscal Year 2006 income on energy bills.⁹ There are about 13 million such households in poverty, and there are about 33 million people considered LIHEAP-eligible.¹⁰ For the LIHEAP eligible population, energy bills will consume about 16 percent of their annual income.¹¹ The burden on low-income households can be contrasted with median-income households, whose average income was just over \$47,000 in 2005.¹² Median-income households will need to spend more than 5 percent of their annual income, after adjusting income for inflation.¹³

"Instability with the cost of energy (especially natural gas) is most worrisome for low-income families, whose tight budgets allow little flexibility in spending," said John Colgan, Director of Public Policy for the Illinois Community Action Association. "Winter heating costs can easily push low-income households into a cycle of increasing debt and/or service disconnections."¹⁴

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The increasingly heavy burden of home energy costs on low-income families is not being matched by growing LIHEAP funds. The National Energy Assistance Directors' Association ("NEADA") released a study stating that the share of heating expenditures covered by the average LIHEAP grant is projected to decrease for homes heated by natural gas from 68.6 percent to 28.8 percent.¹⁵ The Center on Budget and Policy Priorities stated that the purchasing power of LIHEAP grants is lower than in any year between 1982 and 2005.¹⁶

NEADA cited three factors to explain the diminishing share of heating costs covered by LIHEAP: the price of heating costs has jumped significantly over the past few years; the number of LIHEAP recipient families was projected to increase by 33.1 percent, while the federal funding has increased by only 20.1 percent, and the average grant assistance during this period has declined from \$319 to \$288.¹⁷

In December 2005, NEADA released data that showed that LIHEAP applications this winter were already up an average of 10 percent, and some states projected increased applications for heating assistance of at least 25 percent.¹⁸ Mark Wolfe, Executive Director of NEADA, stated that "three years ago, energy was affordable for most households; today's prices are not affordable for poor as well as lower middle income families."¹⁹

Recipients of LIHEAP Assistance

The LIHEAP statute sets certain income eligibility guidelines for potential recipients of LIHEAP funding.²⁰ The maximum income for eligibility is 150 percent of the federal poverty level, except where 60 percent of the state median income is higher, and states can set the limit as low as 110 percent of the federal poverty level.²¹ Participation in the LIHEAP program has increased by about 6 percent each year since 2002.²²

According to the LIHEAP Home Energy Notebook for Fiscal Year 2003, only 13 percent of federally eligible households received LIHEAP benefits in 2002.²³ Because of such severe funding limitations, the U.S. Department of Health and Human Services

has identified two main groups of households to target for funding: vulnerable households, or households that have at least one member who is a young child, an individual with disabilities or an older adult; and high burden households, which includes households with the lowest incomes coupled with the highest home energy costs.²⁴

The government's goal of providing assistance for only the neediest families was illustrated in a 2005 survey of 1,100 LIHEAP recipients conducted by the National Energy Assistance Directors' Association ("NEADA").²⁵ The NEADA found that 94 percent of LIHEAP recipient households included at least one member who was elderly, disabled, a child, or a single adult supporting one or more children.²⁶

Many of these households also had members who suffered from medical or health-related problems. Almost half of these households had a member who suffered from asthma, emphysema, heart disease, or a stroke.²⁷ In fact, 32 percent of surveyed households stated that they did not fill a prescription or took less than the prescribed dosage because of energy bills in the past five years.²⁸ This figure included 41 percent of those with the described medical or health-related problems.²⁹

In addition, a study by researchers from Stanford University, the University of Chicago, the RAND Corporation and UCLA for the National Bureau of Economic Research found that low income families may face greater nutritional problems during periods of cold weather and high heating bills.³⁰ In their study, the researchers stated that poor families reduce their expenditure on food and have lower caloric intake during the winter months.³¹ The authors estimated that a 10 degree decrease in temperature resulted in about \$11 reduction in monthly food expenditures and a \$37 increase in fuel expenditures per month.³² These results were not found in wealthier families, whose nutritional intakes did not significantly change during the winter and summer months.³³

