DEMOCRACY & JUSTICE

COLLECTED WRITINGS

BRENNAN CENTER FOR JUSTICE

Volume Six

The Brennan Center for Justice at NYU School of Law

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group, part communications hub — the Brennan Center seeks meaningful, measurable change in the systems by which our nation is governed.

About Democracy & Justice: Collected Writings 2012

The material in this volume is excerpted from Brennan Center reports, policy proposals, and issue briefs. We've also excerpted material from public remarks, legal briefs, congressional testimony, and op-ed pieces written by Brennan Center staff in 2012. The volume was compiled and edited by Jeanine Plant-Chirlin, Jim Lyons and Pat Wechsler. Erik Opsal and Kimberly Lubrano provided invaluable assistance in producing the volume. For a full version of any material printed herein, complete with footnotes, please email jeanine.plant-chirlin@nyu.edu.

Introduction from the President

The Declaration of Independence proclaims we are all "created equal." Each generation measures the institutions of its day against that founding ideal. When those institutions are wanting, we change them.

That's the American story. In 2012, the Brennan Center for Justice wrote a new chapter in that story.

Among our achievements: We exposed, and opposed, a new wave of laws that would curb voting for the first time since the Jim Crow era. At least 5 million could have found it far harder to vote. To a remarkable degree, we prevailed, leading a national effort to block those laws. The Center stepped forward as one of the nation's leading voices for reform.

We continued to work to remedy the deleterious consequences of *Citizens United*. We crafted an innovative plan for small donor public financing. We fought to stop filibusters from paralyzing the Senate. We insisted on accountability and transparency in the fight against terrorism. And we initiated a major effort to address a great moral and economic issue of our time: mass incarceration in the United States.

We are proud of our work and proud of how we do it. As a think tank, legal advocacy group, and cutting edge communications hub, we are forging a new model for change. We are fiercely non-partisan, fact-based — and independent. We knew we were onto something when, in the same month, Rachel Maddow and the *National Review* praised our work.

This volume offers a taste of that work in 2012.

We are continuing these fights into 2013 on new terrain. President Barack Obama, in his Inaugural Address and State of the Union, urged the country to address voting reform. We will press forward with our plan to modernize voter registration, which would add 50 million to the rolls — permanently. And we will continue to devise other new ideas for a new democracy. That's how we can make real the American promise of true civic equality.

Michael Waldman
President

Democracy & Justice: Collected Writings 2012
Table of Contents

VOTING

Drive to Curb Voting Rights, Driven Back

Wendy Weiser and Diana Kasdan

The last election cycle saw an unprecedented effort to restrict the franchise. Starting two years ago, 19 states, representing 85 percent of the electoral votes needed to win the presidency, passed 25 laws that curbed voting. In 2011, the Brennan Center tallied that 5 million could find it harder to vote in 2012. Our research spurred a major national debate. Citizens, the courts, and public officials fought back and largely won. By Election Day, millions saw their vote saved, in a remarkable victory for the public interest.

Our nation was founded on the principle that "all men are created equal." To fulfill this promise, our voting system should be free, fair, and accessible to all eligible citizens.

A year ago, the Brennan Center issued a study documenting the recent and abrupt reversal of America's long tradition of expanding voting access. Without national notice, legislators pressed scores of new bills that would make it harder for eligible Americans to vote. This report helped spur much-needed public scrutiny of these laws and their possible impact on our elections.

We estimated that these new laws — which included onerous voter ID laws, cutbacks to early voting, and community-based registration drives — "could make it significantly harder for more than 5 million eligible voters to cast ballots in 2012." That number reflected the sheer quantity and scope of restrictive legislation already then enacted in 14 states.

The drive to curb voting continued beyond October. All told, since January 2011, at least 180 bills were introduced in 41 states. Ultimately, 25 new laws and two executive actions were adopted in 19 states. These states represented 231 electoral votes, or 85 percent of the total needed to win the presidency. This amounted to the biggest threat to voting rights in decades.

Today, the reality is very different, and far better for voters. The dramatic national effort to restrict Americans' voting rights was met with an equally dramatic pushback by courts, citizens, the Department of Justice, and farsighted public officials.

What does a survey of the landscape one week before Election Day 2012 now show? Strikingly, nearly all the worst new laws to cut back on voting have been blocked, blunted, repealed, or postponed. Laws in 14 states were reversed or weakened. As a result, new restrictions will affect far fewer than the 5 million citizens we predicted last year. For the overwhelming majority of those whose rights were most at risk, the ability to vote will not be at issue on November 6th.

Excerpted from *Voting Law Changes in 2012: Election Update*, October 2012.

At the same time, the fight will continue well past November. Courts will examine laws in Wisconsin, Pennsylvania, and elsewhere. Politicians will introduce more bills to limit voting rights. Most significantly, the U.S. Supreme Court will likely hear two major cases that could substantially cut back on legal protections for voters. It has already agreed to hear a challenge, brought by Arizona, that could curb federal power to protect voting rights. The Court likely will also hear a challenge to Section 5 of the Voting Rights Act, which has proven to be a key protection against discriminatory laws, including many of the ones passed in 2011-12.

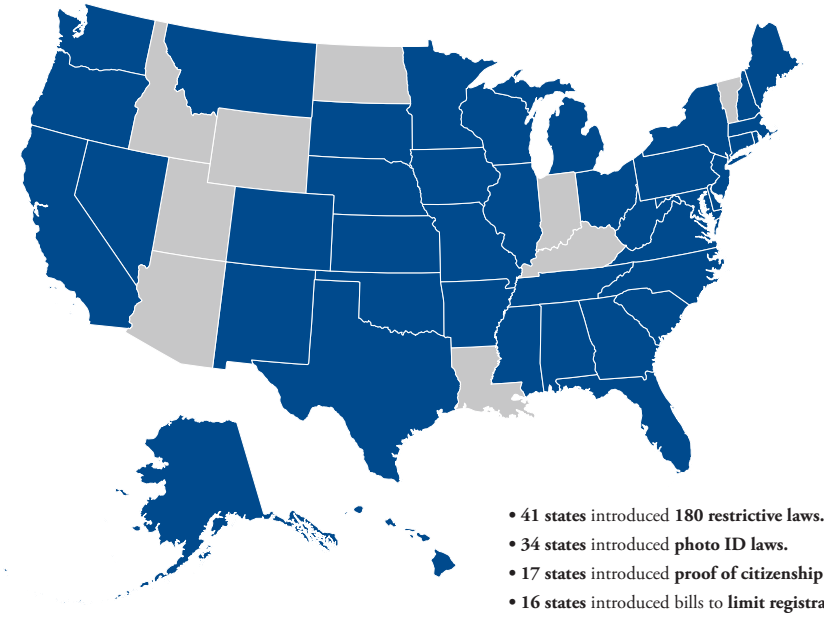
This upcoming legal battle unfolds against the backdrop of the recent struggle over voting rights — and in the wake of a clear demonstration of the vital need for strong laws to protect democracy.

Summary of the Assault on Voting Rights

A. Changes in State Law

What did these new restrictions look like?

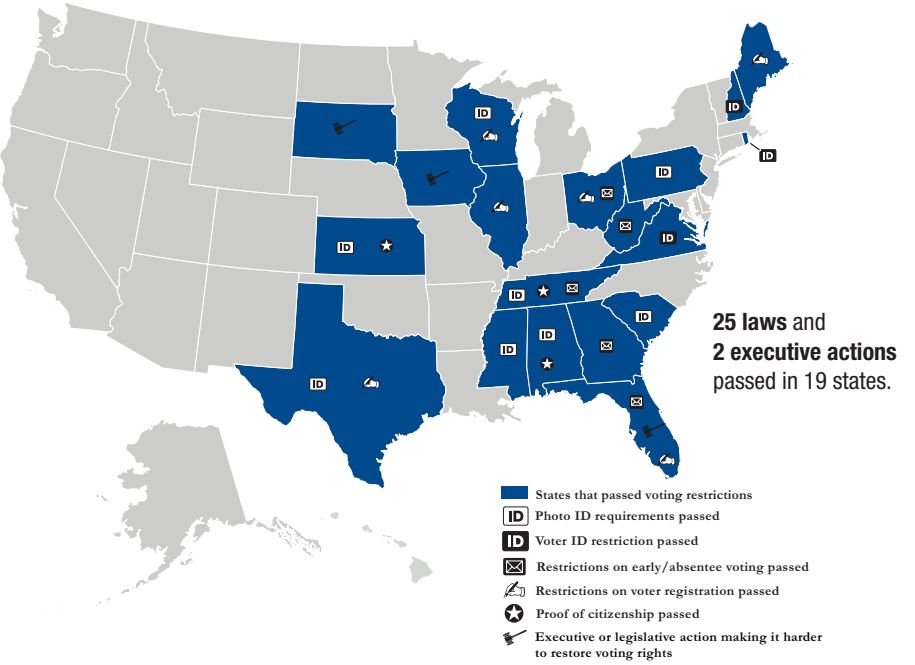
STATES WITH RESTRICTIVE VOTING LEGISLATION INTRODUCED SINCE 2011



- **41 states** introduced **180 restrictive laws.**
- **34 states** introduced **photo ID laws.**
- **17 states** introduced **proof of citizenship requirements.**
- **16 states** introduced bills to **limit registration.**
- **9 states** introduced bills to **reduce early voting periods.**

Voter ID Laws: The most common new voting law — passed in nine states — was to require voters to show certain government-issued photo IDs to vote. Every state already had some form of voter ID requirement in place, at least for new voters and often for all, but these laws were far more stringent. These highly inflexible and restrictive laws allow only select forms of ID, like driver's licenses and non-driver's IDs, which 11 percent of voting-age Americans — or 21 million citizens — do not have. Studies also make clear that those without photo IDs are disproportionately seniors, African-Americans, the poor, students, or people with disabilities. Among older voters, 18 percent do not have the kind of photo IDs required by these laws; for African-Americans, 25 percent; and for low-income voters, 15 percent. Three additional states passed new voter ID requirements, albeit ones that are less rigid.

STATES THAT PASSED RESTRICTIVE VOTING LAWS



Documentary Proof of Citizenship Laws: Three states passed laws to require documentary proof of citizenship to register or to vote. These requirements — which at least 7 percent of voting-age Americans do not have — fall particularly hard on women and low-income citizens. A full one-third of women do not have citizenship documents with their current names and 12 percent of low-income individuals do not have such papers available.

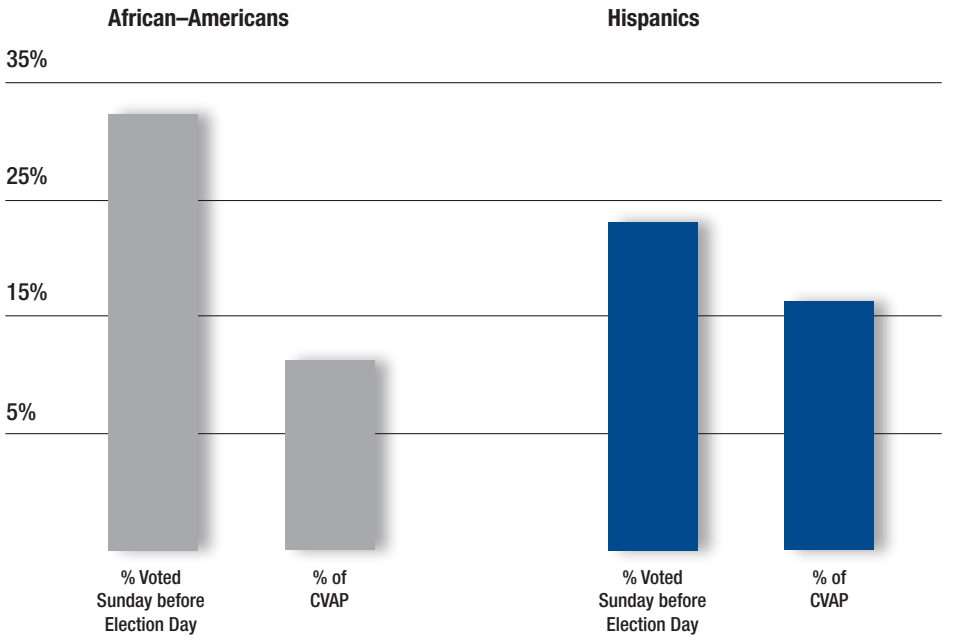
Laws Making Voter Registration Harder: Six states passed various laws making it harder for citizens to register to vote, but the most common were restrictions on voter registration drives. For example, in Florida, for a full year, onerous new restrictions on drives shut down groups like the League of Women Voters and Rock the Vote. These drives have historically played an extremely important role in getting people registered so they can vote. In both 2004 and 2008, hundreds of thousands of Florida voters registered through drives. Once the new law passed, many of those drives ground to a halt and many Floridians lost a key opportunity to sign up. African-American and Latino citizens were especially hurt. Nationally, they register through drives at twice the rate as whites. Elsewhere, new laws eliminated highly-popular Election Day registration, and made it harder for people who have moved to stay registered to vote.

Laws Reducing Early Voting Opportunities: After decades of states expanding early voting, for the first time there were efforts across the country to reduce this method for enhancing voting opportunities. Five states cut back on early voting, and some in ways that were most likely to make it harder for minorities to get to the polls. For example, Ohio and Florida both eliminated early voting on the Sunday before the election — a day on which African-American and Latino churches organized very successful pews to polls drives in 2008.

A full one-third of citizens who voted early on the eliminated Sunday in Florida in 2008 were African- American, even though African-Americans make up only 13 percent of the state's citizen voting-age population.

Laws Making it Harder to Restore Voting Rights: Three states also made it harder to restore voting rights for persons with past criminal convictions. The governors of Florida and Iowa both issued executive orders reversing prior policies that increased opportunities to restore rights. And South Dakota passed a law to disenfranchise persons who are on probation.

Novel Threats: Ending Sunday Early Voting
Florida 2008



B. Purges and Challenges

The onslaught of new laws was only the start. As legislative sessions wound down, efforts picked up to systematically purge voters from the rolls and challenge the eligibility of registered voters. These efforts continued in the final months leading up to the November election, creating additional — often last-minute and unforeseen — barriers to eligible, registered citizens.

Although regular list maintenance is an important tool for maintaining accurate voter registration lists, far too frequently, after secretive and inaccurate purge programs, eligible voters show up to the polls and discover their names have been removed from the voting lists. Federal law, to some extent, constrains states' list maintenance activities, including by prohibiting systematic efforts to purge the voter rolls within 90 days of a federal election.

Colorado, Florida, and Texas, among other states, began to implement large-scale programs to remove registered voters in the latter part of 2012. These attempts were wildly inaccurate and threatened to throw thousands of eligible citizens off the rolls.

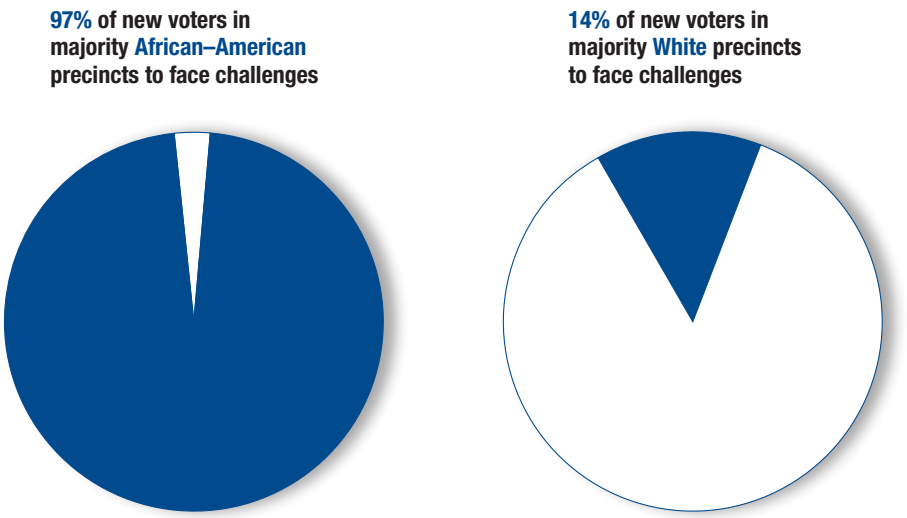
In Texas, in September 2012, a court blocked a last-minute massive purge of nearly 80,000 voters identified as deceased shortly after hundreds of eligible living voters received removal notices. In Florida, Secretary of State Ken Detzner announced he had a list of more than 180,000 potential non-citizens on the rolls, necessitating a purge before the election. Under greater scrutiny, though, that list quickly dwindled to just fewer than 3,000 voters targeted for removal. Within weeks of notices going out to those individuals, at least 500 confirmed their citizenship, including Bill Internicola, a 91-year-old World War II veteran who was born in Brooklyn. By the time Florida was done refining its purge program, including the use of a federal data system, it reported only about 200 potential non-citizens on the rolls. These names are still being checked.

This pattern repeated in Colorado. Secretary of State Scott Gessler initially announced there were potentially 11,000 non-citizens on the rolls. That number dropped to just under 4,000, and then down to a list of only 141 people. With less than two weeks to the election, Gessler abruptly announced he found an additional 300 potential non-citizens. At the same time, private organizations including True the Vote, Judicial Watch, and local citizen-led groups have threatened or filed lawsuits demanding purging of the voter rolls.

In addition to purges, there has been an increase in mobilization of political groups to challenge voters at the polls. In nearly every state, antiquated laws known as "challenger laws" allow private individuals to contest the eligibility of a voter either before or on Election Day. The growing use of challenger laws in recent years has exposed abuse that suppresses and intimidates eligible voters. This year, True the Vote and other groups have announced large-scale plans to blanket the polls with challengers and poll watchers. It is not yet known whether the current challenger plans will materialize on Election Day. Past efforts have targeted communities of color, students, and voters with disabilities. Shortly before the 2004 presidential election in Ohio, for instance, a local political party planned to station 3,500 challengers in select voting precincts. A court found that under this scheme, 97 percent of first-time voters in majority-black precincts would have encountered challengers at the polls compared to just 14 percent of first-time voters in majority-white precincts. Under scrutiny, the controversial plan was abandoned on Election Day.

That's the bad news. The good news is that, starting in 2012, this overwhelming series of attacks on voting finally came to a halt.

SPENCER V. BLACKWELL
Ohio 2004



Election Reform: How to Fix Voting

On Election Night, President Barack Obama described long voting lines, and declared, "we have to fix that." How? We need basic national standards to minimize long lines at the polls and ensure that every eligible American who takes responsibility to vote is properly registered and can cast a ballot that counts. Voter Registration Modernization is a key reform to achieve these goals.

Introduction

On Election Day 2012, the world's greatest democracy once again showed its power. But Election Day was marred. Citizens who took the responsibility to vote had to stand in lines as long as seven hours. For far too many voters, these delays happened because of problems with the voter registration system. In our national elections, *millions* of eligible citizens arrive at the polls each election only to find their names are not on the voter rolls — often, wrongly deleted.

Today, the greatest barrier to free, fair, and accessible elections is our ramshackle voter registration system. The current system is based on a blizzard of paper records. Rife with errors, it causes disenfranchisement, confusion, bloated rolls, and long lines on Election Day. It is unacceptable for America to rely on an outdated system that prevents millions of eligible voters from casting a ballot that counts.

The United States needs a new paradigm for how we register voters. Fortunately, a nonpartisan, common-sense solution is within our grasp: Congress should enact basic national standards to ensure that every citizen who takes responsibility to register and vote can actually vote. **Voter Registration Modernization (VRM)**, at the heart of such reforms, would help give Americans the election system they deserve.

Voter Registration Modernization requires the government to take responsibility for ensuring that every eligible voter can become and stay a registered voter, using digital technology to pass names of consenting citizens from state agencies to election officials. Citizens would also have the choice to register or update their registration online or at the polls.

VRM would cost less, because computerized records are far easier to keep than today's chaotic piles of paper. And by increasing the accuracy of our rolls, it would also curb the potential for fraud. VRM provides flexible and secure options for voters from all walks of life to get and stay registered: at government agencies, by mail, or online. And it does so in a way that largely

Excerpted from *The Case for Voter Registration Modernization*, January 2013.

eliminates the errors, frustrations, shenanigans, and bureaucratic snafus that plague the current system.

- Up to 50 million eligible American citizens would be added to the rolls permanently.
- States would save money on election administration.
- The accuracy of our voter rolls would be increased, curbing opportunities for fraud.

Our election system should offer the convenience, flexibility, and security that Americans demand from their banks and their retirement accounts. Every American citizen — whether retired in rural America, living in a high-tech city, studying on campus, or stationed in Afghanistan — should have a fair and equal opportunity to get, and stay, registered to vote. When you move, your registration should move with you. If you're an eligible voter you should be a registered voter — period.

Voter Registration Modernization offers a common-sense, non-partisan opportunity to increase both civic participation and election integrity. It embodies the best of American values: choice, freedom, opportunity, and mutual responsibility. Citizens must take the responsibility to vote, but government should do its part by clearing bureaucratic obstacles to the ballot box. Voter Registration Modernization would vastly improve American democracy.

Overview

I. The Problem: A Voter Registration System Plagued With Errors

Our voter registration system has not kept pace with modern America. Still based largely on paper, the system is plagued with errors. These errors create needless barriers to voting, frustration, and long lines at the polls. They also give rise to fears about the system's security. According to the Pew Center on States:

- One in four eligible citizens is not registered to vote.
- One in eight registrations in the United States is invalid or significantly inaccurate.
- One in four voters wrongly believe their registration is automatically updated when they change their address with the Postal Service.

The voter registration system is the largest single obstacle to full participation in American democracy. A 2001 task force chaired by former Presidents Jimmy Carter and Gerald Ford concluded, "The registration laws in force throughout the United States are among the world's most demanding…[and are] one reason why voter turnout in the United States is near the bottom of the developed world." American voters fall off, or are pushed off, the rolls. They fail to meet the specific rules or deadlines of their particular state. And they drift further away from electoral participation.

The scale of the problem is enormous. More than 50 million Americans — about one in four eligible citizens — are not registered. While some choose not to, many more try and fail or drop off the rolls. In 2008, according to Harvard political scientist Stephen Ansolabehere, up to 3 million voters who *thought* they were registered showed up to the polls, only to be turned away or told their votes would not count because of registration problems.

The current system fails to reflect our modern and mobile society. One in six Americans moves every year. Because their registrations do not move with them, voters risk falling off the rolls after a change of address, even within state lines. A study by Harvard's Thomas Patterson noted a full one-third of

unregistered voters were those "who had moved and hadn't re-registered." Yet, even if every one of those voters changed their address with another government agency, that information never filters through to the registration file.

The lack of portability doesn't just harm voters. It also creates duplicate registrations on our rolls, with opportunities for fraud and error. Placing the burden of registering and re-registering on individual citizens makes it harder to keep lists accurate. Election experts and observers of all political stripes note that voter roll errors lead to confusion, delays at the polls, and wrongful exclusion of eligible citizens on Election Day. Others worry that bloated, outdated lists create the potential for fraud and manipulation. "The inability of this paper-based process to keep up with voters as they move or die," the Pew Center found, "can lead to problems with the rolls, including the perception that they lack integrity or could be susceptible to fraud." For example, Pew found that there were approximately 2.75 million people who have registrations in more than one state.

And the costs of maintaining this antiquated system are substantial. Election administrators must process each paper form manually. The volume is massive: Between 2006 and 2008, states received more than 60 million registration forms, most on paper.

According to a Pew study, Oregon alone spent nearly $9 million on paper-based registration in 2008, which translates to $7.67 per registration and $4.11 per registered voter. Were these costs extrapolated nationwide, the United States may have spent around $700 million on 174 million active voter registration records. At a time when states face financial crises, we should not be spending 12 times what Canada spends per voter on registration — getting far inferior results.

Voter registration in 21st century America is a 19th century relic. At a time when smart phones and online banking are commonplace, a paper-based system just does not make sense for voters, and creates headaches for election officials. Perhaps no other government system is so antiquated, so bureaucratic, and so rife with error. Fortunately, there is a better way.

II. The Solution: A Modern System for All Americans

To strengthen voting and modernize registration, we need a fundamental change: More responsibility for voter registration must be shared by the government. It should be the obligation of the government to ensure that all eligible Americans are registered and able to cast a vote on Election Day if they take the responsibility to do so. This would be vastly beneficial for voters and election officials alike. Registration and participation rates will rise, and the rolls will be more accurate.

Here's what Voter Registration Modernization looks like:

- It establishes voluntary, automated registration of all consenting citizens when they interact with a wide range of government agencies.
- It makes registration portable, keeping voters on the rolls even when they move.
- It provides fail-safe procedures to ensure that eligible voters whose information is not on the rolls or not up to date can correct the information online or at the polls.
- It offers states federal funding to make necessary technological upgrades.

The benefits are substantial:

- It boosts election integrity, providing safeguards against hacking and curbing the potential for fraud.
- It could help bring up to 50 million eligible voters into the political process.
- It costs less than the current paper-based system.

For voters, the process would be seamless. Instead of the system acting as an obstacle, the government would seize every opportunity to ensure that consenting citizens are registered whenever they interact with government. The goal is to achieve fuller participation in our democracy — and an accurate system that is easier to administer.

A. Automated Registration

The first step to a modern system is providing for automated, electronic registration in the states. A federal bill should create a system in which all citizens will be offered the opportunity to update their voter information whenever they visit the offices of state or federal government agencies. When an eligible voter gives information — for example, to get a driver's license, receive Social Security benefits, apply for public services, register for classes, or become a naturalized citizen — the transaction will offer each individual the choice to provide this information for registration purposes. No separate process or paper form is required. Once a voter confirms she is an eligible citizen, and wishes to be registered, all the information already given to the agency will double as a voter registration update. Under this new system, registration is still entirely voluntary — no citizen will be added to the rolls without her consent. Local election officials will continue to police applications for eligibility and error — no one will be registered if a local election official determines she is ineligible.

Once a voter consents, the necessary information would then be securely and confidentially transmitted to election officials to add to the statewide voter database. Election officials would send eligible citizens a notice that their registration has been accepted, providing a receipt and confirmation for any electronic transaction. Under this system, every American who would like to be registered will have the opportunity to do so, every voter who thinks she has registered will actually become registered, and every voter will be able to count on registration records that are accurate and error-free.

B. Portable Registration

The second component of Voter Registration Modernization really brings the system into the modern age: portability. Once a voter is on the rolls, she would be permanently registered. Every time she moves, her registration would move with her. As with automated registration, any time a consenting citizen changes her address with a broad set of government agencies, such as state DMVs, the Social Security Administration, or the Post Office, that information would be updated in a voter file. As with any new registration, this update is entirely voluntary, and the system would generate a notice to the voter of any change.

In this day and age, we have the technology to ensure that no voter loses the right to vote just because she moves. Once a citizen is registered, she stays registered. And we can all be confident in voter rolls that are far more accurate and up to date.

C. Online Voter Registration and Correction System

A modern election system offers every citizen the choice to register and make updates online. Federal law should require each state to create a secure and accessible online portal that every eligible voter can access. If the voter is not yet registered, the online system would prompt all information needed to

complete a registration, just as voters currently do on paper. If the online system finds a match, the system would prompt the voter to enter any address change, correction, or missing information, such as party affiliation. Registered voters could also use the portal to view their records and polling locations, making it a full-service, one-stop shop for everything a citizen needs to cast a ballot that counts.

Voters deserve convenience, flexibility, and choice. Consumers routinely shop, bank, change their address, and renew licenses online. And we regularly use online systems to ensure our information is accurate and up to date. Americans should demand no less for the fundamental right to vote.

D. Fail-Safe Registration and Correction to the Voter Rolls

Even under the best and most modern list-building system, some errors are bound to happen, and some voters will fall through the cracks. Any modern registration system must include fail-safe procedures to ensure that eligible citizens can correct mistakes on their voter records at the polls. One highly successful option is same-day registration, which would allow every eligible voter to register and vote on Election Day and during early voting. This ensures that voters do not bear the brunt of government mistakes, and it has significantly boosted turnout in every state that has adopted it. With Voter Registration Modernization, this fail-safe would rarely be used, because the rolls would be far more complete and accurate than today.

No eligible American should lose the right to vote because of errors or omissions on the rolls. These fail-safes provide a corrective to problems with the registration system and ensure that citizens who take the responsibility to vote can do so.

E. Federal Investment in Voter Registration

Voter Registration Modernization requires a national mandate to ensure basic national standards for our registration system and to protect every American's right to vote. Congress should provide sufficient national resources to help states complete the transition to a modern system. Much of the work is already done: With federal support, all states now have (or will soon have) the primary technological building block of a modern system — a computerized voter registration database. Federal support for modernization should cover all elements of the reform, including upgrades for automated and portable registration, a full-service online voter portal, and fail-safe procedures at the polling place. And it should cover ongoing maintenance and support for new technologies.

A small investment of resources will yield ongoing savings to the states that will outstrip the costs in a very short time. Rarely are such dramatic benefits available from such a modest investment in our democracy.

III. The Benefits: Modernized Voter Systems Work, and Work Well

Elements of Voter Registration Modernization are already in place throughout the nation. They have produced dramatic benefits for voters, election officials, and the system itself.

Twenty-two states have already automated the transmission of voter registrations at state DMVs. In many of these states, the entire process is paperless, so that all information election officials need is transmitted electronically and uploaded into their databases, saving personnel costs and preventing human error. Eight states have systems of portable registration that allow voters who move to cast valid ballots even if they do not update their records before Election Day. Ten states have enacted laws providing for Election Day registration, allowing eligible citizens to register or update their records on Election Day. Sixteen

states now offer online registration or will soon do so. And most states (34) allow citizens to access their registration information online.

Combined, these states account for the vast majority of the U.S. population. These systems already serve more than half of the country — registering both Republicans and Democrats, and serving voters living in urban and rural areas alike. Other major democracies also provide encouraging examples of what happens when government assumes the responsibility of getting and keeping citizens on the rolls. Canada, which shares our decentralized federal system, provides the most relevant analog: 93 percent of eligible citizens are registered to vote, compared to 68 percent of Americans as of the last Census report. Great Britain, France, Australia, and other democracies also enlist the government to ensure that eligible citizens are registered.

A. Increased Registration Rates

VRM could add millions of eligible Americans to the rolls. Existing models in the states demonstrate that each element of VRM — automated and portable registration, same-day registration, and online access — increases registration rates.

Automating the transfer of digital voter data at government agencies at least doubles registration rates at those agencies. For example, Kansas and Washington began automatically sending information from the DMV to election officials in 2008. Within a year, DMV registrations nearly doubled. Rhode Island and South Dakota produced even more dramatic results. The Ocean State automated its system in August 2005. Previously, it had averaged 906 registrations per month. In the first full year of the automated system, registrations jumped to a monthly average of 2,004 — a 221 percent increase. In South Dakota, DMV registrations grew at least seven-fold from the pre-automation year of 2003 to the post-automation year of 2008.

Making registration portable produces similar benefits. Studies by political scientist Michael McDonald determined that if we allowed registration to follow voters when they move, turnout would increase by as many as 2 million.

A robust VRM plan also includes full same-day voter registration, which has markedly boosted turnout. Because some states have offered the choice of same-day registration for nearly 40 years, its benefits are clear and well-documented. States with same-day registration have consistently seen higher turnout than states without: Same-day registration states in 2004 averaged a 12 percent higher turnout rate than non-same-day registration states, and 7 percent higher turnout in 2008. It also provides a fail-safe for voters who discover errors on their records — they can simply re-register and cast a full ballot at the polls.

Finally, letting citizens register online increases access and expands the electorate. Online registration is critically important for reaching 18-24 year-olds, who typically sign up at substantially lower rates than older adults. Arizona began online registration in 2002. Registration rates for 18-24 year-olds doubled from 29 percent to 48 percent in 2004, and 53 percent in 2008. In California, where a new online system preceded an all-time high voter registration rate in the state, those who signed up online had the most diverse party affiliation of any group of registrants.

Increasing registration rates and improving the accuracy of records will help boost civic participation. A citizen who is not registered — or whose name has fallen off the voter rolls — cannot participate in elections. Campaigns and community groups typically reach out to newly registered voters. Such outreach has been proven to increase civic participation. Improving the process also protects against wrongful disenfranchisement. We know 2 to 3 million Americans tried to vote in the 2008 presidential election but could not due to registration problems. Under VRM, every single one of those millions of voters who showed up to the polls would have been able to cast a ballot that counts.

B. Accuracy Increases

Voter Registration Modernization makes voter rolls more accurate and current. Digital systems vastly improve on the ramshackle paper process that has created 24 million flawed registrations.

The benefits happen for two key reasons. First, automated processes leave less room for human error — whether due to bad handwriting, the mishandling of paper forms, or manual data entry. Second, with voters constantly sending more real-time information and address changes to the system, outdated or duplicate registration records can be found and eliminated.

State officials found that the accuracy of their rolls has gone up significantly since taking steps to modernize. In 2009, officials in Maricopa County, Arizona, took a survey of incomplete or incorrect registration forms. Even though only 15.5 percent of registration was done through paper forms, more than half of those containing incomplete, inaccurate, or illegible information were paper forms. This means that paper registrations are *five times* more likely to have errors than electronic files. Craig Stender, who formerly worked in the Arizona Secretary of State's office on information technology, said that, as a result of automation, his office received "far, far fewer calls" in 2008 than it had in previous presidential election years. Every state to have taken key steps to modernize has reported benefits for voters and election processes alike.

The benefits of more accurate rolls are hard to overstate. Accurate rolls help election officials administer elections with confidence, and critically, prevent unnecessary disenfranchisement at the polls. Chris Nelson, South Dakota's former secretary of state, said he believed automated DMV registration helped reduce the number of provisional ballots cast. Additionally, officials report that automation has reduced the number of people who show up on Election Day to find their names are not on the rolls.

Finally, increasing accuracy means decreasing opportunities for fraud in our election system. With voter rolls constantly updated by public agencies, there is no need for partisan election officials to undertake controversial purges. Further, getting rid of bloated voter lists that may contain deceased or ineligible individuals will curb fears of the potential for election fraud.

C. States Save Money

Modernizing also cuts costs. Election officials say it takes half the time or less to process electronic forms instead of paper. In addition, digital registration saves on printing and mailing costs, and allows election officials to automate voter verification processes like address confirmation. Real-time updates from voters also allow elections officials to create and review records on a regular timetable — in stark contrast to the tidal wave of paper forms that is now commonplace in the weeks before an election. All of these benefits lead to more sensible election administration, reduced personnel costs, and savings on printing, mailing, and lost paper.

Maricopa County, Arizona's modernized registration system, which includes fully-automated transmission of voter registration at its DMVs, has produced significant cost savings. The county, with a population larger than 23 states, spends only 3 cents to process an electronic registration, compared with 83 cents for a paper form. The county estimates it saved more than $450,000 in registration costs in 2008 alone. Other states are seeing similar savings — immediately. Delaware saved more than $200,000 in the first year it fully automated DMV registration. Washington's State Board of Elections saved more than $126,000 in 2008 alone, and its counties saved even more.

Start-up costs are relatively small. It typically takes a state one year to implement a paperless system. It cost Arizona $130,000. Washington, which has an unusually decentralized voter database, spent a total of $279,000, including all costs at the county-level. Oregon spent $200,000 for online registration — the same amount it formerly spent in one election cycle to print paper forms. These are costs that can and should be offset by modest grants from the federal government.

Each element of Voter Registration Modernization already has begun to work for more than half of the country. VRM increases registration rates, cuts costs, and increases accuracy. It is time for the government to take the responsibility to implement a fair, cost-saving, and accurate system that benefits *all* American voters.

IV. Congress Can Act

The good news is that Congress already has a clear path forward to Voter Registration Modernization. VRM is the core policy reform of the Voter Empowerment Act, introduced by Reps. John Lewis (D-Ga.), James Clyburn (D-S.C.), and Steny Hoyer (D-Md.) in the House, and Sen. Kirsten Gillibrand (D-N.Y.) in the Senate. The legislation is a comprehensive approach to bringing the voter system into the 21st century.

States that have modernized their systems in the past decade did so with bipartisan and non-partisan support, and politicians of all stripes have sung its praises. Congress should follow in these footsteps and act — now — to offer all eligible American voters the election system they deserve. The Voter Empowerment Act offers a common-sense opportunity to improve our elections, increasing both voter participation and the integrity of our election system.

The Human Cost of a Diminished Democracy

Wendy Weiser

This lecture, delivered at Pitzer College in Claremont, California, puts into context the human dimension and history of the voting fights that still raged in 2012.

My topic for today is the battle over voting rights in 2012. I will start by telling you about one casualty of that battle — Jill Cicciarelli.

Jill Cicciarelli is a high school civics teacher in New Smyrna Beach, Florida whose job includes preparing students for civic life. Last fall, Ms. Cicciarelli was notified that her name had been forwarded to the secretary of state for violating Florida's election laws, meaning she could face $1,000 in fines and other penalties. Her offense: setting up a voter registration table at her school that helped about 50 eligible students register to vote.

What Ms. Cicciarelli did last fall was the same thing she had been doing for years, and something I hope many of you will consider doing as well. She told the *Daytona Beach News Journal*, "I just want them to be participating in our democracy. The more participation we have, the stronger our democracy will be."

But what she didn't know was that Florida had just passed a law requiring anyone who helps others register to vote to jump through a series of hoops or face hefty fines and other legal consequences.

To comply with this new law, even *before* setting up a voter registration table in the school auditorium, Ms. Cicciarelli would have had to register online with the state as a "third party voter registration organization," and to sign an affidavit warning her about all the possible felonies involved in voter registration. She would also have had to ensure that each of the students who were helping her with the drive signed that affidavit, so that she could submit their affidavits to the state. She would then have had to wait for the state to assign her a special number. Once she got the number, that number would have had to be stamped or written on all the forms she used for her drive.