The authors argued that low-income families are confronted with difficult choices when increasing their expenditures on home energy, potentially at the cost of reducing their spending on food and nutrition.³⁴ Further, they stated that their evidence "suggests that poor parents are only imperfectly able to protect their

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children from the effect of cold weather shocks. Both children and adults reduce their caloric intake during winter months.”³⁵ In closing, they noted that “existing social programs, taken together, are insufficient to buffer poor families from cold weather shocks to family budgets.”³⁶ The National Bureau of Economic Research study supports the view that home energy assistance is not only about helping low-income families with a basic necessity but is also a public health issue.³⁷

“The struggle is going on because it is about spending more money than ever before when the federal government has less money than ever before for all domestic non-security programs.”

-Dr. Meg Power, Senior Advisor for the National Community Action Foundation

History and Funding of Low-Income Home Energy Assistance Program

A number of public policy and advocacy organizations for low-income households, such as NEADA and the National Community Action Foundation, have encouraged the federal government to increase funding for LIHEAP.³⁸ Using the U.S. Department of Energy projections, the Center on Budget and Policy Priorities stated that the cost to heat homes for LIHEAP beneficiaries will increase 31.1 percent this winter.³⁹

Congress authorized LIHEAP in a 1981 measure, and the program began in 1982.⁴⁰ LIHEAP developed from several earlier energy programs that were created following the 1970’s energy crisis.⁴¹ LIHEAP funds are administered by the U.S. Department of Health and Human Services, and are allocated as block grants to states.⁴² LIHEAP funds are also supplemented by funding from state governments and non-profit organizations.⁴³

In 1994, Congress amended the law to state that the purpose of LIHEAP is “to assist low income

households, particularly those with the lowest income, that pay a high proportion of household income for home energy, primarily in meeting their immediate home energy needs.”⁴⁴

In its Fiscal Year 2003 LIHEAP Report to Congress, the U.S. Department of Health and Human Services-Administration for Children and Families stated that approximately 5 million households received LIHEAP assistance, including both heating and cooling costs.⁴⁵

Congress appropriates funding for LIHEAP annually, and the amount has fluctuated over the years.⁴⁶ Congress appropriated about \$2.1 billion in 1985 for LIHEAP, and just \$1 billion in 1997.⁴⁷ About \$2.183 billion was appropriated in 2005 to assist roughly 4.9 million low-income households.⁴⁸

In July of 2005, Congress passed the Energy Policy Act, which authorized \$5.1 billion in funding for LIHEAP for each of the years from 2005 through 2007.⁴⁹ Though the measure was signed into law by President Bush in August of 2005, Congress still has discretion to appropriate less funding for the program, and so far has not appropriated anywhere near the \$5.1 billion amount.⁵⁰ Congress only approved \$2.161 billion in LIHEAP funding for this winter, and President Bush released about \$100 million in LIHEAP emergency contingency funds on January 5, 2006.⁵¹

Government Response to LIHEAP Funding Problem

In addition to a public outcry from organizations like NEADA, the National Consumer Law Center, the Campaign for Home Energy Assistance and others, many government officials have reacted to the impending need.

“The struggle is going on because it is about spending more money than ever before when the federal government has less money (relative to size) than ever before for all domestic non-security programs,” said Dr. Meg Power, Senior Advisor for the National Community Action Foundation.⁵²

“People who want to spend on other things or not spend on the poor are delaying in hopes of an early spring and the return of the nation’s customary deficit on poverty.”⁵³

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A group of U.S. Senators has requested that the Bush Administration allocate another \$2.92 billion in funding for LIHEAP and winter heating programs for this year.⁵⁴ The legislators argue that low-income families this winter have faced choices of whether to heat their home or buy basic home necessities, like food or prescription drugs, which is a choice they shouldn't have to make.⁵⁵ In March, 2006, President Bush signed a measure allocating \$1 billion in additional LIHEAP funding for states.⁵⁶ The law brings this winter's funding total to \$3.16 billion.⁵⁷