At that point, she could have set up her table to help students register to vote. But that's not all. She would also have had to track the forms that she and her student volunteers handed out so that she could report to the state each

Weiser delivered the lecture at Pitzer College on May 1, 2012.

month what happened to those forms, whether or not they were used for voter registration. And after helping students fill out registration forms, she would have had to ensure that each form reached state election officials within 48 hours, no matter how far in advance it was of an election. If she was even a minute late, she would face a $50 fine per form.

This is hardly a prescription for encouraging civic activity and voting. As you might imagine, the effect of this law has been just the opposite. It has caused the Florida League of Women Voters, which has been registering voters for over 70 years, and other groups across the state to shut down their voter registration drives completely.

The new rules seem to serve no practical purpose other than to scare people away from voter registration drives.

And for what? What important public purpose does this law serve? The legislative history mentioned only a desire to stop groups like ACORN from submitting fake voter registrations in the name of Mickey Mouse. But it doesn't explain how that goal could be advanced in the least by the law's actual requirements. Pre-registration, reporting, and 48-hour turnaround rules in fact do nothing to stop Mickey Mouse from registering; pre-existing laws do.

Government lawyers claim that the law's reporting requirements enable election officials to track down people who turn in forms late. But they have not been able to identify a *single* instance under the old rules in which a voter was injured by a form being turned in late. In short, the new rules seem to serve no practical purpose other than to scare people away from voter registration drives.

And that is a travesty. In Florida, like in many other states, voter registration drives have played an extremely important role in getting people registered so they can vote. In both 2004 and 2008, hundreds of thousands of Florida voters registered through drives. Now many of those drives have ground to a halt and many Floridians have lost a key opportunity to sign up. African-American and Latino citizens will be especially hurt; in both Florida and nationally, they register through drives at twice the rate as whites.

This is the natural and predictable effect of Florida's new voting law. It is only one of a massive wave of new laws enacted since last January that will make it harder for eligible citizens to vote. ...

For the past two years, while most people were focused on the country's economic woes, state legislators across the country were pushing a different agenda — an agenda to make it harder to vote.

To some, this might not sound like it's such a big deal — after all, most people can still participate under these rules — but it is. These kinds of restrictions keep people from voting. It's not a majority, but it's a sizable number — certainly significant enough to make the difference in our era of close elections. And the people these laws keep from voting are mostly those who have the least political power in our society, and for whom the vote is not only critical, but also their primary means of political expression. This is the vote — the main currency of democracy. It matters....

If you want to find another period in which this many new laws were passed restricting voting, you have to go back more than a century — to the post-Reconstruction era, when Southern states passed a host of Jim Crow voting laws and Northern states targeted immigrants and the poor. There are stark differences between our time and that time, but there are similarities too, including a pile of laws adding new hurdles that a potential voter has to jump over in order to participate in elections.

This is a legislative movement of historic proportions. So, why is it happening now? What accounts for these new laws?

The most immediate reason for this wave of new voting laws is the recent change in partisan control in statehouses.

As a general rule, Republicans tend to favor tighter restrictions on voting, and Democrats tend to oppose them. This is in part due to ideology; and it is also the case that the groups who are disproportionately harmed by these laws tend to lean Democratic. (Neither side is made up of saints; both can be expected to act in their perceived electoral self-interest.)

In the 2010 elections, Republicans picked up 675 state legislative seats across the country. They gained control of both chambers in 26 states (up from 14); and picked up five governorships, increasing their total to 29.

This electoral sweep put Republicans in a position where they could advance a legislative agenda to restrict voting. And that's just what they did. In 15 of the states to have passed laws making it harder to vote since last year, both houses and the governor's office have been under Republican control.

In the two states where Democrats added hurdles to the voting process, the new laws were far less restrictive. Rhode Island, for example, passed a photo ID law for voting, but it accepts any form of photo ID, whether or not it is state-issued, and if you don't have one, the state will still count your vote after checking your signature.

While Republican electoral success made a difference, it is not the whole story. After all, the Republicans swept the statehouses in 1994, winning control of both legislative chambers in 19 states and 30 governorships. They kept roughly this level of power for more than a decade, until Democrats made gains in 2006. But the Republicans' electoral success in 1994 was not accompanied by significant attempts to roll back voting rights.

One major difference between 1994 and 2010 are the demographic changes that occurred across the country in the interim.

In the decade between 1990 and 2000, for example, the Hispanic population grew by 58 percent. From 2000 to 2010, it increased by another 45 percent, rising to 14 percent of the population overall.

This population growth was met with cutbacks to voting rights that disproportionately affect Hispanics. Of the 12 states identified by the Pew Hispanic Center as having had the largest Hispanic population growth over the past decade, seven have passed (or are about to pass) laws restricting voting this past year (and one more passed a law that was vetoed). Several of those states also passed controversial anti-immigrant laws. Three more states that have among the highest Hispanic populations in the country also passed restrictive laws (Texas, Florida, and Georgia).

The people these laws keep from voting are mostly those who have the least political power in our society, and for whom the vote is not only critical, but also their primary means of political expression.

There is a similar pattern with respect to black voters. Although the African-American population did not grow at a faster pace than the rest of the population, it did dramatically increase its voter participation rates, especially in the 2008 elections. The 2008 election almost eliminated the longstanding racial participation gap, with 65 percent of blacks participating, compared to 66 percent of whites. Statewide, the greatest increases were in Southern states with large black populations: Both Georgia and South Carolina, for example, saw black participation increase by more than 13 percent.

These increased black participation rates were also met with new voting restrictions. Of the 10 states with the highest black turnout in 2008, seven passed or are on the verge of passing restrictive voting laws since last year (and one more passed a law that was vetoed). States with a history of racial discrimination were also more likely to pass new voting restrictions that disproportionately affect African Americans. Of the nine states that are covered by the Voting Rights Act because of a history of racial discrimination in voting, five saw restrictive voting laws pass this year, one more is about to pass such a law, and still one more passed restrictive laws a few years ago.

Another major difference between 1994 and 2010 is that 2010 came after the 2000 presidential election.

Many of you may be too young to remember the neck-and-neck race between George W. Bush and Al Gore, which turned on a few hundred disputed votes in Florida. The drama of that election, its recount, and the Supreme Court decision that ultimately decided the race spawned not only movies but also a close examination of the mechanics of our election system.

And what the nation found wasn't pretty. The system was rife with administrative errors, and it was susceptible to manipulation for partisan ends. This wasn't only about vote-counting practices. For example, a faulty effort in Florida to purge the voter rolls of people with felony convictions instead removed thousands of eligible, largely African-American voters, far more than the 537 vote margin of victory in that election.

Florida revealed the messy underside of democracy, butterfly ballots, hanging chads, and all. It also taught the nation that the rules of election administration can make a difference to election outcomes — especially in our era of close races — and that those rules leave a lot of room for partisan maneuvering.

This opened the door to the politicization, the strategic manipulation of election rules. After all, in America, unlike in other democracies, the rules of the game are largely set by partisans — by legislators who write and run under state election laws, and by chief election officials, most of whom are also elected, who administer those laws. And when it comes to a close national election, it only takes one state to throw things off.

Once that cat is out of the bag, it is very hard to put it back in.

The potential for mischief did not immediately result in widespread changes to election rules. That took time.

First, state legislators who were focused on different issues needed an impetus to play with election rules. For many, that came in the form of an act of Congress in 2002. In response to the Florida 2000 election fiasco, Congress passed the Help America Vote Act to upgrade our election technology and to help ensure that eligible voters are no longer cut out because of administrative errors.

To comply with this new federal law, every state legislature in the country had to revise its own election laws in the run up to both the 2004 and 2006 elections. What this meant in practical terms was that the rules of election administration in every state were now on the table, part of the legislative agenda. When state legislatures opened up their election codes to scrutiny, they found places where those codes could be tweaked to advance partisan agendas. Ironically, a law that was intended to prevent voter disenfranchisement also provided an opportunity for partisans to try to accomplish just the opposite.

And so we started seeing state legislative and administrative efforts to restrict voting well before 2011. In the run up to the 2006 election, for example, more than half the states introduced photo ID requirements for voting, and three passed laws, though one was struck down in court. Another state imposed a proof of citizenship requirement for registering to vote, and a handful more put in place technical hurdles that made it harder for new voters to get on the rolls. The debates over these efforts took on a sharply partisan tone, with both Democrats and Republicans accusing the others of trying to undermine the integrity of our elections. Only a few of these efforts resulted in new laws, and only a few of those new laws stood up in court. But the movement to restrict voting was clearly already underway.

Ironically, a law that was intended to prevent voter disenfranchisement also provided an opportunity for partisans to try to accomplish just the opposite.

In a significant respect, then, the recent movement to restrict voting is the realization of the lesson learned from Florida, and the maturation of the decade-long trend of increasing politicization of the rules of election administration.

This politicization didn't only infect state legislatures and election administrators. It also infected the highest ranks of law enforcement — the U.S. Department of Justice. The 2007 scandal over the firing of nine U.S. attorneys, which ultimately led to the resignation of the attorney general, revolved around the U.S. attorneys' refusal to bring baseless, politically motivated prosecutions for voter fraud. That scandal also exposed other ways in which the Department of Justice's voting rights enforcement arm had become improperly politicized and used to restrict voting.

While the movement to restrict voting was simmering across the country by 2006, a few factors brought this simmer to a boil. I have already discussed the changing demographics that were so starkly visible in the 2008 elections, as well as the Republican state electoral victories in 2010.

Another factor is the Supreme Court.

Until recently, the courts provided a strong deterrent to laws and policies that restrict voting. The Supreme Court has long held that the Constitution

protects the fundamental right to vote, even if it is not explicitly mentioned in the Constitution. And courts also enforce a variety of federal statutes that protect voters, the most important of which is the Voting Rights Act of 1965. Those legal protections have long been presumed to put significant constraints on how much states could regulate access to the ballot box.

But three fairly recent court decisions have undermined that presumption.

The first is the Supreme Court's 2000 decision in *Bush v. Gore* to stop Florida's recount and effectively call the election for George Bush. As a technical matter, the decision was actually an affirmation of voters' rights to equal treatment. But the decision was highly unusual — so much so that the Court took the unprecedented step of saying that the principles it was using to decide the case applied only to that case and could not be cited in any other decision. As a result, the decision fueled the belief — at least among Gore supporters — that the Court too would put partisan politics above judicial principle.

The recent movement to restrict voting is the realization of the lesson learned from Florida, and the maturation of the decade-long trend of increasing politicization of the rules of election administration.

But while *Bush v. Gore* may have sowed cynicism and mistrust in the Court, it did not weaken voting rights. The case that did that was a 2007 case called *Crawford v. Marion County Election Board.* In *Crawford*, the Supreme Court upheld Indiana's new photo ID requirement for voting against a constitutional attack. As a technical matter, the decision was pretty narrow. But it included sweeping statements that made clear that the Court was not interested in second-guessing the states' efforts to prevent voter fraud, even if the fraud was non-existent. This was the first time since 1974 that the Supreme Court had considered a law making it harder to vote, and a significant shift in its approach to these issues. The decision sent a strong signal that the Constitution would not be a major obstacle to laws restricting voting.

And in fact, ever since then, states have used this decision to try to justify a range of new voting regulations — certainly photo ID requirements, even ones far more restrictive than Indiana's, but also others, like laws cracking down on voter registration drives.

The third decision to undermine voting right protections came in 2009, in a case commonly called *NAMUDNO*. That case challenged the constitutionality of a central provision of the Voting Rights Act of 1965, a law that is widely acknowledged as the most successful piece of civil rights legislation in U.S. history. The provision at issue — called the preclearance provision — has been extraordinarily successful in dismantling Jim Crow and preventing discriminatory voting laws in states with a demonstrated history of racial discrimination in voting. In the 2009 *NAMUDNO* case, the Supreme Court upheld that core provision, at least temporarily, but it also suggested that the provision would not fare as well in the future.

And so, while the Indiana case signaled that the Constitution might not stand as a barrier to laws that burdened voting rights, the *NAMUDNO* case signaled that the Voting Rights Act might no longer be a barrier to voting laws that detrimentally affect minorities.

The upshot is that states have become much bolder in passing laws restricting voting, including laws that disproportionately harm minorities.

Another result is that states covered by the Voting Rights Act have launched an all-out legal attack against that Act. Over the past two years, while states across the country were passing laws making it harder to vote, six states and localities brought cases to invalidate the core requirement of the Voting Rights Act, one of the few tools citizens have to fight back against discriminatory voting laws.

To get a sense of what a radical change this is, only six years ago, in 2006, Congress voted by overwhelming bipartisan majorities to renew the Voting Rights Act for 25 more years, saying that the law was still needed to prevent discrimination in the voting system. The vote was unanimous in the Senate and 290-33 in the House, and President George W. Bush signed the Act into law.

But the discourse on voting has dramatically deteriorated since 2006. It has deteriorated so quickly that even though the state of Arizona wrote a brief in 2009 urging the Supreme Court to uphold the Voting Rights Act, only two years later it filed a lawsuit urging the courts to strike it down. (Arizona recently dropped this suit, but other states press on.)

The discourse has deteriorated so much that Texas Gov. Rick Perry was able to draw applause at a presidential primary debate on Martin Luther King Day when he praised South Carolina for going to "war with the federal government" by threatening to sue to block the Voting Rights Act.

And the law that previously seemed inviolate — the Voting Rights Act — now appears to stand on shaky legal ground. If it is invalidated, that could be the big historic legacy of this movement.

We are marching backward from Selma in more ways than one.

So what will be the historic legacy of this moment? Will this be an era of contracting voting rights, a triumph of vote suppression?

I don't think so....

The problem with our democracy is not too much participation. It is too little.

Only 65 percent of Americans participate even in our highest turnout elections. And while other major democracies boast voter registration rates of 90 to 95 percent, in America only 70 to 75 percent of eligible citizens are registered to vote. Voter confidence in the system has plummeted not only as a result of perceived partisan manipulation of the rules of elections, but also because of the rising tide of special interest money flooding our elections. Americans are concerned that their voices are being drowned out.

We can and should do better. Instead of making it harder for Americans to vote, we should be strengthening our election system so that every eligible citizen can participate and have confidence in the system. And to counter the flood of special interest money, we need a flood of voters.

One reform that will go a long way toward accomplishing those ends, a reform that elicits bipartisan support, is to modernize our ramshackle voter registration system. That could bring as many as 65 million voters into the system, reduce errors, prevent fraud and manipulation, and save millions of dollars.

To meet the challenge raised by this wave of restrictive voting laws, we need strong national protections for voting — both from the courts and from Congress. And to ensure that we get these protections, we need every American to stand up for their right to vote.

As Jill Cicciarella, the high school civics teacher in Florida so aptly said, "The more participation we have, the stronger our democracy will be."

The First Amendment and the Right to Register Voters

Lee Rowland

In 2011, Florida passed a new state law severely limiting the ability of community-based groups to register voters. The League of Women Voters of Florida found the rules so onerous that it suspended its registration efforts for the first time in 72 years. The Brennan Center, representing the League, Rock the Vote, and the Florida Public Interest Research Group, successfully challenged the law in court. Below, an edited excerpt of Counsel Lee Rowland's oral argument in the Tallahassee courtroom before U.S. District Judge Robert Hinkle. In May 2012, Judge Hinkle ruled that the restrictions violated the U.S. Constitution and federal law, effectively overturning the new constraints.

MS. ROWLAND: What is at stake in this case is no less than whether plaintiffs could interact with potential voters, which is core protected First Amendment activity, without running into a maze of burdensome and vague laws that lead to onerous penalties.

I would like to highlight three issues that are core to the plaintiffs' constitutional claims under the First and Fourteenth Amendments to you.

First, the regulations here are fundamentally different from any that have been examined by any court within this circuit. And they are very burdensome, which requires close scrutiny under the Anderson test, given that they touch upon constitutionally protected activity.

Second, that the state has offered no justification to show how this law furthers what, under the Anderson test, are the precise interests furthered by this law. I would submit to you that not only has the state not identified any precise interests that are furthered by the text of the law before the court, but there has not even been an argument made that the law has been tailored in any way to meet those stated interests, which, again, is required under the Anderson test.

Finally, I would like to touch briefly on the fact that the evidence thus far before the court underscores the fact that vagueness permeates this statute in both the core ways that a law can be unconstitutionally vague. By failing to provide fair notice to our clients about what conduct is prohibited and how to comply with this law; and that there are simply no standards in place here to govern the enforcement of this law in a manner that prohibits arbitrary or discriminatory enforcement, [poses] a grave risk .

To challenge the law, the Brennan Center worked alongside attorneys at Paul, Weiss, Rifkind, Wharton & Garrison led by partners Robert Atkins and Alex Young K. Oh and counsel Farrah Berse.

All of these constitutional harms have led to an unlawful chill on the constitutionally-protected activity that is engaged in by our clients. As Your Honor is surely aware, two of our clients have imposed moratorium on their voter registration activity. We also have an affidavit from a nonparty to the case, Cynthia Slater, the president of the Volusia County NAACP, who is attempting to comply with this law and has set forth a very compelling story about how this law is having, as she put it, "devastating impacts on their ability to interact with potential voters and help them get onto the voter registration roll."

[Rowland then discussed the new law's requirement of submission of completed registration forms to the state within 48 hours. Failure to comply could subject volunteers to substantial fines.]

The elections division has been saddled with an unworkable law.

We have unfortunately now swung back to the regime where strict liability is possible, and that is a very real concern for clients particularly in Coastal Florida where weather, severe weather, is common. You know, this is not a hypothetical concern. This is something that impacts that.

And when they are returning forms under what is now literally a ticking time clock that is measured not by hours but by minutes, the possibility that that can be derailed by severe weather and then be looking at a serious fine and damage to the reputation of the organization that you care deeply about, have given your time to volunteer for, has chilled these folks from participating and will continue to do so.

[Next Rowland critiqued the form that all those seeking to register voters were required to submit to the state for approval.]

In addition, Your Honor was right to highlight some of the language that appears on [the form], which is now the first point of contact that any volunteer who wants to sit down at a table and help register voters, offer to collect and submit a form for them, that first point of contact is that form. It says the word "felony" a handful of times. It is chilling. It is intimidating. All of the clients' affidavits, as well as the nonparty affidavit from [the NAACP's] Slater, specifically highlight the form as something that has caused intimidation among their volunteers.

And what is almost as striking about that form and what it says is what that form doesn't say. Notably, that form says absolutely nothing about the new regulations at issue here....There is no information or notice given to someone as to what they are signing up for. It literally just cherry-picks the most severe felony penalty that's available under the law for the crime of false registration, which, as Your Honor noted, is glossed in such a way to make it seem like unintentional conduct could lead to felony penalties. And what is perhaps even — what emphasizes the reasonableness of our clients' fear about that form is that [Gisela] Salas, [former director of Florida's Division of Elections] when deposed herself, indicated that she was not sure if the unintentional submission of false registrations might subject someone to felony penalties.

So, again, our clients should not have to engage legal counsel before they fill out a form to sit down and donate an hour of their time to an organization to which they want to associate.

[Rowland and Hinkle next discussed whether he should consider the Florida Division of Elections' regulations stemming from the new law and whether they should be seen as bringing the necessary specificity to the statute.]

JUDGE HINKLE: I guess what I'm trying to get you to tell me is, if there is a reason why I shouldn't take the rules as fully setting forth the law on the subject, or tell me why I shouldn't...

MS. ROWLAND: I think the case law is pretty clear, Your Honor, that deference to an agency's interpretation, particularly in this vagueness context, is generally appropriate. [But h]ere, there are issues with that because the interpretations have not been consistent... [T]he elections division has been saddled with an unworkable law. They are doing their best to give it some gloss that makes it workable. They themselves admit that — the officer who's charged with the implementation of this law admits that there is still a total lack of clarity on several of these provisions. I think what all of that goes to is the lack of tailoring here; that this is, frankly, not a serious law; that this was not a law that was drafted with an eye toward [the] specifics of implementation; how it would impact these groups; and how it [would] meet a state interest.

Ignoring the Real Threat of Fraud

Lawrence Norden

When states moved to curb voting rights, they insisted it was to prevent "voter fraud." But the new rules would do little to address the actual challenges to election integrity.

Why are states with new voting restrictions so unconcerned about fraud that is the real threat to our elections?

Over the past 18 months, in a bitterly partisan environment, several states have passed new restrictions on access to voting. They often say they did so to prevent fraud. But something doesn't add up. The very states that passed the most restrictive laws have also failed to take basic security steps recommended by experts to prevent fraud — steps that nearly every other state in the country has taken.

What does it say about states that pass restrictive voting laws to "prevent fraud," when they ignore the most serious threats and refuse to take the most basic safety measures — particularly when these measures would disenfranchise no one?

Let's look at the most controversial (and common) of the new voting laws. Nine states have passed restrictive voter ID requirements that could be in effect this November, depending on the outcome of legal challenges. Under these laws, if a voter cannot produce a specified type of government-issued photo identification — most commonly, a driver's license — his or her vote will not count. Period.

Because millions of Americans do not have the kind of ID required by these laws, the Brennan Center for Justice and others have objected to them. We argue that there should be some way for people who don't have the ID required by these laws to verify who they are and cast a ballot that will count.

Many have argued that the new ID laws have nothing to do with preventing fraud. Instead, they explain, these laws are mere manipulations by politicians, who are trying to prevent people who may not support them — in particular the elderly, the poor, and racial minorities — from voting. This viewpoint got a strong validation when the Pennsylvania Speaker of the House Mike Turzai, a proponent of the state's new voter ID law, said it would "allow Gov. Romney to win the state."

But does that mean these nine states aren't also concerned about fraud? The best way to find out is to look at their record to combat potential fraud in elections generally. Several studies have shown that insecure voting machines are among the most serious risks to the integrity of our elections. There is wide agreement among computer scientists and security experts who have studied elections that paperless touchscreen voting machines are especially insecure.

A non-partisan task force of the nation's leading experts convened by the Brennan Center in 2005 identified 35 potential attacks against such

This article appeared in *Politico* on August 17, 2012.

machines, each of which had the potential to change the outcome of a major statewide election.

An overwhelming 40 states have responded to this evidence by taking the most basic security measure they could: They moved toward requiring voter-verified paper records for every voting machine. These paper records can be used to make sure that voting machines were not hacked or manipulated.

And what of the nine states that have passed voter ID laws which could be in effect this November? The states that claim to be so concerned about the integrity of our elections? Eight use paperless touch screen voting machines. One, Tennessee, passed a law to move to paper records four years ago, but has failed to implement it. A majority of its machines are still paperless.

So, on one side, we have 80 percent of the states (plus D.C.) that have adopted a simple measure to prevent potentially calamitous fraud or error on their voting machines. On the other side, we have the vast majority of states that have ignored this very real threat, while adopting restrictive voter ID laws that could prevent millions of people from voting.

What does it say about states that pass restrictive voting laws to "prevent fraud," when they ignore the most serious threats and refuse to take the most basic safety measures — particularly when these measures would disenfranchise no one?

What does it say about their "election integrity" efforts, when the only actions they take are deemed of little security value by independent experts, but will keep many who have voted their whole lives from casting a ballot this November?

The most obvious answer is: Nothing good.

Is the Next Florida Around the Corner?

Richard L. Hasen

Twelve years after Bush v. Gore, *are we in store for another national election fiasco? "The Voting Wars" author Richard Hasen argues that in many ways, partisan electoral chicanery and incompetence have only gotten worse since 2000, undermining voter confidence — and ultimately, American democracy.*

Let me start off with a hypothetical. I want you to imagine a very close Election Day contest between the Democrat and the Republican for president. It shouldn't be too hard.

And let's say that the election comes down to the state of Wisconsin and its 10 electoral votes. Wisconsin has been the scene of some nasty, protracted partisan struggles over the last few years, over rules related to labor unions and there have been a number of very close elections. Throughout the night, we have election results coming in from different counties, from precincts within counties. In this election for president in Wisconsin, the votes are seesawing back and forth between the Democrat and the Republican. About 3 a.m., the Democrat is ahead by 200 votes.

At this point, Republicans start complaining about voter fraud. John Fund, formerly of *The Wall Street Journal*, goes on television and talks about what he calls "bizarre anomalies" with the vote totals in Dane County, which is where the University of Wisconsin at Madison is located, as well as a pattern of fraud in Milwaukee, not coincidentally home to many Democratic poor and minority voters. The voter fraud claim gets picked up by blogs across the country and starts to make it into the conservative media. The next morning Kathy Nickolaus, an election official in Waukesha County, holds a press conference to explain she had forgotten to include the 15,000 votes from the city of Brookfield in her totals. When you add in the votes from the city of Brookfield, it turns out that the Republican is up by 7,000 votes.

Now it's the Democrats' turn to complain. The liberal blog *Think Progress* writes, "Critics are saying there are only two possible explanations for this bizarre development — foul play or incompetence. The URL of the blog post is a little more blunt: "Kathy Nickolaus: Crook or idiot?" Turns out that Kathy Nickolaus used to work for the Republican Party in the legislature, and she is a Republican election official.

The story you have just heard is 100 percent true, only the election has been changed. This was an election between incumbent Republican David Prosser

Richard Hasen delivered remarks at a book talk at the Center on September 11, 2012.

and Democrat Joanne Kloppenburg for a state Supreme Court justice seat open last summer. The race was very nasty. Eventually, the government accountability board determined there was no fraud, but there was incompetence on the part of the election officials.

And so, I worry about what happens when the next presidential election is decided like this. Twelve years after *Bush v. Gore*, could Florida 2000 happen again? And would the next meltdown be worse?

I'm going to argue that thanks to social media, if we do have another election meltdown, it would actually be much worse than we saw in 2000. So the voting wars that we have witnessed in places like Russia and Egypt have come to the United States, and the question is, how are things going to go should we have another meltdown?

Thanks to social media, if we do have another election meltdown, it would actually be much worse than we saw in 2000.

The book starts in Florida in 2000. Some of you are old enough to remember Katherine Harris, the Republican Secretary of State for Florida. She was also the co-chair of Bush's campaign committee, and it's worth pausing at this point to note that we're the only country in a mature democracy where the chief election officer of a state can also be the top chair of a committee to elect one of the candidates running. And the partisanship goes up and down the line in Florida.

It wasn't just Katherine Harris; it was election supervisors who were Democrats and Republicans. They reached different decisions on whether to purge voters based on whether those voters happened to be Democrats or Republicans. It extends to the county canvassing boards. How many votes counted for Gore depended on whether it was a Democrat or Republican doing the counting? And of course we had problems — this is a subject near and dear to people here at the Brennan Center — with ballot design, and with the so-called "butterfly ballot," which caused many Democrats to mistakenly vote twice or cast a vote for Pat Buchanan rather than for Al Gore.

What we saw in Florida was a problem with partisanship, with localism, with technology, and with what everybody agrees was an out of control court, subverting the democratic process. I think everybody agrees on that. What they don't agree on is whether the out of control court was the Florida Supreme Court or the U.S. Supreme Court because we had courts dividing along ideological or party lines as well.

What's happened since 2000? In many ways, things have gotten worse. And the controversy has had an effect on voter confidence. In 1996, before *Bush v. Gore*, about 10 percent of the people thought the electoral process was very or somewhat unfair. Immediately after 2000, that spiked: 44 percent of Democrats thought the system somewhat or very unfair and so did 25 percent of Republicans....

The message is simple: If my guy wins, the election was fair and square; if your guy wins, it must have been fraud or incompetence. Here are other troubling numbers from Pew: When whites are asked how confident they are that their votes will be accurately counted, 63 percent said they were. Only 30 percent of African-Americans were confident. Eight percent of whites said they were not confident at all compared with 29 percent of African-Americans. So confidence in the process divides by race.

Of course, the big fight, the one that we see the most in the news, is the fight over voter identification. Onerous voter identification laws started being put in place in the middle of the last decade and really picked up after 2008 when the U.S. Supreme Court rejected a constitutional challenge to Indiana's law.

Where did it come from? Why do we think there's such a problem with voter fraud that we need to have these new identification laws? In the book, I trace the history of a group called the American Center for Voting Rights, which literally sprang up from nothing two days before a hearing on what became the Help America Vote Act. The purpose of this group appeared to be to claim that voter fraud was rampant, and it required passing the new laws which would make it harder for people to register to vote and to vote. A prominent Washington lawyer named Thor Hearne started the group. He is now with Arent Fox; at the time he worked with a firm in Missouri. He has since wiped out any mention of this group in his resume. And there were racial undertones to this group, talking about the NAACP engaging in voter fraud, talking about at least one individual being paid to register voters with crack cocaine — a clear message here.

Dick Armey spoke in Orange County, California, just before the 2010 election and claimed that 3 percent of votes were cast as fraudulent Democratic ballots. "I'm tired of people being Republicans all their lives and changing parties when they die." How prevalent is this? A voter ID law only prevents impersonation fraud, where somebody goes to the polls and claims to be somebody else. And that's a really dumb way to steal an election. If you want to steal an election, I'll tell you how to do it. Two ways: one, bribe the election officials. Two, use absentee ballots. With absentee ballots, you can collect them, pay people to verify how they voted and then collect enough to make a difference — maybe not in a presidential election, but a local election. Every year, we see problems with absentee ballot fraud, but we don't see any proposals to cut back on that fraud by eliminating absentee ballots. That's probably because there's a partisan benefit to the Republican side with absentee ballots, not to Democrats.

So the claim is that you need voter ID to prevent impersonation fraud. But how hard is it to do this? First, I have to figure out who's not going to be at the polls that day. Then I have to go or get somebody to go and claim to be that person and hope that the person who is checking people in to vote doesn't know that person and say that I'm not him. I'm also going to have to get enough people to change the outcome of the election and I'm not going to be able to verify whether they actually do this because I can't go into the polling place with them. For the last generation, I cannot find a single case that was even close where impersonation fraud could have affected the outcome of an election.

Yet every year, we have cases of absentee ballot fraud affecting elections. In California, not far from where I live, a small town was collecting the absentee ballots from city hall, steaming them open, finding the votes for the incumbents and resealing the envelopes, finding the votes for the challengers and throwing them away. Now, that's the way to steal an election.

Still the impersonation fraud claims persist....

So what is this about? The Bush administration made preventing voter fraud a key component of what it was doing at the Department of Justice. *The New York Times* looked at this over five years, and found almost no evidence of voter fraud — 86 cases and 43 of them I believe involved election officials. How many involving impersonation fraud? Zero. Zero! Same thing was the case in Texas.

So what is this about? Here's an email that was released as part of the U.S. attorney investigation. It's an email from a Republican party official in New Mexico, to the U.S. attorney for New Mexico, who is a lifelong Republican, a very well respected guy. Here's the email: "I want you to indict the ACORN woman for fraud before the election. You're not going to find a better wedge issue. This is going to help motivate Republicans by talking about Democratic voter fraud." So a big part of this is about getting the base excited, and about fundraising.

MONEY IN POLITICS

Fight Big Money with Small Donor Matching Funds

Adam Skaggs and Fred Wertheimer

Can small donors compete with Super PACs and secret money? This innovative policy proposal suggests one way to bolster the voices of ordinary citizens. Based on the successful New York City system, it would provide multiple matching funds for small contributions to federal candidates. Reps. David Price (D-N.C.) and Chris Van Hollen (D-Md.) introduced legislation modeled on this novel, pro-participation plan.

Our government is broken. Partisan gridlock and armies of special interest lobbyists prevent Congress from acting to solve the serious problems facing the nation. On the issues that matter most to Americans, Congress often does nothing. And when Congress does act, it is all too often on issues that favor narrow interest groups that funnel millions of dollars to elect our representatives.

The surge of unlimited, often secretive spending in the wake of *Citizens United* threatens to make this situation even worse. Our money-drenched campaign finance system prevents Congress from working in the public interest. Moreover, as history has shown, unlimited and secret money in politics leads to scandal and corruption.

At the same time, recent years have seen the beginning of a far more positive trend: breakthroughs in the rise of small donors in presidential elections. Beginning a dozen years ago, and spurred on by Internet tools that make political giving easier, small donors began to play an important role in some presidential campaigns. Candidates from John McCain in 2000 and Howard Dean and John Kerry in 2004 to Ron Paul and Barack Obama in 2008 were lifted by small donors.

But even as Obama raised unprecedented amounts of small donations in 2008, he raised substantial amounts in large gifts from traditional sources. And members of Congress continue to raise funds the traditional way, heavily from lobbyists and PACs.

There can be no doubt that small donors — of both major parties, of all ideologies, from all over the country — can play a new, positive role in our politics. Citizens must be engaged as an alternative source of funding to the role being played by influence-seeking donors.

The breakthroughs in small donor fundraising that have occurred in presidential campaigns demonstrate the potential that exists for greatly increasing the role of small contributions in federal elections by magnifying their importance

Excerpted from *Empowering Small Donors in Federal Elections,* published with Democracy 21, August 2012.

with multiple matching funds. The future of campaign finance reform must include an effort to bolster the power of small donors by amplifying their political voice. Congress can do that by adopting a small donor empowerment program for federal elections.

A system in which small donations to federal candidates are matched with public funds at a multiple ratio would increase the importance of small donations and increase the incentive for a broader base of voters to participate in funding elections. Such a system could transform political candidates into agents of civic participation who focus on mobilizing their constituents, instead of lining up special interest fundraisers. Financial involvement in elections, even in small amounts, serves as a "gateway" to other forms of engagement in the political process — like displaying lawn signs, volunteering for campaigns, canvassing voters, and passing out campaign literature — and studies show that small donors are more likely to engage in this kind of participation.

The system would be strictly voluntary: Candidates could opt to participate — and thus to be eligible for public matching funds — in exchange for agreeing to lower contribution limits, limits on the use of their personal wealth, and new reporting requirements. Other candidates could choose to forgo public funds and continue to finance their campaigns in the traditional manner.

The future of campaign finance reform must include an effort to bolster the power of small donors by amplifying their political voice. Congress can do that by adopting a small donor empowerment program for federal elections.

The digital age we live in holds great promise for magnifying the role and importance of small donors. Technological breakthroughs in raising and giving small donations through the Internet and social media, in combination with a system of multiple matching funds for small contributions, could have a revolutionary impact in the way campaigns are financed in our country.

While the transformative power of a small donor matching program would be profound, the design of such a system is comparatively simple. The following components are derived from years of experience with, and analysis of, public funding systems — including the highly successful program developed in New York City. This proposal contemplates a small donor matching program that would be available for primary and general election campaigns, and would include the following elements as the core of a small donor empowerment program to fix federal elections:

- ***A 5-to-1 match*** on in-state contributions up to $250. Donors could give larger contributions, but only the first $250 would be matched. A $100 donation would yield an additional $500 in matching funds; a $250 donation would yield an additional $1,250 in matching funds.

- ***Reducing contribution limits by half*** for participating candidates. The existing limit of $2,500 per individual contributor (per election) would continue to apply to candidates who chose not to participate in the small donor matching program. For candidates who did participate, the maximum individual contribution would be reduced by 50 percent, to $1,250 per election.

- ***A cap on public funds*** available per race — $2 million for a House candidate and $10 million for a Senate candidate — ***but no expenditure limits for candidates***. Spending limits are not viable in the post-*Citizens United* world of outside spending groups. Subject to the cap, the amount of public funds a candidate received would depend on the number of small donations the candidate raised. Even after receiving the maximum public funds, candidates would be able to raise (and spend) additional funds privately — subject to the contribution limits applicable to participating candidates.

- ***A qualifying threshold*** to ensure that public funds were not disbursed to uncompetitive or marginal candidates. Before becoming eligible for public funds, House candidates would need to raise $40,000 from at least 400 donors, and Senate candidates would need to raise the same amounts times the number of congressional districts in their states. These contributions would need to be in amounts of $250 or less per donor from in-state residents.

- ***Unlimited coordinated party expenditures in support of candidates***, but only from funds the parties raised from contributions limited to no more than $1,250 per donor per year. This would strengthen the ability to respond to outside spending groups.

- ***Effective disclosure and enforcement*** to ensure the program was effectively and efficiently administered, and to ensure the program is not defrauded.

- ***An adequate and reliable funding stream*** to ensure sufficient matching funds and guarantee the program remains solvent.

Revisiting Citizens United?

In 2012, the U.S. Supreme Court considered revisiting the logic of Citizens United. *Montana had refused to change its century-old law barring corporate campaign spending. The Supreme Court froze Montana's law. But Justices Ruth Bader Ginsburg and Stephen Breyer issued a statement urging outsiders to tell the Court what had happened in the two years since* Citizens United. *The Brennan Center responded with this "friend-of-the-court" brief on behalf of leading constitutional scholars. The filing was a "Brandeis brief": focusing more on hard fact than legal theory. Ultimately, the Court declined to hear arguments and struck down Montana's law.*

Summary of Argument

In a long and unbroken chain of cases, this Court has held that the need to curb real and perceived corruption justifies the regulation of money in politics. In *Buckley v. Valeo*, it made clear that assessing whether any given rule adequately promotes these interests is an inherently fact-bound inquiry. Since then, this Court has repeatedly confirmed that whether, and in what ways, corruption or perceived corruption flow from spending that is uncoordinated with a candidate are questions of fact, not law.

For the reasons detailed by the Montana Supreme Court, the unique facts of this case amply support the constitutionality of Montana's Corrupt Practices Act and its restrictions on corporate electioneering. Accordingly, the Court should deny the petition and let the Montana court's decision stand.

Argument

Whether Uncoordinated Political Spending Can Give Rise to Real or Apparent Corruption is a Question of Fact, Not Law

As this Court recently affirmed, states have "compelling interest[s] in combating corruption and the appearance of corruption" by regulating money in politics, and courts must "give weight" to governmental efforts to "dispel either the appearance or the reality of [improper] influences." Preventing the appearance of corruption is an interest "of almost equal concern" because if government lacks the "authority to regulate the

---

Authored by Michael Waldman, Adam Skaggs, Mimi Marziani, and David Earley, the Brennan Center submitted its amicus brief to the U.S. Supreme Court on May 4, 2012 in the case of *American Tradition Partnership v. Bullock*. The brief was filed on behalf of scholars including Columbia Law's Richard Briffault, Harvard Law's Lawrence Lessig, and Fordham's Zephyr Teachout.

appearance of undue influence[,] [] 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" Simply put, avoiding the appearance of corruption is "critical... if confidence in the system of representative Government is not to be eroded to a disastrous extent."