Senator Olympia Snowe (R-Maine), a sponsor of the legislation, stated that "[w]ith the President's signature, relief will soon be on the way to families struggling to heat their home amidst record-high fuel prices."⁵⁸

State governments have also stepped in to assist low-income families. In Illinois, the Governor's Special Director for Emergency Energy Assistance worked with the state's major utilities companies, who agreed to waive the reconnection fees and suspend deposits for customers receiving LIHEAP benefits.⁵⁹ In addition, the utilities agreed not to disconnect residential heating customers for non-payment between December 1, 2005 and March 31, 2006.⁶⁰ Called "Keep Warm Illinois," the governor's office also held a number of Winter Assistance Days to offer information about available benefits.⁶¹

As energy prices continue to increase, home energy costs for low-income families will be an ongoing and important public health and policy issue.

¹ 42 U.S.C. § 8621 *et seq.* (1981).

² Energy Information Administration, *Short Term Energy Outlook* (Jan. 17, 2006), <http://www.eia.doe.gov/emeu/steo/pub/contents.html>.

³ *Id.*

⁴ Energy Information Administration, *Residential Gas Prices: What Consumers Should Know*, www.eia.doe.gov/oil_gas/natural_gas/analysis_publications/natbro/gasprices.htm (last visited Mar. 2, 2006).

⁵ Telephone Interview with Aviva Aron-Dine, Research Assistant, Center on Budget and Policy Priorities (Feb. 7, 2006).

⁶ National Energy Assistance Directors Association ("NEADA"), *2005 National Energy Assistance Survey Report: Key Findings*, <http://www.neada.org/comm/>

[surveys/NEADA_2005_National_Energy_Assistance_Survey-Key_Findings.pdf](http://www.neada.org/comm/surveys/NEADA_2005_National_Energy_Assistance_Survey-Key_Findings.pdf) (last visited Mar. 1, 2006).

⁷ 42 U.S.C. § 8621(a).

⁸ *Id.* at 4.

⁹ Meg Power, *FY 2006 Energy Bills and Burdens of Low-Income Consumers*, ECONOMIC OPPORTUNITY STUDIES, Oct. 25, 2005, at 2, available at <http://www.opportunitystudies.org/repository/File/weatherization/highlights-bills-and-burdens.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Interview with John Colgan, Director of Public Policy, Illinois Community Action Association, Chicago, Illinois, (Mar. 1, 2006).

¹⁵ Mark Wolfe, *Federal Low Income Home Energy Assistance Grants for LIHEAP Decline to Lowest Level in Five Years*, NEADA (Jan. 24, 2006), <http://www.neada.org/comm/press/pr2006-01-24.pdf>.

¹⁶ Richard Kogan & Aviva Aron-Dine, Center on Budget and Policy Priorities, *Out in the Cold: How Much LIHEAP Funding Will Be Needed to Protect Beneficiaries from Rising Energy Prices?* Jan. 18, 2006, at 3.

¹⁷ Mark Wolfe, *supra* note 15.

¹⁸ Mark Wolfe, *States Call on Congress to Approve Additional Funding for LIHEAP; Applications Reaching Record Levels; States Begin to Exhaust Funds*, NEADA (Dec. 22, 2005), <http://www.neada.org/comm/press/pr2005-12-22.pdf>.

¹⁹ Kogan & Aron-Dine, *supra* note 16, at 3.

²⁰ Administration for Children & Families, *Eligibility Guidelines*, <http://www.acf.hhs.gov/programs/liheap/guidance/index.html> (last visited Mar. 7, 2006).

²¹ *Id.*

²² Kogan & Aron-Dine, *supra* note 16, at 4.

²³ U.S. Department of Health and Human Services, *LIHEAP Home Energy Notebook for Fiscal Year 2003*, <http://www.acf.hhs.gov/programs/liheap/data/notebook/notebook.html> (last visited Mar. 1, 2006).