When campaign finance laws are carefully tailored to combat real and perceived corruption, this Court has upheld them, even when they burden protected activity. Outside the campaign finance context, too, the Court has relied on the interest in safeguarding public confidence in government to sustain a range of election laws that burden speech and associational rights — even in the absence of direct evidence that electoral integrity has been compromised. Thus, Montana's interest in insuring public confidence in government — by avoiding even the appearance of corruption — provides compelling justification for the sensible regulation of political spending.

Whether and how independent spending gives rise to corruption or its appearance are questions of fact, not law. The Court has repeatedly recognized that whether independent political spending gives rise to real or perceived corruption is a question of fact, not law. In *Buckley*, the Court examined the limited record evidence before concluding that "the independent advocacy restricted by [this] provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." The Court left open the possibility that a sufficient factual showing could justify the regulation of outside spending. After *Buckley*, the Court repeatedly affirmed that evidence could establish that outside spending threatens to corrupt government or create a widespread belief in corruption.

A fact-bound examination of whether outside spending can raise corruption concerns is consistent with the Court's evaluation of other campaign finance regulations. [This evaluation] underscore[s] that when government seeks to regulate money in politics, there must be specific factual support to justify any infringement on First Amendment rights. Courts, in turn, must assess the state's asserted interests in light of the record presented.

In *Citizens United*, the Court relied on the lack of record evidence showing a need for the corporate electioneering restrictions it ultimately struck down. But it reiterated the appropriateness of considering factual evidence of corruption arising from outside spending, observing that, "[i]f elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern." The Court did not need to determine whether independent spending could ever pose corruption threats to resolve the question presented in the case — whether independent spending by corporate entities could be regulated differently than that same spending by natural persons.

Spending by Independent Groups Can Give Rise to Corruption and Public Perceptions of Corruption

In fact, outside groups can and do operate as vehicles to buy and sell access — and their fundraising and spending can raise concerns identical to those flowing from large campaign contributions and soft money. There is troubling evidence that spending by outside groups has long been used to coerce lawmakers into specific legislative results. Officeholders are well aware which interests have threatened to spend large sums to defeat them — or which votes will trigger similarly vast expenditures in support. Such signaling itself poses risks of corruption and its appearance.

Now, new and rapidly unfolding developments since *Citizens United* have sharply worsened corruption risks. The degree of tacit coordination between candidates and nominally independent groups goes far beyond what this Court has previously considered when assessing regulations on third-party spending.

Because these closely intertwined entities now receive unlimited contributions, the new campaign landscape offers startling opportunities for corrupt dealings. Public confidence in our country's elections and government has been severely undermined.

This election season has been marked by a disturbing new phenomenon — billionaires seeming to sponsor presidential candidates like racehorses.

Most notably, and as discussed below, this election season has been marked by a disturbing new phenomenon — billionaires seeming to sponsor presidential candidates like racehorses. In the most publicized example, a political committee dedicated to Newt Gingrich's election received almost all of its money from casino owner Sheldon Adelson and his family, who donated more than $20 million. This means that one individual, under multiple federal investigations, effectively funded nearly the entirety of a presidential campaign. Just 18 months after *Citizens United*, the new reality portends tremendous risks of corruption and its appearance in this election and those to come.

Citizens United has been extended to create groups that are inextricably connected with candidate campaigns, but allowed to solicit and accept unlimited contributions.

As noted, some lower courts have interpreted *Citizens United* as holding that spending by ostensibly outside groups is *per se* non-corrupting, and that record evidence to the contrary is irrelevant. From this misunderstanding, these courts extended *Citizens United* to invalidate funding restrictions — including limits on the size of contributions — for allegedly independent groups. This result significantly expanded *Citizens United* — which expressly declined to address the constitutionality of campaign contribution limits. It led to the creation of "Super PACs": federal political committees that can collect unlimited donations from individuals, corporations, and unions, so long as their expenditures do not meet the Federal Election Commission's highly-technical coordination definition.

While Super PACs were freed from contribution limits by simply declaring themselves "independent," this new breed of political committee is anything but genuinely autonomous. Despite this Court's repeated explanation that independent expenditures must be truly and wholly independent — made "without any candidate's approval (or wink or nod)" — the FEC has failed to promulgate regulations that "rationally separate[] election-related advocacy from other activity." As a result, under longstanding regulations, federal candidates can closely cooperate with a supportive Super PAC without producing any "coordinated communications" or otherwise "coordinating" with that candidate's campaign.

Today's political committees are thus wholly distinct from the organizations this Court has seen in the past — such as Massachusetts Citizens for Life, the Michigan Chamber of Commerce, and Citizens United itself — which have truly independent issue agendas and have continued existence apart from any candidates they support. Modern political realities raise novel concerns of corruption that defy earlier regulatory assumptions.

The lack of any mechanism to ensure that groups claiming independence are actually operating "without any candidate's approval (or wink or nod)" has led to the most egregious new development: the candidate-specific Super PAC. Now, candidates for federal office, including every leading presidential candidate, have an affiliated Super PAC acting as a *de facto* arm of their campaigns — an arm that accepts unlimited donations.

The result is a remarkable new world of campaign finance, in which large contributions from legislatively-interested parties — gifts that would plainly raise corruption concerns if directly handed to a candidate — are instead handed to "his" Super PAC. Public concerns have mounted with each example of the close connections between candidates and "their" Super PACs. At least four disturbing trends are clear:

First, candidate-specific Super PACs exist for the sole purpose of aiding a candidate's campaign and are operated by the candidate's close friends and most trusted political advisors. Mike Toomey, co- founder and chief principal of Gov. Rick Perry's Super PAC, Make Us Great Again, is Perry's former chief of staff and co-owns a private island with a chief strategist for Perry's campaign. Our Destiny PAC was created to support Jon Huntsman by the vice president of the family-owned Huntsman Corporation, and a former campaign official became principal strategist there — alongside Huntsman's father and the family's lawyer. Comparable connections exist within every candidate-specific SuperPAC.

Candidate-specific Super PACs exist for the sole purpose of aiding a candidate's campaign and are operated by the candidate's close friends and most trusted political advisors.

Second, candidates and their campaign staff appear at their Super PACs' fundraising events and solicit funds for them. David Plouffe, a senior aide to President Obama's campaign, has repeatedly attended fundraisers for Priorities USA Action; members of Obama's cabinet have also said they will appear. [According to The Washington Post,] on July 19, 2011, Mitt Romney strode into a dining room above Central Park that was packed with dozens of his wealthiest supporters . . . . The event was not a fund-raiser for Mr. Romney's campaign, however, but for Restore Our Future. ... [O]nly when Mr. Romney left the room did [a Super PAC official] brief the donors on their plans: to raise and spend millions of dollars in unrestricted campaign donations — something presidential candidates are forbidden to do themselves — to help elect Mr. Romney president.

Third, candidates and their Super PACs share vendors, consultants, messages, ad footage, and even airplanes. Romney's campaign and Restore Our Future retained the same political consulting firm, hired the same event-planning company, and depended heavily upon the same New

York City fundraiser. Candidates' campaigns and Super PACs swap video footage for campaign advertisements: Texas Gov. Rick Perry used video clips from a commercial first aired by his Super PAC, while Restore Our Future recycled a commercial from Romney's 2008 campaign.

Before former Pennsylvania Sen. Rick Santorum suspended his presidential campaign, Foster Friess — the largest donor to Santorum's Super PAC — frequently traveled with the candidate on the campaign trail. Given the close connections, Santorum's suggestion that he had "no idea what Foster Friess [was] doing to my super PAC" strained credulity. His use of the possessive in referencing the group more accurately reflected reality.

Shortly after Santorum declared his candidacy over, the group announced that it was reorganizing to function in part as a "leadership PAC" — with Santorum at the helm. Whatever semblance of independence Santorum and his Super PAC once asserted instantly disappeared.

Essentially every facet of these Super PACs' operations is intertwined with the candidates' campaigns. Huge, multi-million dollar contributions from interested parties are legally given to a candidate's Super PAC with the candidate's full knowledge, approval, and encouragement.

In short, essentially every facet of these Super PACs' operations is intertwined with the candidates' campaigns. Huge, multi-million dollar contributions from interested parties are legally given to a candidate's Super PAC with the candidate's full knowledge, approval, and encouragement. Even if these groups fulfill a legalistic definition of independence, it is impossible to believe that their strategic plans — as well as countless specific decisions — are made without the candidates' express or implicit consent. Certainly they create gratitude for the future. Super PAC contributions are therefore just as valuable to a candidate as a direct contribution: both directly advance the candidate's chances of winning his election. Disproportionate spending by independent groups has given rise to concerns about corruption and its appearance.

Perhaps the best evidence of the value to candidates of Super PAC spending is the sheer amount of money these groups have raised and spent on their behalf. As of May 8, 2012, Super PACs had raised more than $204 million and had spent more than $98.8 million to influence federal election results — six months from the general election. In total, outside groups had already spent roughly $121.2 million on federal campaigns, double the amount spent in the same period in 2008.

In some months, candidate-specific Super PACs collected more funds than the corresponding candidate's campaign. In January of this year, for instance, donors gave Gingrich's campaign just $5.5 million while Winning Our Future received more than $11 million. The same month, Romney's campaign collected about $6.5 million; Restore Our Future raised $6.6 million.

Super PAC spending has been credited as the deciding factor in several races, and has frequently eclipsed the amount spent by the campaigns themselves. In the Alabama and Mississippi primaries, for example, more

than 90 percent of the television ads promoting presidential contenders were paid for by the candidates' Super PACs. Despite Gingrich's reliance on Super PAC spending to win the South Carolina primary, Gingrich lambasted Romney for relying on Super PAC spending in his subsequent victory over Gingrich in Florida — complaining that the pro-Romney Super PAC outspent him five to one.

These huge sums deployed to buy candidates' allegiance are threatening our democracy. There is ample evidence that such nominally independent spending is creating the appearance of corruption — as well as the opportunity for improper dealings after Election Day.

By enabling the circumvention of contribution limits, Super PACs allow a few wealthy donors to wield influence over candidates that raises serious corruption concerns. For instance:

- More than $50 million in contributions to Republican Super PACs during the current election came from "[a]bout two dozen individuals, couples or corporations."

- More than 78 percent of the money donated to the Super PACs active in the presidential election came from just 90 donors who each gave more than $100,000. Over two-thirds of the money donated to Super PACs came from donors who gave $500,000 or more.

- Donors giving $1 million or more gave more than half of the money collected by Super PACs since the beginning of 2011 — almost $110 million. As of April, about 45 corporations, unions, and individuals had donated more than $1 million to their chosen Super PAC.

There is ample evidence that such nominally independent spending is creating the appearance of corruption — as well as the opportunity for improper dealings after Election Day.

There is little doubt that many of these big dollar donors have specific interests that they hope to advance through their political influence. While Adelson pumped millions into Winning Our Future — and publicly expressed his willingness to contribute as much as $100 million in total — his business was under investigation by multiple federal agencies. Just as one might ask what motivated a litigant who spent $3 million to elect a judge presiding over his case, here observers might ask what it suggests "when a man under three federal investigations can plan on spending up to $100 million... to elect the man with authority over the agencies conducting those investigations?"

The risks of *quid pro quo* corruption stemming from these new campaign finance trends have seriously undermined public confidence in elections and democracy. There has been thunderous opposition to the opportunities for corruption created by Super PACs in every type of media outlet, from network news programming to popular blogs. Indeed, in the last year, the editorial boards of the country's major newspapers have repeatedly voiced public concerns about Super PACs' corrosive effects on our democracy.

Public opinion polls, too, reveal widespread perceptions of corruption flowing from Super PACs. An ABC News/*Washington Post* poll found that a bipartisan 69 percent of all Americans agree that Super PACs should be made illegal. According to another, 67 percent of Americans — including majorities of Republicans, Democrats, and independents — said that there should be limits on the amount independent groups can spend on advertisements during a presidential campaign.

These deeply negative perceptions threaten democratic participation. One in four Americans say they are less likely to vote because of the outsized influence Super PAC donors have on elected officials, and 41 percent say their votes do not matter very much because big Super PAC donors have such greater influence. Broad segments of the public believe the officials we elect in November will ignore the public interest to serve the few donors whose million-dollar contributions fueled the shadow campaigns that elected them.

Amending the Constitution: No Solution

Monica Youn

A constitutional amendment to overturn Citizens United *could galvanize public opinion around the need for reform. But no single proposal would solve the many problems created by the destructive Supreme Court ruling. More, argues the first Brennan Center Constitutional Fellow at NYU Law, the drive for an amendment would distract lawmakers from working to achieve reforms currently within reach.*

A proposal to amend the Constitution can function on two levels, the actual — forcing a change in constitutional law — or the aspirational — transforming popular understanding and engagement.

I have serious doubts that trying to amend the Constitution to overturn *Citizens United* would work on an actual level, even apart from the obvious problem of amassing the necessary support. An amendment strategy assumes there is a silver bullet that can take care of a particular problem with a simple constitutional proposition, or a set of simple propositions. But even critics of the ruling (myself included), cannot agree on the crux of the problem — whether it's corporate personhood, equating money with speech, or the special status of elections in First Amendment law. More fundamentally, the complex regulatory problems of money in politics require flexibility and nuance and resist such encapsulation.

Even if you pick the right target for the silver bullet, you can never underestimate an unwilling Supreme Court's ability to dodge it through an interpretive evasion. This creates a separate dilemma — either you draft your amendment narrowly, accepting that resistant judges and private actors will make the most of whatever loopholes remain, or you go broad, creating potentially enormous problems of unintended consequences in the sensitive sphere of expressive freedoms.

On the aspirational level, however, a constitutional amendment strategy may be more valuable. Unlike ordinary legislation, an amendment has a unique power to capture the public imagination, catalyzing awareness and engagement. Such a strategy can yield concrete gains whether or not the proposed amendment is adopted. An educated and energized constituency is a lasting resource that can be mobilized to push for other, more readily achievable reforms.

We should, however, be suspicious when politicians use the aspirational as political cover to avoid talking about the actual. Even in the post-*Citizens United* era, there are reforms that are within reach and that would make a difference — such as greater disclosure, public financing, regulatory reform, and a Federal Election Commission overhaul.

But it's a lot easier for politicians to sign on to a highly unlikely constitutional amendment than to back reforms that would force changes in their own fund-raising practices. Treating a largely political problem as a purely constitutional problem can be just another way of passing the buck, of blaming the Supreme Court for our own failings.

This op-ed was originally published by *The New York Times* online on October 24, 2012.

‘People Know This is Fundamentally Wrong’

Jeff Clements

In a talk at the Brennan Center, the author of “Corporations Are Not People” argues that amending the Constitution would restore “fair elections to the people.”

Q: Where do you think we are two years after *Citizens United?* What kind of mobilization are you seeing and are chinks developing in *Citizens United*’s armor?

Clements: From my view, this idea of corporate personhood is a bit like finding yourself at a cocktail party with bellbottoms and everybody else has moved on. It was not a fashionable thing to do and it was not a mainstream idea. It was not a big issue in the law schools. It was not a big issue in the courts. If you were fighting for the idea that corporations have rights under our Constitution, rather than rights under our statutes that we decide upon, you didn’t have a whole lot of company.

I think *Citizens United* has been the wake-up call. Corporate power is always a problem. They are great vehicles for economic activity, for marshaling investment, for spreading risk, spreading reward, all kinds of great things, but there is a danger as Justice Rehnquist has said, as Madison said, as Theodore Roosevelt has said, and as the [Supreme] Court has said in the past years. There is a danger of leveraging that power into political power — and like Madison’s faction, it could ultimately destroy democracy if we don’t keep them in balance.

After two years of *Citizens United,* hostility and opposition to it crosses all political lines — conservatives, progressives, liberals, and libertarians. It’s a mainstream American problem. Millions of Americans have signed resolutions to reverse *Citizens United.* Just a few days ago the New Mexico House of Representatives voted to call on Congress to amend the Constitution, to send an amendment to the states for ratification to overturn *Citizens United*. New York City, right here, has passed that resolution. So has Los Angeles and countless cities across the country. People know this is fundamentally wrong and we need to fix it. Where we are is much further than where I would have expected two years ago.

Clements delivered remarks at the Brennan Center on March 8, 2012.

Q: I am not a lawyer, but it seems nonsensical on its face that a corporation has the same rights as a person. How did the Supreme Court convince itself that a corporation has those rights?

The problem is that the word person in the due process clause, the equal protection clause, and "people" in the Constitution were never intended to bestow personhood on a corporation.

Clements: It goes back to a line of cases in the late 1800s that said the due process clause in the 14th Amendment applied to all persons, regardless of race. Then the railroad corporations drove into the law with relentless perseverance the idea that corporations were persons too and had equal protection rights and due process rights.

The problem is that under state law the idea of a corporation, the person metaphor, is actually very useful. It's what enables a lot of people to get together and act as one. In a business, for example, if the president signs a contract, it is going to be binding even if the president goes and someone else is there. It doesn't matter if it is the corporate person that has made that contract. We can sue or be sued. We can enforce the law, when the Clean Water Act says "no person shall dump pollutants into the waters of the United States," that includes corporations.

Those are all good metaphors, but notice that every metaphor is a person definition that comes out of state law that we decide in a democratic fashion that can change if we want to. The problem is that the word person in the due process clause, the equal protection clause, and "people" in the Constitution were never intended to bestow personhood on a corporation. Justice Anthony Kennedy's *Citizens United* opinion says Congress cannot make laws that benefit some speakers and not others, that squelches some voices. He talks about how the law is unconstitutional where it disadvantages a class of person. It actually says a disadvantaged class of person, which refers to the corporations. They are really using a corporate person metaphor and they are misusing it. They are taking a useful metaphor under state law, for corporate activities that we can decide on as a majority, and twisting it to a person when it is used in the Constitution.

We don't vote on who has rights under the Constitution. They are there because we are human. We have our rights we are born with and so when the Constitution says person it's not something that we can just invent under state law. In my view how it happened is an abuse of language, an ideologically driven abuse of language.

Thanks, SCOTUS, for Election Mess

Adam Skaggs

As massive sums flowed into the election, supporters of the Supreme Court's Citizens United *ruling began making an odd argument: Their handiwork had nothing to do with the new world of Super PACs. That's absurd.*

Before a Senate Judiciary subcommittee in July 2012, the Cato Institute's Ilya Shapiro became the latest to come out swinging against critics of *Citizens United*, testifying that the case is one of the most misunderstood high court decisions ever and claiming that "it doesn't stand for half of what many people say it does." Shapiro joins a chorus of *Citizens United* defenders, including First Amendment lawyer Floyd Abrams and his son Dan — the latter of whom has railed against what he calls the media's "shameful, inexcusable distortion" of the case — as well as *The New York Times Magazine*'s chief political correspondent, Matt Bai, who recently wrote that liberal criticism of the decision is "just plain wrong."

To be sure, it would be an oversimplification to suggest the decision is the *only* cause of our current Wild West campaign finance environment. But those criticizing the critics of *Citizens United* miss the forest for the trees. Their myopic focus on debunking overstatements about the case downplays the major role *Citizens United* played in ushering in current conditions — and how it fits with the Roberts Court's ongoing project to put our democracy up for auction.

The defense of *Citizens United* rests on two primary claims about the case, one factual and one legal. Its defenders contend, first, that while *Citizens United* only concerned corporate election spending, the facts show that it is spending by individuals — not corporations — that counts this year. Next, they argue that, as a legal matter, individual spenders have been free to make unlimited political donations since long before *Citizens United*. They're wrong on both counts.

It's true that individuals have donated more than corporations to Super PACs, but it's misleading to suggest corporate dollars don't matter. A recent analysis by the *Washington Times*, for example, showed that "nearly 200 companies gave $8.6 million to super PACs in June" — the highest total yet this year — including "many repeat givers who have given a total of $18 million."

And corporate donations to Super PACs are just the tip of the iceberg. More corporate money is flowing into non-profit "social welfare" groups and trade associations like the U.S. Chamber of Commerce, which spend millions of dollars on electioneering but don't reveal their donors. Corporate donors afraid of alienating customers prefer these groups because they allow the corporations to remain anonymous — except when a company like Aetna accidentally reveals that it gave more than $7 million to such groups to influence elections. As *The New York Times* recently reported, secretive tax-exempt groups outspent Super PACs by a 3-to-2 margin in 2010, and "such groups have accounted for two-thirds of the political advertising bought by the biggest outside spenders so far in the 2012 election cycle."

Just as misguided as downplaying corporate election spending this year is suggesting that there's nothing new about the unlimited contributions

Originally published on *The Atlantic* website, July 27, 2012.

that individuals are making — like the up to $100 million that casino magnate Sheldon Adelson has pledged to defeat President Obama. Defenders of *Citizens United* say individuals like Adelson have had the right to spend unlimited sums since 1976, when the Supreme Court decided the seminal campaign finance case *Buckley v. Valeo*.

True, *Buckley* struck down expenditure limits — but it *upheld* contribution limits. So, after *Buckley*, Adelson could have made his own political advertisements and bought the air time to run them. But few chose to do so. Most donors prefer not to get their own hands dirty. They'd rather give to political action committees run by campaign professionals. Before *Citizens United*, there were strict contribution limits on how much an individual could donate to a PAC.

By paving the way for Super PACs, Citizens United *delivered that inherently corrupt system of unlimited contributions in time for the 2012 election.*

Some tried to circumvent these limits by giving to so-called 527s — like the Swift Boat group in 2004 — but as election law expert Rick Hasen has written, doing so was of dubious legality. The FEC levied fines of several hundred thousand dollars against 527 groups after they got involved in the 2004 election. Hasen explains that if Adelson had donated tens of millions to a 527, "you can bet that there would be a criminal investigation and very serious charges considered."

Not anymore. The federal appeals court in Washington determined that *Citizens United* outlawed contribution limits to groups that make only independent expenditures, giving rise to Super PACs that accept unlimited contributions and spend unlimited sums. This year, leading candidates for president have Super PACs that function as a *de facto* arm of the campaign — and that accept million-dollar donations that would be illegal if given directly to the candidate.

Super PACs are the progeny of *Citizens United*, not *Buckley*. *Buckley* upheld contribution limits because, the Court said, they are necessary to deal with the "corruption *inherent in a system permitting unlimited financial contributions*." By paving the way for Super PACs, *Citizens United* delivered that inherently corrupt system of unlimited contributions in time for the 2012 election.

It is either naïve or disingenuous to minimize the role *Citizens United* played in shaping the current election — it was hugely important. But its real significance is as but one in a series of destructive decisions from the Roberts Court. Rick Hasen, Professor Nate Persily, and the Huffington Post's Paul Blumenthal have all explained that the tide began to turn as soon as Chief Justice Roberts and Justice Alito replaced William Rehnquist and Sandra Day O'Connor, radically transforming the Court.

Five times in the five years after Alito joined the Court, it considered common-sense legislation designed to mitigate the distorting effects of big money on our elections and government. All five times, the Court struck down laws designed to promote political participation and protect democratic values.

The Roberts Court's conservative bloc may have fractured in the contentious Obamacare decision. On matters of money in politics, though, it marches in lockstep to impose a vision of the First Amendment that ensures democracy is for sale to the highest bidder.

The Only Way to Clean Up Albany

Ed Koch and Peter Zimroth

New York Gov. Andrew Cuomo has made campaign finance reform one of his top priorities. He doesn't have to go very far for ideas. For more than 25 years, New York City's public financing program has successfully minimized the power of big money in politics by providing matching funds for small donations. And for the first time in decades, the system has an unlikely group of backers: leaders in business, finance, philanthropy, and real estate.

Nearly 25 years ago, we helped craft a campaign finance system for New York City that has enhanced our democracy ever since. By sharply limiting the amount any one person can contribute — and providing public matching funds for small donations — we empowered New Yorkers of all income levels and minimized the role of big money in city elections.

Unfortunately, New York State legislators never followed suit. As a result, our system of electing state officials is broken in a way that is undermining the democratic process.

The state system breeds cynicism. It isolates and distances citizens from their government.

Extremely high contribution limits — $41,000 for statewide races — mean that it's more efficient for candidates to spend their time courting big donors, who in turn expect, and often get, disproportionate influence in government decision-making.

The end result is that the vast majority of citizens who can't afford to make big donations feel shut out, and in many cases actually are.

The New York City model proves that, even in an era in which campaigns are growing ever more expensive, even in a pricey media market, big money doesn't have to distort the process. A recent report by the Brennan Center and the Campaign Finance Institute reveals that the city's public financing system has contributed to a fundamental change in the relationship between candidates and their donors along with a dramatic increase in the number and diversity of the city's residents who participate in the process.

The end result is that the vast majority of citizens who can't afford to make big donations feel shut out, and in many cases actually are.

This stands in stark contrast to state elections. For instance, while 90 percent of the census blocks in New York City housed someone who contributed less than $175 to a City Council candidate in 2009, two-thirds of census block groups housed no small donors whatsoever to candidates for State Assembly in 2010.

The statistics are equally striking when it comes to diversity, with participation in City Council elections more accurately representing New York City as a whole, with more donations from areas with lower incomes, higher poverty rates, and higher concentrations of minority residents.

Koch was mayor of New York from 1978 to 1989 and Zimroth is a partner at Arnold & Porter and served as the city's corporation counsel from 1987 to 1989. This op-ed originally appeared in New York's *Daily News* on January 6, 2013. This was one of Mayor Koch's last published articles.

Indeed, 24 times more small donors from the poor and predominately black Bedford-Stuyvesant neighborhood and the surrounding communities gave money to candidates for the City Council than for the State Assembly. For Chinatown, the advantage was 23 to 1. In the heavily Latino neighborhoods of upper Manhattan and South Bronx, it was 12 to 1.

Those people weren't buying access or influence, because the sums were far too small for that. They were simply getting involved — and improving the quality of governance in the process. The City Council is not perfect, but in a whole host of ways, it's far more accountable than the legislature in Albany.

We have every reason to believe that replicating the city's system of public financing at the state level will have precisely the same effect.

This is obviously not a new idea; good government and community groups have supported it for decades. The surprising thing is that, for the first time, there appears to be broad support from an unlikely source: New York businesses. Prominent New Yorkers in business, finance, real estate, and philanthropy, who have come together under the banner of an alliance called NY LEAD, have woken up to the fact that good governance is good for business.

They are fed up with elected officials not doing the people's business and sick of reading about corrupt state officials being indicted. And as the ones on the receiving end of so many fund-raising pleas, they know that elected officials are spending too much time courting big donors and not enough time doing the people's business.

Earlier this year, Gov. Cuomo pledged his support for lower contribution limits and public financing. We must hold the governor to his word.

GOVERNMENT REFORM

Rampant Filibuster Abuse Paralyzes Senate

Mimi Marziani, Jonathan Backer, and Diana Kasdan

Just after the 2012 election ushered in a new crop of reform-hungry lawmakers, the Center issued a study showing that it's not just divided government crippling Congress — but Senate paralysis, due to the filibuster, is also a major cause of the gridlock. For three months, advocates pressed for significant change. Ultimately, Senate leaders adopted a more modest, anti-climactic package of rules changes to smooth Senate procedure — and help fix our broken government.

How can we make American government work better?

It is plain that this nation's problems can only be solved by parties working together through effective public institutions. But Congress has increasingly lost the capacity to make that happen. Over the past decade, time and again, the Senate failed to vote, or even deliberate, on bills that could address the serious issues facing our country. This must change. Ending the dysfunction that has gripped the United States Senate is a necessary first step. If Congress is to fulfill the people's mandate, the Senate must amend the rules that have become its tools for legislative dysfunction.

In 2010, the Brennan Center first issued a report on the causes and harms of current Senate dysfunction, *Filibuster Abuse,* and put forth a call for sensible reforms. Building on those recommendations, this update provides empirical evidence of how rampant filibuster abuse continues to cause an unprecedented lack of legislative productivity. Of course, since 2010, Congress has been marked by a division of party control between the House and Senate. Does that account for the gridlock? Emphatically, no. A close study of the Senate's productivity shows that its paralysis stems from reasons well beyond divided government. The Senate continues to face an unprecedented, effectively permanent filibuster, which affects matters entirely within its own purview. These findings confirm that the Senate must act decisively, at the start of the 113th Congress, to put its house in order.

Why rules reform?

As findings in this update confirm, longstanding rules have become tools for legislative minorities to paralyze the Senate as a lawmaking institution. Under current rules, a minority of lawmakers has effective veto power over bills and nominees, derailing the legislative process. As a consequence, little happens. Even routine legislative matters and governmental appointments are frozen. As a matter of practice, a *de facto* 60-vote "supermajority" requirement applies to *all* legislation. This is not what America's Founders had in mind. As Alexander Hamilton noted, requiring a supermajority substitutes "the pleasure, caprice,

Excerpted from *Curbing Filibuster Abuse*, November 2012.

or artifices of an insignificant, turbulent, or corrupt [faction for] the regular deliberations and decisions of a respectable majority."

As described in *Filibuster Abuse,* both constitutional structure and Senate history confirm that majority rule "binds both chambers with equal force." Indeed — except for extraordinary and explicitly designated situations such as expelling members — the Framers specifically rejected supermajority voting requirements after experiencing the consequences of legislative paralysis under the Articles of Confederation. But contrary to this constitutional design, the current Senate Rules impose an untenable supermajority requirement.

Reform of these rules is necessary for overcoming the current state of Senate dysfunction and congressional gridlock. Filibuster abuse devalues the Senate as an institution, cripples Congress, and undermines the proper operation of government — which was meant to function with three branches, not two. For instance, the government cannot properly fund operations when the Senate fails to pass a single appropriations bill, as it has this year. Similarly, courts are left without adequate resources when the Senate ignores its constitutional responsibility to approve or reject judicial nominees.

Filibuster Abuse is Rampant:

- As of October 2012, the current Congress has enacted 196 public laws, the lowest output of any Congress since at least World War II. This is not purely the result of divided party control of chambers. Control of the House and Senate was also divided from 1981 to 1987 and 2001 to 2003.

- The current Senate passed a record-low 2.8 percent of bills introduced in that chamber, a 66 percent decrease from 2005-2006, and a 90 percent decrease from the high in 1955-1956.

- Cloture motions — the only way to forcibly end a filibuster — have skyrocketed since 2006, creating a *de facto* 60-vote requirement for all Senate business.

- In the last three Congresses, the percentage of Senate floor activity devoted to cloture votes has been more than 50 percent greater than any other time since at least World War II, leaving less time for consideration of substantive measures.

- On average, it has taken 188 days to confirm a judicial nominee during the current Congress, creating 33 "judicial emergencies," as designated by the Office of U.S. Courts. Only at the end of the congressional term in 1992 and 2010 have there been more judicial emergencies.

The start of the 113th Congress offers a rare opportunity to set the foundation for reform. On the first day of the legislative session, senators can enact changes in the Standing Rules of the Senate with a simple majority vote, instead of the 67-vote threshold normally required to change the rules. A group of newly-elected, reform-minded senators, joining with an increasing number of like-minded veteran senators, bring reform of Senate Rules within reach.

At the start of the current session two years ago, Senate leaders attempted to bring a modicum of efficiency through an informal understanding. But this "gentleman's agreement," which in part was supposed to reduce filibusters, had no discernible impact. Pledges of comity alone cannot rein in procedural abuse. Obstructionist tactics by the minority — and retaliatory measures by the majority — cannot be curbed until the rules permitting these tactics are modified.

After detailing the growth in obstruction over the past six years, this report offers a blueprint for mitigating the worst abuses, while preserving a role for minority input. Commonsense reform is necessary for the Senate to effectively address the challenges the country faces in the 21st century.

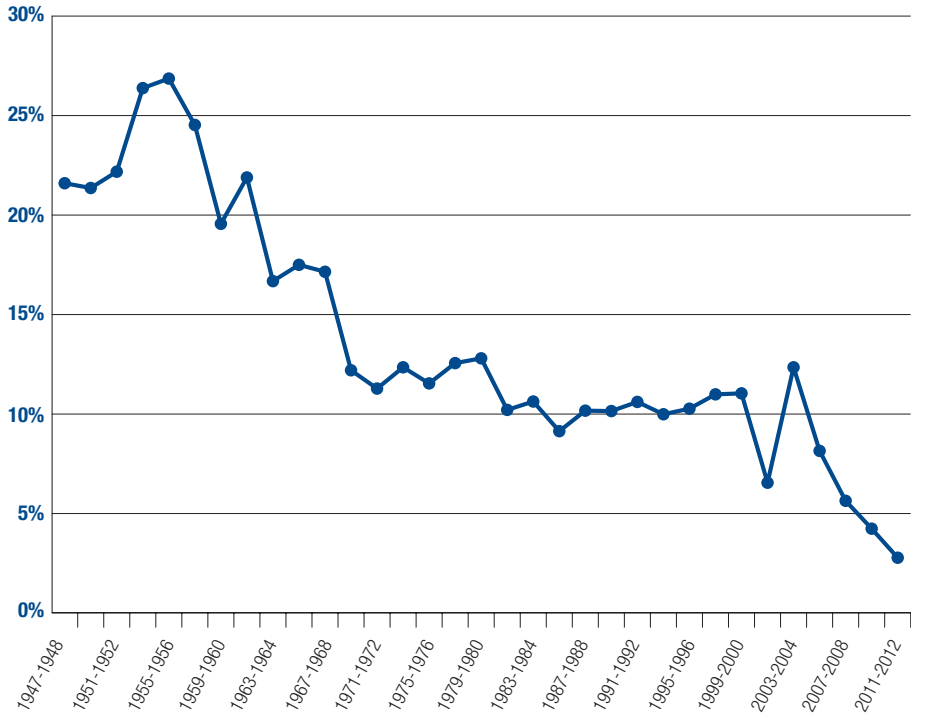
Senate Obstruction Remains at an All-Time High

The current Congress has been markedly unproductive. *The New York Times* denounced the current Congress as "the least productive body in a generation." Since at least World War II, no Congress has achieved a lower output.

Further, split party control between the House and the Senate does not alone account for the productivity drop. From 1981 to 1987, Democrats controlled the House of Representatives and Republicans controlled the Senate. Despite the division of partisan control, Congress enacted an average of 587 public laws during each two-year span, compared to 196 by the current Congress.

Another measure of decreased productivity: The Senate is passing fewer and fewer of its own bills. During this Congress, the Senate passed a record low 2.8 percent of bills introduced in the chamber, a 66 percent decrease from 2005-2006, and a 90 percent decrease from the high in 1955-1956.

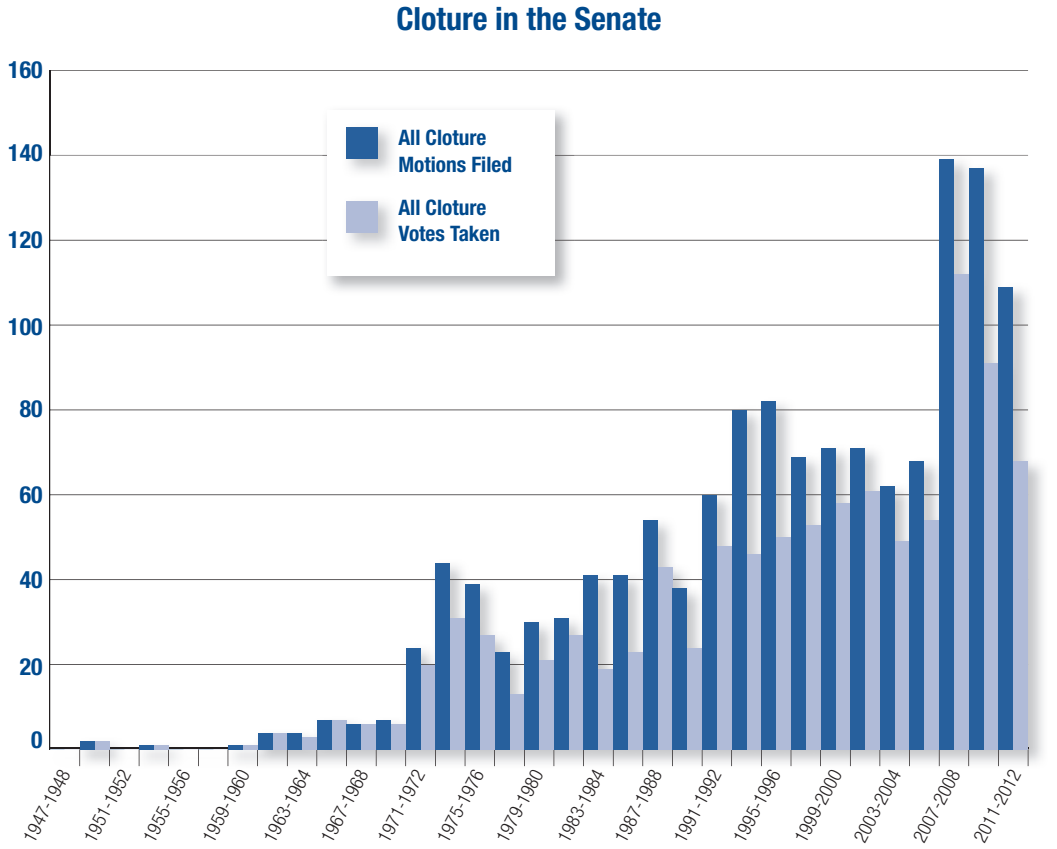
Senate Bills Passed as Percentage of All Bills Introduced



A key contributing factor to this gridlock is Senate time spent responding to persistent filibuster abuse and related procedural tactics.