²⁴ *Id.*

²⁵ NEADA, *supra* note 6.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Jayanta Bhattacharya, Thomas DeLeire, Steven Haider, & Janet Currie, *Heat or Eat? Cold-Weather Shocks and Nutrition in Poor American Families* (Nat'l Bureau of Econ. Research, Working Paper No. 9004, 2002), at 19.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 20.

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categories led to the Senate's resistance towards the legislation.⁶⁵ The traditional categories of people that Medicaid covers are children, pregnant women, parents or caretakers of minor children and elderly or seriously disabled people.⁶⁶ The problems is that "destitute adults without minor children, including individuals who are ill or injured and may have lost everything in the hurricane, will continue to be turned away unless Congress acts to suspend these restrictions for a temporary period for hurricane survivors, said Donna Cohen Ross, Outreach Director of the Center on Budget and Policy Priorities.⁶⁷

Despite the many concerns, a segment of the Grassley-Baucus legislation was included in the recent budget reconciliation package in both the Senate and House proposed packages.⁶⁸ The House and the Senate reconciled the differences between their bills resulting in the Deficit Reconciliation Act of 2005.⁶⁹ The final bill permits \$2 billion in additional funds for state Medicaid programs.⁷⁰ These funds would be allocated for both the direct impact states (Alabama, Louisiana & Mississippi), as well as states that have accepted evacuees who are Medicaid eligible.⁷¹

National and Local Aid

National Organizations

In partnership with community groups like Rainbow/PUSH, the *Change to Win Coalition* rolled out a blueprint for a massive, multi-industry program to train an army of workers to rebuild the Gulf Coast a few days after the hurricane hit.⁷² "We have the resources and know-how to create the most successful worker training initiative in American history so that poverty is something we can look at in the rearview mirror," said Anna Burger, Chair of *Change to Win*, a coalition of seven major unions representing six million workers.⁷³ "We trained thousands of workers from the Gulf Coast and placed them in good paying jobs with benefits you can raise a family on."⁷⁴ The *Change to Win* unions included many members who have already had extensive experience in recruitment and training, so that these skills were rapidly deployed to help out communities in crisis.⁷⁵ The coalition executed

a comprehensive renewal and retraining program for Louisiana that allows families in these ravaged communities to rebuild their lives by putting them on a path to a better economic future.⁷⁶

In addition to providing immediate relief like food, housing, health care, day care and legal services, the coalition will also provide, from its centers, comprehensive case management and labor-exchange data capacity to match local workers and evacuees to training and jobs.⁷⁷ One other project provided by the coalition unions includes a stationary training facility in Louisiana that is staffed with skilled instructors certified to provide training in hazardous waste, Occupational Safety and Health Administration ("OSHA") 10-hour mold remediation and first aid.⁷⁸

"Resources and dollars already committed to the rebuilding effort will stretch exponentially further when paired up with the skills and experience coalition unions bring to this worker training initiative," said Burger.⁷⁹

Similarly, *America's Second Harvest*, the nation's largest domestic hunger-relief organization, obtained and distributed more than 16 million pounds of food, water and essential supplies to the victims within 12 days after Katrina hit.⁸⁰ With a national network of over 200 member food banks and food-rescue organizations throughout all 50 states and Puerto Rico, *America's Second Harvest* serves approximately 50,000 local charitable hunger-relief agencies, including food pantries, soup kitchens, women's shelters and Kids Cafes.⁸¹ The food supplies that were dispatched to the Gulf States initially came from four major sources: (1) major corporate in-kind donations, i.e. truckloads of portable food; (2) food bank inventories that do not impact their own community; (3) purchased groceries through individual and corporate financial donations and (4) USDA commodities.⁸² Hundreds of volunteers were also obtained in order to move food to where it was and continues to be most needed.⁸³ Indeed, *America's Second Harvest* is ongoing in distributing food and water to maintain the long-term relief efforts.

While common relief efforts addressing hunger and housing issues are common disaster measures, Operation Hope, Inc. partnered up with the American Red Cross to offer alternative programs.⁸⁴ Their

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program connects under-served, minority communities to mainstream resources such as financial education, technology and disaster services.⁸⁵ It primarily offers instruction to individuals about basic financial principles, such as how to maintain a savings account or understand their credit.⁸⁶ These information sessions teach individuals how to build their own knowledge and rely on themselves more and the community less.⁸⁷

Local Organizations

The combined resources and joint effort from these national and governmental organizations have provided reliable services to disaster victims; however, sometimes connecting disaster victims to the relief is the hardest part, which is where local Louisiana organizations have contributed.⁸⁸ One well-known recovery effort is a relief center provided by the Acadiana Outreach Center in Lafayette, LA. The uniqueness of the center's program is due in part to the fact that more than 30 of the staff providing assistance are Katrina evacuees.⁸⁹

Valerie Keller, who runs the Acadiana Outreach Center, said that "the program mainly involves case managers who work one-on-one with displaced individuals and families to address needs such as employment, transportation, housing and mental health."⁹⁰ For each identified need, the case manager connects the evacuee to available federal, state and local governmental and private resources.⁹¹ Further, housing and employment specialists provide the missing link between the available housing and job market by establishing relationships with landlords and businesses.⁹²

This article mentions only a small portion of the legislation, policies and other efforts that have been implemented to aid the Katrina victims. It is clear that despite the satisfaction or disappointment with post-Katrina efforts, many parties have put in efforts toward rebuilding the communities that were lost by thousands.

¹ Editorial, *Renewal: Commission's report important step*, THE CLARION-LEDGER (Jackson, MS) Jan. 9, 2006, at 6A; Opinion, *Outrageous Waste Cheats Victims; the Bumbling Federal Emergency Management Agency Needs Stronger*

Controls and More Accounting to Make Sure Disaster Relief Does Not Continue to Be Disastrous, WIS. STATE J. (Madison, WI), Feb. 15, 2006, at A6.

² Discussed *infra*.

³ Discussed *infra*.

⁴ Hurricane Recovery Education Act, Pub. L. No. 109-148, § 107, 119 Stat. 2680, 2792 (2006).

⁵ Telephone Interview with Chad Colby, the Public Affairs Representative for the U.S. Department of Education (Jan. 16, 2006).

⁶ Hurricane Recovery Education Act, *supra* note 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² David Epstein, *Doling Out Katrina Relief*, Inside Higher Education, Feb. 9, 2006, <http://www.insidehighered.com/news/2006/02/09/katrina>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Hurricane Recovery Education Act, *supra* note 4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Michael O'Connor, *Education Rights of Homeless Children*, Coalition on Human Needs, Sept. 5, 2005, <http://www.chn.org/pdf/katrinaeducation.pdf>.

²⁴ *Id.*

²⁵ McKinney Vinto Act, 42 U.S.C. § 11432, ch. 119 (2005).

²⁶ *Id.*

²⁷ *Id.*

²⁸ O'Connor, *supra* note 23.

²⁹ McKinney Vinto Act, *supra* note 25.

³⁰ *Id.*

³¹ Mississippi Department of Education, Katrina Recovery Information, <http://www.mde.k12.ms.us/Katrina/faq/index.html#> (last updated Nov. 4, 2005).

³² *Id.*

³³ National Low Income Housing Coalition, *FEMA and HUD Post-Katrina Rental Assistance Programs* Dec. 12, 2005, <http://www.nlihc.org/news/093005.html>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Brian Sullivan, *Jackson And Chertoff Announce Comprehensive Transitional Housing Assistance Program For Katrina Evacuees*, HUD News Release (Sept. 23, 2005), <http://www.hud.gov/news/release.cfm?content=pr05-130.cfm>.