Today, the threat of a filibuster shapes nearly every Senate action. As a result, cloture motions — now the standard method for moving forward a contested measure — have reached record numbers. Since 2006, 385 cloture motions have been filed. This is greater than the total number of cloture motions filed in the 70 years between 1917 (when the Cloture Rule was created) and 1988 (the last year of Ronald Reagan's presidency). But this measure underestimates the frequency of filibusters, as it does not even account for bills that are abandoned or nominations that are withdrawn due to the mere threat of a filibuster.

Sixty votes are now presumed necessary to conduct regular Senate business — as if constitutionally mandated.



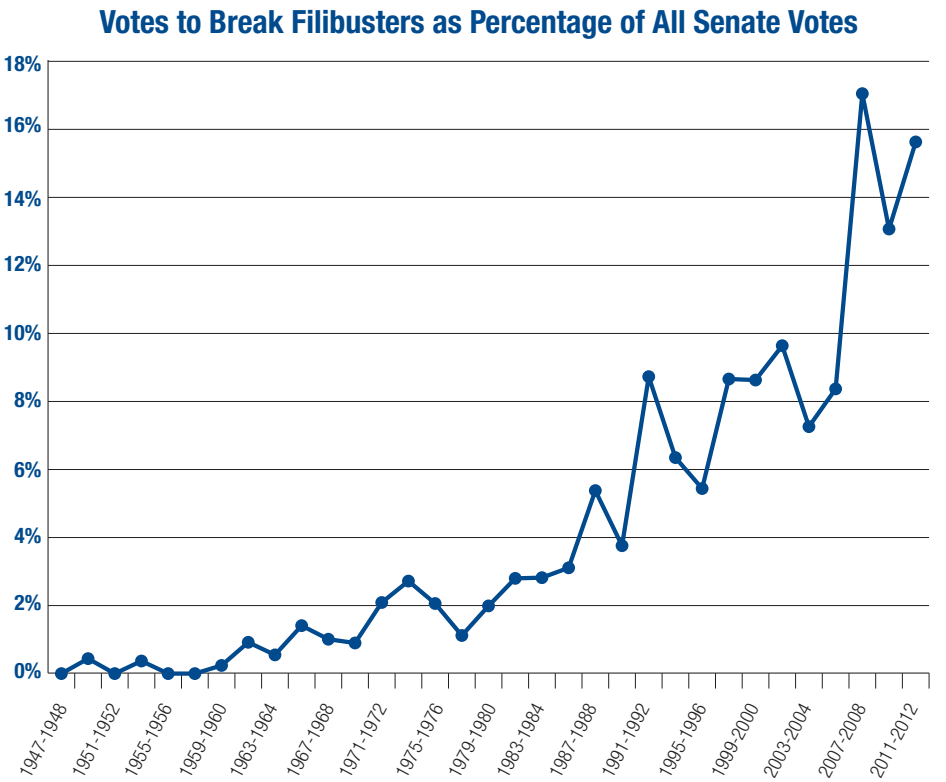
When the political parties are rigid and polarized, 60 votes must come completely from the majority party. Since Hawaii and Alaska joined the Union in 1959, one party has held a majority with 60 or more members during just 8 of 27 Congresses. This includes the 111th Congress, when the Democratic Party held 60 votes briefly — between July 2009 (when the race for Minnesota's Senate seat was decided in Al Franken's favor) and February 2010 (when Sen. Scott Brown won a special election to replace the Massachusetts Senate seat left empty by Ted Kennedy's death).

Moreover, today's filibusters have little in common with filibusters of the past. Traditionally, filibustering senators had to stand up on the Senate floor and actually speak. The filibuster was a device to slow consideration of legislation so objecting senators could persuade colleagues and the public. By contrast, the modern filibuster requires almost no effort. Senators typically send a short email to the Senate majority leader threatening obstruction. Unless the majority can find the 60 votes needed to move forward, that bill or nominee is effectively removed from consideration.

In fact, most bills are blocked long before they even reach the Senate floor. By filibustering a "motion to proceed" — the motion that begins consideration of a measure — an obstructionist can kill a bill early, avoiding all public debate. Plus, one successful cloture vote does not clear the way for passage. Senators committed to grinding the chamber's activity to a halt can filibuster at six different points in the legislative process. And, successful cloture votes do not trigger instant advancement; each time, the obstructionists can force the Senate to wait up to 30 additional hours before proceeding.

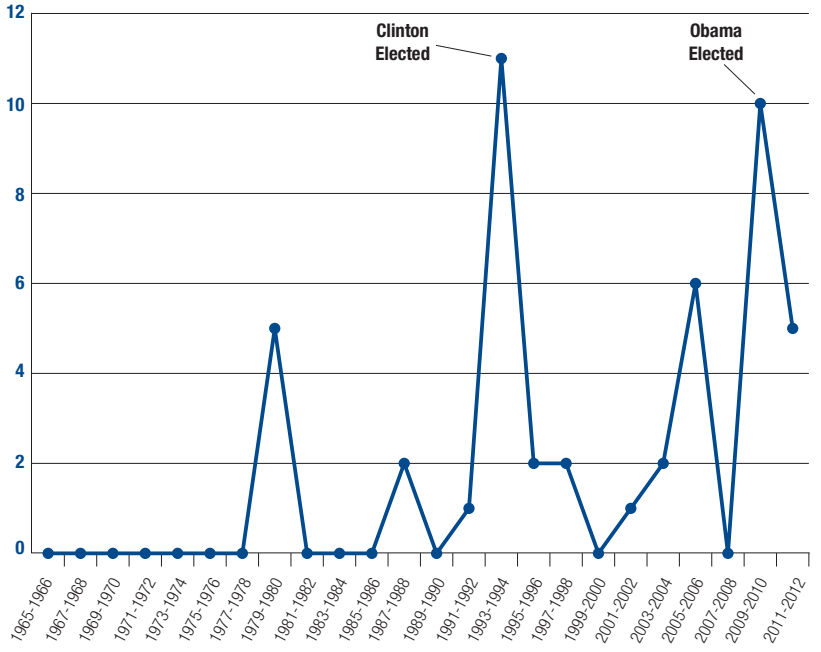
The majority party has responded to this relentless obstruction by subjecting its legislative agenda to triage, stripping the number of measures on which the chamber acts to a bare minimum. A significant indicator of Senate obstruction is the proportion of overall Senate votes to end filibusters.

Between 1961 and 2006, cloture votes have gradually increased as a percentage of Senate floor activity, although never consuming more than 10 percent of the chamber's total roll call votes. But, over the past three Congresses, cloture votes have averaged more than 15 percent of all recorded votes — a 50 percent increase over the previous high during the first two years of President George W. Bush's administration. The largest absolute percentage of votes devoted to breaking filibusters since at least World War II was between 2006 and 2008, when Democrats controlled both chambers.

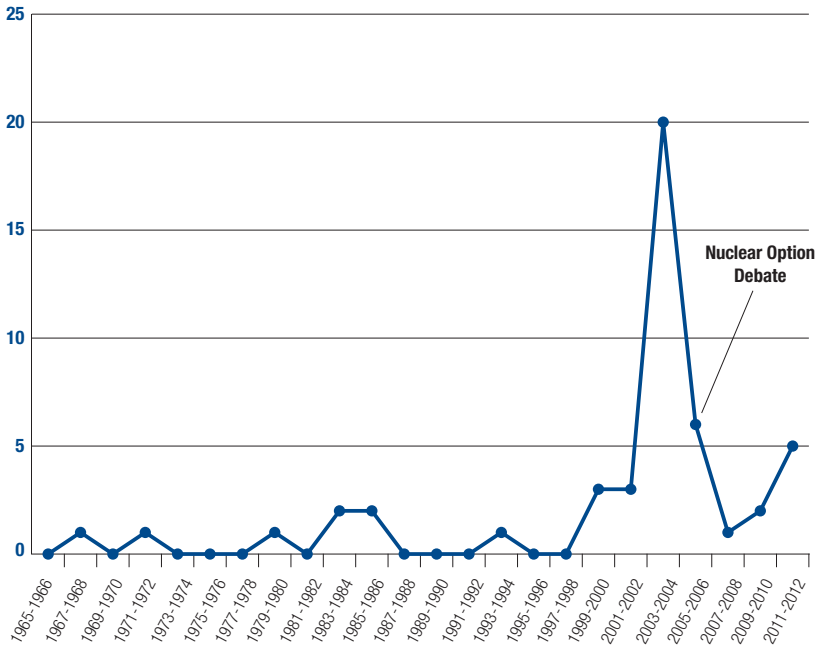


In addition, the Senate has disregarded its constitutional obligation to provide "advice and consent" on executive and judicial appointments. Notably, since the House of Representatives plays no role in confirming judicial and executive appointments, divided control has no bearing on Senate inactivity on appointments.

Cloture Votes: Executive Nominees



Cloture Votes: Judicial Nominees



The current number of cloture votes on judicial nominees in this Congress is nowhere near the record set during the 108th Congress when Democrats relentlessly filibustered judicial nominees. (This ultimately pushed then-Majority Leader Bill Frist [R-Tenn.] to threaten, in the middle of the congressional term, eliminating filibusters for judicial appointments.) But such comparisons mask other measurements that show delay for delay's sake has become the norm.

According to the Alliance for Justice, the 2010 confirmation process for judicial nominees took an average of 150 days even for nominees who were eventually confirmed with *no* minority opposition. In the current Senate, it has taken an average of 188 days to confirm a judicial nominee. The Senate has confirmed only two judges nominated in 2012, and it did not confirm its first — Judge Michael A. Shipp — until 182 days after his nomination. The lag was not due to concern about Judge Shipp's qualifications: He was ultimately confirmed by a vote of 91-1.

Unwarranted delay has led to a record number of "judicial emergencies." These are vacancies that the Office of U.S. Courts believes could harm a jurisdiction's ability to handle its caseload. Currently, 33 have emergency status. Since the Office created the designation in 1988, there have only been more emergencies at the end of a Congress twice — in 1992 and in 2010. Unless the Senate confirms a large number of judges during the lame duck session in December 2012, there will be markedly more judicial emergencies than when President Obama took office in 2009. As U.S. Supreme Court Chief Justice John Roberts wrote two years ago, the Senate's failure to confirm judicial nominees is "a persistent problem" creating "an urgent need for the political branches to find a long-term solution to this recurring problem."

Redistricting and Congressional Control: A First Look

Sundeep Iyer and Keesha Gaskins

Gains from the 2010 redistricting cycle may put the GOP in position to keep long-term control of 11 more seats than under previous congressional district lines, according to this in-depth assessment issued just before the 2012 election.

Following the 2010 Census, states redrew congressional districts across the country. In America's deeply divided political climate, even small changes to district boundaries can determine which party controls Congress. The outcome of redistricting can make the difference between which policies are adopted and which ones are ignored — not just in 2013, but for the next decade. But redistricting is not just consequential for partisan control. It also affects how communities are represented and determines whether legislators are responsive to the citizens they represent.

What has happened in this redistricting cycle? What will be the likely consequences? Of course, it is too early to say for sure — the votes have not been counted. But it is not too early to make some preliminary assessments. This study — a prologue to a more extensive analysis forthcoming in the spring — features our initial analysis of the 2010 congressional redistricting cycle. It focuses on the likely impact of redistricting on the partisan balance of power in Congress.

Based on our preliminary analysis, it is clear that:

- **Republicans were the clear winners of the 2010 redistricting cycle.** Compared to the current partisan makeup of Congress, the net effect of redistricting was roughly a "wash." However, before redistricting, Republicans were not in position to maintain long-term control of several seats they won in the 2010 election. During redistricting, Republican-controlled legislatures shored up many of their recent gains: **The GOP may now be in position to maintain long-term control of about 11 more seats than they would have under the pre-redistricting district lines**. As a result, Democrats will find it harder to gain the 25 seats needed to take control of the House in 2012.

Excerpted from *Redistricting and Congressional Control: A First Look,* October 2012.

- **Democrats and Republicans used redistricting to their political advantage.** Where Republicans controlled redistricting, they may now be in position to win nine congressional seats currently represented by Democrats. Democrats countered some of these gains where they controlled the process, but Republicans redrew the lines for four times as many congressional seats as Democrats.

Many election contests are decided not on Election Day, but months and years before, when states redraw their districts. Both parties use redistricting to tilt the electoral terrain to achieve specific political objectives. This political gamesmanship brings with it important long-term electoral and policy consequences for voters.

Nonetheless, recent reforms in some states have taken redistricting out of partisan hands — or, at the very least, may have reduced the ability of partisans to manipulate the process to their advantage. For example, California's new redistricting commission dismantled several incumbent-protecting gerrymanders, reducing the number of safe seats in the state by nine. Meanwhile, Florida, where Republican line-drawers were required to comply with the state's new "Fair Redistricting" criteria, is the only state where Republican state legislators drew new congressional districts that may have actually increased the opposing party's political power.

Many election contests are decided not on Election Day, but months and years before, when states redraw their districts. Both parties use redistricting to tilt the electoral terrain to achieve specific political objectives.

Of course, it is far too early to draw conclusions about what effects these reforms and others have had. This report is the starting point for the Brennan Center's ongoing assessment of redistricting and its effects on citizen representation. The analysis in this report is limited to the findings from the most recent redistricting cycle based on available data on partisan voting patterns. This report does not address the fairness of district boundaries, nor does it explore whether communities of interest are effectively represented in the new districts. The analysis also does not draw any causal links between who controlled redistricting and the eventual outcomes of the election.

Following the 2012 election, the Brennan Center will examine other aspects of redistricting, including its effect on minority representation and the fairness of the process, among others. That broader assessment will describe in greater detail the lessons learned from the 2010 redistricting cycle.

Introduction

Every decade, after the national Census is completed, the Census Bureau determines the number of congressional representatives from each state based upon the overall population count. Using Census population data, each state draws new boundaries for congressional, state legislative, and local political districts.

Redistricting is the process of creating district boundaries to determine which constituents each legislator represents. Most often, elected officials in state legislatures draw the district lines. In some states, independent or politician commissions control redistricting. If commissions or legislatures are unable to complete the task because of gridlock, excessive delays, or a finding of illegality, courts take control of the redistricting process and determine what district lines will be used.

This report features the Brennan Center's preliminary analysis of the 2010 congressional redistricting cycle, focusing on who drew the lines — legislatures, commissions, or courts — and how that shaped the outcomes of the process. Specifically, the study reviews the new congressional districts and presents data on how the new lines could affect electoral competitiveness and the partisan balance of power in Congress. When assessing whether redistricting furthers the public interest, electoral competitiveness only tells part of the story. Prior to an election, however, it provides a clear lens for preliminarily understanding the potential implications of redistricting for congressional representation.

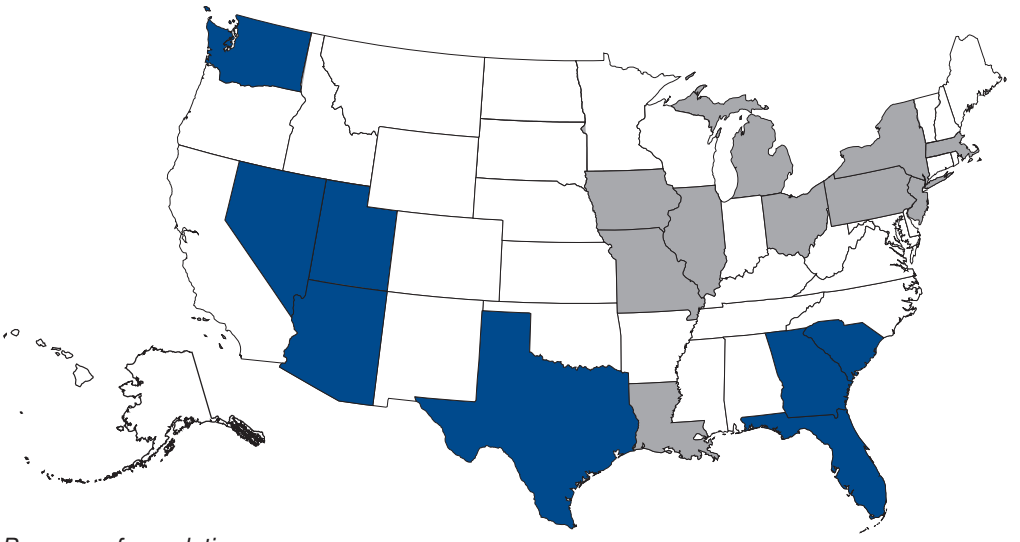
This report does not comprehensively analyze whether redistricting met the goal of enhancing effective representation. It does not examine congressional districts for compliance with principles of compactness and contiguity, for consistency with political boundaries, nor for whether the districts adequately protect communities of interest. It also does not consider whether line-drawers incorporated citizen input or made the process sufficiently transparent to constituents. And the report does not study minority representation or how the Voting Rights Act of 1965, hallmark legislation that protects minorities against electoral discrimination, shaped the end results of redistricting. After the 2012 election, the Brennan Center will undertake a broader assessment of the 2010 redistricting cycle, examining the lessons learned, and evaluating how the process can be improved, in 2020 and beyond.

Before the 2010 redistricting cycle began, several important developments set the stage for the process. First, in the 2010 election, Republicans won six governorships and about 675 state legislative seats previously held by Democrats. As a result, Republicans began the redistricting cycle controlling redistricting for 213 of the 435 seats in Congress. By contrast, Democrats drew the lines for just 44 seats.

Redistricting *is the process of redrawing legislative district lines.*

Reapportionment *is the process of using a state's population to decide how many representatives it gets.*

Gerrymandering *is a practice whereby line-drawers manipulate district lines to establish a political advantage for a particular party or group. A gerrymandered district is best identified by understanding the intent of the line-drawers rather than simply by looking at its shape.*



Because of population shifts, eight states gained congressional representatives, and 10 states lost representatives.

States Gaining Representatives	
Texas	+4
Florida	+2
Arizona	+1
Georgia	+1
Nevada	+1
South Carolina	+1
Utah	+1
Washington	+1
Total	**12**

States Losing Representatives	
New York	-2
Ohio	-2
Illinois	-1
Iowa	-1
Louisiana	-1
Massachusetts	-1
Michigan	-1
Missouri	-1
New Jersey	-1
Pennsylvania	-1
Total	**12**

Second, although partisans controlled redistricting for more than half of all congressional districts, independent redistricting commissions became much more prominent, and courts continued to play an important role in the process. Independent commissions controlled redistricting for 78 seats, while courts ended up controlling 62 seats.

Third, America experienced significant demographic shifts during the past decade. In particular, the nation's Hispanic, Asian, and African-American populations experienced dramatic growth since 2000. While the white population grew by just 5 percent, the Hispanic and Asian populations increased by 43 percent, and the African-American population increased by 12 percent.

Finally, trends in population growth and migration patterns shifted political power from the Northeast and Midwest to the Southeast and West.

Based on the Brennan Center's preliminary analysis of the 2010 redistricting cycle, it is clear that:

- Republicans benefited more from redistricting, primarily because they controlled redistricting for nearly four times as many seats as Democrats.
- Where they controlled the process, partisan actors — both Democrat and Republican — used redistricting to increase their political advantage.