³⁸ *Id.*

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³⁹ National Low Income Housing Coalition, *supra* note 33.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Louisiana Recovery Corporation Act, H.R. 4100, 109th Cong. (2005).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Opinion Journal.com, *Louisiana Repurchase* (Feb. 13, 2006), <http://www.opinionjournal.com/editorial/feature.html?id=110007959>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Bill Walsh, *White House Against Baker Bailout Bill*, TIMES-PICAYUNE (New Orleans), Jan. 25, 2006, National, at 1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Cynthia Gervais and Carolynn Race, *Post-Katrina Health Care Highlights Gaps in the System*, <http://www.pcusa.org/washington/issuenet/hc-051111.htm> (last visited Feb. 26, 2006).

⁶² Emergency Health Care Relief Act of 2005, S. 1716, 109th Congress (2005).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Bob Cusack, *Group Looks to Sidestep GOP dispute on Katrina Bill*, THE HILL, Sept. 25, 2005, <http://www.hillnews.com/thehill/export/TheHill/Business/092705.html>.

⁶⁶ *Id.*

⁶⁷ Telephone Interview with Donna Cohen, Outreach Director for Center on Budget and Policy Priorities (Feb. 23, 2006).

⁶⁸ Gervais & Race, *supra* note 61.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Email from Anna Burger, Chair of Change to Win (Jan. 27, 2006) (on file with author).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

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they believed it would not protect their trade secrets.³⁹ Importantly, the Court found that there are real privacy issues in handing over even short text-string Internet searches, which can contain personal information such as credit card and Social Security numbers. Additionally, the Court noted that many users perform “vanity searches” where they look up their own name, and which can involve additional terms exposing private and sensitive issues such as a need for an abortion clinic address, political affiliations, and sexually explicit information.⁴⁰

Although the Justice Department’s request for searches was denied, computer experts like Marc Rotenberg of the Electronic Privacy Information Center, are worried that the demand itself might set a precedent for more intrusive future demands.⁴¹ Another question this situation has raised is just how much information Google stores about consumers and whether the new desktop program Google is releasing will increase that information.⁴² Many consumers are unaware that any e-mail left on Google’s server can be accessed by the government without much difficulty.⁴³ Indeed, a recent class action lawsuit was filed against AT&T for aiding the government in wiretapping phones and intercepting emails and internet transmissions without the knowledge of the consumer.⁴⁴

It is clear that protection of consumers through the law has not been able to keep up with the development of technology; thus, consumers and consumer advocates must remain vigilant for any possible privacy invasions.

¹ Two lawsuits were filed against the National Security Agency over wiretapping by the U.S. Government following September 11, 2001, which were done without a warrant and in secrecy. One was filed by the American Civil Liberties Union in the Eastern District of Michigan on behalf of several journalists, authors, scholars and organizations. The other was filed by the Center for Constitutional Rights in the Southern District of New York. *Two groups Sue over NSA Wiretap Program*, CNN.com, Jan 17, 2005, <http://www.cnn.com/2006/LAW/01/17/aclu.nsa/>.

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² John Borland, *FAQ: Sony's "rootkit" CDs*, CNET News.com, Nov. 14, 2005, http://news.com.com/FAQ+Sony+rootkit+CDs/2100-1029_3-5946760.html?tag=nl.

³ Michael Liedtke, *Google's new search feature seeks greater access to personal computers*, Associated Press, Feb. 9, 2006, available at <http://news.findlaw.com/ap/ht/58/02-09-2006/3112002e4282fe0a.html>.

⁴ Arshad Mohammed, *Google Argues Against Subpoena*, WASH. POST (Feb. 18, 2006), at D03; Order Granting in Part and Denying in Part Motion to Compel Compliance with Subpoena *Duces Tecum* at 20, *Gonzales v. Google*, Case No.: 06-CV-8006 (N.D. Cal.), available at http://www.google.com/press/images/ruling_20060317.pdf.

⁵ This concern is demonstrated by the enactment of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 *et seq.* (1998), which was enacted to protect digital copyrights, and the Electronic Communication Privacy Act ("ECPA"), 18 U.S.C.S. § 2701 *et seq.* (1986), which was enacted to prohibit the disclosure of the contents of electronic communication to any person or entity, or to the government, without first meeting certain restrictions. Also, some states have enacted Consumer Protection Against Computer Spyware Acts. An overview of the legislation in different states can be found at National Conference of State Legislatures ("NCLS"), *2005 State Legislation Relating to Internet Spyware or Adware*, <http://www.ncsl.org/programs/lis/spyware05.htm> (last visited on Mar. 21, 2006).

⁶ Discussed *infra*.

⁷ Michael Hiltzik, *Golden Slate: Privacy Statutes Need to Catch Up*, L.A. TIMES, April 13, 2006, available at http://goldenstateblog.latimes.com/goldenstate/2006/04/golden_state_co_3.html.

⁸ CDs that have been identified so far include: Trey Anastasio, *Shine* (Columbia), Celine Dion, *On ne Change Pas* (Epic), Neil Diamond, *12 Songs* (Columbia), Our Lady Peace, *Healthy in Paranoid Times* (Columbia), Chris Botti, *To Love Again* (Columbia), Van Zant, *Get Right with the Man* (Columbia)

Switchfoot, *Nothing is Sound* (Columbia), The Coral, *The Invisible Invasion* (Columbia), Acceptance, *Phantoms* (Columbia), Susie Suh, *Susie Suh* (Epic), Amerie, *Touch* (Columbia), Life of Agony, *Broken Valley* (Epic), Horace Silver Quintet, *Silver's Blue* (Epic Legacy), Gerry Mulligan, *Jeru* (Columbia Legacy), Dexter Gordon, *Manhattan Symphonie* (Columbia Legacy), The Bad Plus, *Suspicious Activity* (Columbia), The Dead 60s, *The Dead 60s* (Epic), Dion, *The Essential Dion* (Columbia Legacy), Natasha Bedingfield, *Unwritten* (Epic), and Ricky Martin, *Life* (Columbia). Electronic Frontier Foundation, *Are You Infected By Son- BMG's Rootkit?* Nov. 9, 2005, <http://www.eff.org/deeplinks/archives/004144.php>. Identification of the CDs was possible because they were marked on the side as being "content protected," which should remind

consumers of an important lesson that is easy to forget: read the fine print. John Millar, *Read Fine Print for Root Kits*, London Free Press (Ontario) Dec. 2, 2005, § Business, at D10.

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pharmaceuticals from liability rather than protecting the welfare of the general public.⁶⁷ A relatively broad definition of countermeasure would allow any product used to treat conditions stemming from a biological attack such as ulcers, nausea and headaches to be protected from liability, as well as the products specifically designed to protect against a bioterrorist attack or pandemic outbreak.⁶⁸ While pharmaceutical companies would not be protected from willful misconduct, these claims must be designated as willful by the secretary of DHHS before a plaintiff could proceed with his case.⁶⁹ Additionally, willful misconduct requires a much higher standard and is therefore harder to prove.⁷⁰ Critics fear that the shield from liability along with the patent extensions will do little in the way of preparing the nation for a bioterrorist attack, but will inevitably drive up prescription drug costs.⁷¹ By allowing pharmaceuticals to extend patents on anything remotely related to biodefense, research of generic brands would be suppressed, thereby raising costs to employers who provide drug benefits to their employees, government programs such as Medicare, and to consumers themselves.⁷²

According to the CDC, a lethal pandemic could kill up to two million people in the United States alone.⁷³ The CDC further predicts that "a medium-level epidemic would kill 207,000 Americans, hospitalize 734,000 and sicken about a third of the United States population."⁷⁴ As of October, DHHS reported that the current stockpile of antiviral flu treatment would only be sufficient to treat one percent of the American population.⁷⁵ Currently, there is no vaccine to protect humans against H5N1 avian influenza.⁷⁶ Without a viable compensation fund, Americans are seemingly left with the frightening choice of receiving an untested and potentially dangerous treatment or no treatment at all.⁷⁷ The ongoing stalemate between the government, pharmaceutical companies and consumer activist groups has the potential to make everyone a loser in the race to shield Americans from a potential bioterrorist attack or pandemic flu outbreak.⁷⁸

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