The preliminary findings of our analysis suggest that the type of authority that controlled redistricting — whether legislature, commission, or court — may have mattered immensely for the results of the process. As the study shows, redistricting by partisans has altered the political playing field for the upcoming decade.

Hyper-Partisan Politics

Thomas Mann

When ideological extremism collides with the consensus-based American system, partisanship wins. One of the country's most respected political scientists grapples with the reality of today's divided government.

Any of you who know me know that I'm not a natural critic of our constitutional system. I'm not a goody two-shoes. I like politics, and I don't glamorize the past; I don't think we've ever had a golden era in American politics. We've certainly had periods of rough and tumble partisan politics in the early 1800s, in the lead up to the Civil War, in the post-Reconstruction period leading to the turn of the century. So we've seen a lot of what we're complaining about before. It's also the case that my co-author and dear friend are not partisans. That doesn't mean we don't have our personal views as citizens, but we've really tried to make our way in Washington by watching, studying, writing about, talking about the way our system works and when it doesn't, and how we might deal with it. This has led to a situation where most people haven't a clue as to what our personal citizen views of the world are. They make certain assumptions based on the fact that Norm is at AEI and I'm at Brookings, but that probably misleads more than anything else. It certainly serves our purpose, because we get a hearing that we might not otherwise get.

Tocqueville observed more than a century ago that Americans were peculiar in many respects, but one of them was our capacity for self-criticism and renewal, that we didn't pretend we lived in the best of all possible worlds. The jingoism about American exceptionalism is a more recent phenomenon. Back then, we acknowledged we had problems and we tried to deal with them, and it's in that spirit that we approach this book.

My co-author and I are not alarmists, but we've become alarmed. We have become increasingly concerned about the state of American politics and governance. We've also become convinced that one of the biggest problems we face is not getting stories straight about what's going on. You can't change the system — improve it until you know what the problem is and what's driving it. People like us, people at think tanks that aspire to do our jobs in a non-partisan way, journalists, and academics who make their living as quote "pundits" without being partisan activists are all suffering from the same disease. The disease is that we really try to be fair, in the immortal words of Fox, "fair and balanced," right? But honestly, we really try to get it straight. But what happens

Brookings Institution Senior Fellow Thomas Mann, author of "It's Worse Than It Looks," co-authored with Norman Ornstein, gave remarks at the Brennan Center on June 15, 2012.

when you insist on imposing a framework of balance when the underlying reality is not balanced? We came to feel that as a consequence, the public was being misinformed about what was going on in our politics, and effectively demobilized and disarmed. It led to conclusions like ah, they're all in it together, it's utterly corrupt, the system is broke, parties are polarized, and they're both to blame. Anyway, that was the backdrop as we saw — certainly after Obama's election, but even well before it. But however awkward it may be for the traditional press and non-partisan analysts to acknowledge, one of our two major parties, the Republican Party, is to blame. It has become an insurgent outlier, ideologically extreme, contemptuous of the inherited social and economic policy regime, scornful of compromise, unaccepting of the conventional understanding of facts, evidence, and science, and dismissive of the legitimacy of its political opposition.

In my mind, to understand today's Republican Party, you have to see its sincere belief that everything has soured and at the root of the problem is government and the role it plays in our society. It's a really aggressive form of economic libertarianism that's mixed up with very strong feelings about who's a real American. This social dimension combined with the economic libertarian dimension basically rejects the opposition, sees no value in negotiating or compromising with them, because they're apostates. There's disrespect for science and no acceptance or certainty about facts. Evolution becomes just another theory; climate change, oh, who can say. It produces a different kind of a player, and with Obama's election, we saw something we hadn't seen before.

Think about what the Democrats did after the 2000 election, one of the most controversial presidential elections in at least a century that was decided by a partisan 5-4 vote of the U.S. Supreme Court. And then compare it with how the Republicans responded to the 2008 election. In 2001, the Democrats said, "Ah he's our president, and we'll go to work." That doesn't mean they didn't fight and resist some Republican efforts, but right away they started negotiations on No Child Left Behind. Max Baucus obliged Bush and the Republicans on a tax cut. They did business together. Now let's turn to 2009. A wonderful new book that follows Tea Party members in Congress for their first couple of years has a prologue that reports on a dinner on the night of Obama's inauguration. It was mainly House Republican leaders and activists. Jim DeMint attended. They were reeling from the defeat, and said, "Our way back to power begins in 2010, and the way we get there is to make Obama a failure, and the only way we can make that happen is if we stick together and refuse to engage in any negotiations." Mitch McConnell said as much two years later.

So they were creating an all-out, parliamentary-like opposition party. But in a real parliamentary system, they would have lost and things would have moved through. The majority would have had their program and three or four or five years later be held accountable. Not so here. The strategy was to delay, obstruct, defeat where they could and, if not, damage and discredit. I even went so far as to use the term "new nullification" to talk about the Republican strategy of refusing to confirm the appointment of individuals they deemed qualified to serve in key positions or refusing to implement legislation that had passed and been signed into law, because they didn't like the law. It was really just a stunning, all-out effort of opposition. If you can hold up a nomination or an appointment of some kind, you can take four weeks of Senate time and weaken any effort to get others things done.

The debt-ceiling hostage taking is our initial case in point. We go to great pains to show the new precedent set by this. It was really quite stunning behavior, when you realize the country was in the midst of an economic crisis. They opposed things that they had embraced three, four, five years before just because Obama's name was on it. It was all about the war and nothing about the governing. The capacity to do it was there because of our constitutional system, because of the Senate filibuster.

Anyway, if you don't understand that and accept it, I think you don't understand how our politics has played out in recent years. It leads you to look more skeptically on the search for bipartisanship. If one party defects — and I would consider the Grover Norquist tax plan a defection — and all you do is try

to move closer to them, it doesn't produce the desired outcome. Obama was either naïve or somewhat irresponsible and cynical in making so much of his bipartisanship. I understand it was his signature brand; it's what took him out of nowhere in 2004 and put him in the White House in 2009. It was really something that was important to him, but he was in the Senate long enough to know that the ingredients for that did not exist.

After my session with the Council on Foreign Relations, a man who identified himself as a Republican official from New Hampshire — been very active in politics — came up to me and said, "I read your book. It's even worse than you say it is. My party, they just see Obama as evil incarnate and all the people around him. It's worse than Hitler and Stalin." This kind of stuff is out there. Sadly, these people have been embraced and invited in rather than ostracized. It's a big problem, and most of the solutions people pursue are likely to do more harm than good.

Can we alter our electoral system in ways that would diminish the level of ideological polarization of the parties?

We talk about structural changes that will help over the longer term. Can we alter our electoral system in ways that would diminish the level of ideological polarization of the parties? We obviously talk about everything from increasing turnout in general and primary elections to reform of electoral rules. On the institutional side, we say, if we're going to have parliamentary-like parties, let's get our rules a little closer to majority rule. There are advantages to our system when there's a willingness to negotiate. But there is no such willingness now, and it's counterproductive. Finally, what do we do in the short-term? There's a whole host of things being discussed from recreating a public square, to reintroducing the whole notion of shame, public shame. Shaming reporters into covering the story and the truth rather than simply reporting both sides. We want to get away from just a pure, visceral referendum. "Things are going bad, throw the rascals out." It just repeats the cycle and gets us nowhere.

It's a scary point in our politics. The war is so intense, and the clashing visions so great that we now have one old style conservative party, that's the Democratic Party, who sees the challenges in demography and health care cost and globalization — the sort of basic structure of policy that's evolved over years — and is perfectly willing to change it and to engage in negotiations to do it. The other party says, "No, we don't want to fiddle around the edges to keep this. This is the opportunity to get rid of it entirely." And that means it has become a holy war. It kind of reminds you of the Crusades in some respects. We see it with work the Brennan Center is involved in voter suppression. We see it in the role of money in politics. We see it in tactics used in Congress, and in the press. It really is an all-out war, and you could say that American democracy looks more like a banana republic today than anything we would normally associate with our democracy.

LIBERTY AND NATIONAL SECURITY

It's Time to Police the NYPD

Faiza Patel and Elizabeth Goitein

New documents, uncovered by the Brennan Center, show the urgent need for oversight of the nation's largest police force.

The Police Department has the formidable responsibility of keeping New Yorkers safe from a terrorist attack. It is entrusted with significant powers and broad discretion in how to use them. It has done an admirable job in preventing violence. But last week, we were reminded that no government entity with such powers should operate free from independent oversight.

The controversy centers around the department's use of a 2008 documentary film, "The Third Jihad," in training officers. The film aims to scare Americans into thinking that the United States is under attack from a shadowy conspiracy of Muslim groups that, it claims, pretend to be part of mainstream society while plotting its downfall. The film features cameo appearances by a number of officials, including Police Commissioner Raymond W. Kelly. Its use in training set back relations with the city's Muslim community, which is estimated at around 800,000 and whose members have been vital partners in combating terrorism.

After *The Village Voice* first reported, a year ago, on the film's use in training, the police claimed that it had been shown only once or twice and that the clip of Mr. Kelly had been lifted from previous film footage. Faced with newly released documents demonstrating that the film was viewed by nearly 1,500 police officers and that Mr. Kelly was in fact interviewed by its producers, the department now acknowledges the truth, but maintains that the decision to show the film was the isolated error of a single sergeant.

A similar pattern was evident when The Associated Press revealed last August that the Police Department had been spying on Muslims as they prayed, ate and went about daily life. The police flatly denied the existence of the program. After The A.P. released documents about a "Demographics Unit" assigned to map Muslim communities, the police were forced to acknowledge the program, but minimized its significance. At a City Council hearing, Mr. Kelly gave few details about the program and said the police were following the law.

Contrast this response with the reaction of the F.B.I. and the C.I.A. when recently presented with similar issues. When it came to light that the F.B.I. had been using anti-Muslim training materials, Attorney General Eric H. Holder Jr. denounced their use and immediately ordered a comprehensive review. In response to allegations that the C.I.A.'s cooperation with the police had blurred the line between foreign and domestic spying, the C.I.A.'s inspector general reviewed the relationship and concluded that a C.I.A. officer embedded with the police hadn't been sufficiently supervised. On Friday, Mr. Kelly said the officer would leave in April.

History is filled with examples of law enforcement and intelligence officials overreaching during moments of perceived national security crisis. In the 1970s, the Church Committee investigated both the F.B.I. and C.I.A. for spying on the political activities of Americans during the Vietnam War. These investigations led to the creation of oversight

This op-ed was originally published by *The New York Times* on January 29, 2012.

mechanisms: the F.B.I., for example, has benefited from Congressional oversight and a robust inspector general who has uncovered a number of illegalities in the F.B.I.'s counterterrorism programs.

The Police Department is a different story. Unlike other major city agencies, it is exempt from the jurisdiction of the Department of Investigation, which investigates corruption, incompetence and unethical or other forms of misconduct. The Internal Affairs Bureau, which investigates allegations of corruption and misconduct, and the Civilian Complaint Review Board, which looks into complaints from the public about police mistreatment, focus on individual accusations of wrongdoing. The City Council has shown little interest in examining police counterterrorism or using its subpoena power to force disclosure of information, in part because some politicians are fearful of appearing soft on crime.

History shows that any attempt to oversee the police will be met with great resistance by the department and its political allies. But no agency is immune from mistakes. When the stakes are as high as they are in fighting terrorism, there must be a mechanism to identify excesses and wrongdoing.

When the stakes are as high as they are in fighting terrorism, there must be a mechanism to identify excesses and wrongdoing.

We need an independent inspector general for the Police Department. Such an official would have seen the film scandal for what it is: not the error of one sergeant, but an indication that procedures for authorizing training materials are lacking. Oversight makes government stronger, not weaker.

In November, Mayor Michael R. Bloomberg described the Police Department as "the seventh biggest army in the world." Effective oversight of such a potent force is a necessity — not a luxury — for the country's largest city.

Pushing Back on a Culture of Secrecy

Elizabeth Goitein

Unnecessary classification of information contributes to leaks that undermine our nation's security.

At the end of July, the Senate intelligence committee marked up legislation drafted in response to recent high-profile leaks of classified information. The committee's chairwoman, Dianne Feinstein, claims that the bill will address the "culture of leaks" in Washington. But the leaks are a symptom of the intelligence community's culture of secrecy — and the bill would make that problem worse in a host of ways.

Any insider will tell you that the government classifies far too much information. Top military and national security officials estimate that between 50 percent and 90 percent of classified documents could safely be released. That adds up to a massive amount of unnecessary secrecy when one considers there were 92 million decisions to classify information in 2011 alone.

The WikiLeaks disclosures featured some vivid examples, such as a cable from an American diplomat who classified his description of a typical wedding in the province of Dagestan.

The impetus for the current Senate bill — a series of leaks of classified information that may have been implicitly or explicitly "authorized" by top administration officials — illustrates the problem. High-level intelligence officials are not enemies of the state. If they are approving the disclosure of classified information, it's a pretty safe bet the material didn't require classifying in the first place.

Put simply, officials who routinely see innocuous documents stamped "Secret" lose respect for the system, and that puts all secrets, the real ones as well as the purely nominal ones, at risk.

Take the fact that President Obama is personally involved in identifying the targets of drone strikes, as reported by *The New York Times,* one of the disclosures that prompted congressional action. It is virtually impossible to fantasize a scenario in which this information could be used to harm the United States.

Overclassification contributes directly to leaks that threaten national security. As Supreme Court Justice Potter Stewart commented in 1971, "when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion."

Put simply, officials who routinely see innocuous documents stamped "Secret" lose respect for the system, and that puts all secrets, the real ones as well as the purely nominal ones, at risk.

Excessive classification also means that even low-level or nonsensitive government positions often require clearances. One in every 50 American adults now has access to classified information, not a winning formula for keeping secrets.

This op-ed was originally published by CNN.com on August 8, 2012.

The Senate bill, however, does nothing serious to address the problem of overclassification. Indeed, it perpetuates the fiction that all classified information poses a dire threat.

The bill strips intelligence community employees of their pensions if the Director of National Intelligence decides they leaked classified information, even if the information reveals only that Dagestani weddings last three days. It revokes the clearances of officials who disclose the existence of classified covert operations — even if the operations, like the raid on Osama bin Laden's compound, are in the past and could not possibly be jeopardized by disclosure.

Worse, the Senate bill extends the shroud of secrecy to encompass even unclassified information. Intelligence officials already must submit any publications that discuss their work to their agencies for pre-publication review and approval; under the bill, they must submit "anticipated oral remarks" as well. On its face, the provision could require pre-publication review for dinner party conversations.

The bill also bars current and recent intelligence officials from contracting with the media to provide commentary on any intelligence or national security matters. No member of the intelligence community, for instance, could provide paid commentary on the war in Afghanistan.

Most alarming of all, the bill prohibits any intelligence official other than the agency's director, deputy director, or designated public affairs officer from providing off-the-record information "regarding intelligence activities" — classified or unclassified — to the media. If successful, this provision would ensure that the public hears only the party line on all matters relating to intelligence policy. It also would effectively prohibit whistleblowing. Intelligence officials could raise concerns through approved government channels, but if that failed would have no meaningful way to bring evidence of government fraud, waste, abuse, or illegality to the public's attention.

How to deal with disclosures of classified information about government misconduct is a tricky question. How to deal with disclosures of unclassified information about government misconduct should be a no-brainer. Such disclosures should be welcomed and encouraged.

The law already falls short in this regard: the Whistleblower Protection Act protects other government employees against retaliation for whistle-blowing, but excludes members of the intelligence community. The Senate bill would turn this lack of protection into a virtual prohibition.

Unauthorized leaks of properly classified information are a real problem. Grandstanding about authorized leaks of improperly classified information will not solve this problem, nor will cracking down on disclosures of unclassified information. If Congress wants to get serious about leaks, it will take steps to shrink the universe of secret government information, not expand it to encompass yet more information the public has every right to know.

Despite History, Fear Prompts Court Deferrals to Secrecy

Frederick A.O. (Fritz) Schwarz, Jr.

As Chief Counsel to the U.S. Senate's "Church" Committee in the 1970's, Fritz Schwarz and his colleagues effectively re-wrote 40 years of history with its revelations of wrongdoing by U.S. intelligence. In April, for a speech delivered at the University of Oklahoma's College of Law, Schwarz discussed why the Church Committee succeeded and why the courts, despite all evidence to the contrary, ritually accept government claims on the need for secrecy.

My topic is that availability of government information is one of the foundations of American democracy. However, the courts have unfortunately failed to recognize this part of America's creed. Moreover, the courts have consistently failed to recognize the danger of the overuse of government secrecy.

Before delving into these two subjects, it might be helpful to describe how I first became aware of the overuse of government secrecy, and of the harm this does to America.

In 1975 — at the age of 39 and not knowing a single senator — I was lucky to be appointed as the Chief Counsel of a Senate committee, popularly known as the Church Committee, for its Chair Senator Frank Church of Idaho.

Before the Committee's work in 1975-76, there had never been such a broad investigation and disclosure of secret governmental intelligence information in America or anywhere else. There has not been one since.

What did we learn and disclose?

Six presidents, Democrats and Republicans, from Franklin Roosevelt through Richard Nixon, had abused the powers of their secret intelligence agencies and had hid behind secrecy in doing so.

As for the agencies themselves, just a few examples. Millions of law-abiding Americans were spied upon. The FBI attempted to drive Martin Luther King to suicide, infiltrated many law-abiding organizations including the Women's Liberation Movement, sought to break up marriages of civil rights workers, incited beatings and even killings. The CIA hired the Mafia to help assassinate Fidel Castro, overthrew democratically-elected governments, experimented with dangerous drugs on unwitting Americans, and violated its charter by spying on dissident Americans at home. Both agencies opened mail illegally.

Fritz Schwarz delivered his speech, "Access to Government Information Is a Foundation of American Democracy, but the Courts Still Don't Get It," at the University of Oklahoma College of Law's annual Henry Lecture in April 2012.

Both engaged in warrantless wiretapping and bugs. For decades, the National Security Agency got copies of every telegram leaving America.

Why did the Committee succeed?

Most importantly, by discovering and revealing that the government had acted secretly and illegally, as well as inconsistently with American values. But fundamental to those disclosures was that the Committee was remarkably non-partisan. (In 1975-76, the partisan climate in America was far, far different than now.) Keeping partisanship at bay was also surely helped by the fact that the Committee criticized secret acts of administrations of six presidents from both parties.

• • •

Today, we are left with a sharp debate about the harms and the benefits of secrecy and openness. And so now I am going to shift gears and discuss how the Courts have and have not — contributed to that debate.

Of course, the debate between openness and secrecy has two sides. There are legitimate secrets that need protection. Arguments by the executive branch for secrecy, based upon "national security," are entitled to weight.

The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make us free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes us free, is lessened.

But, in almost all cases the courts have given *conclusive* weight to claims of "national security." This is true in cases where the government moves to dismiss cases because it claims the litigation will expose a "state secret." It is true in Freedom of Information Act (or FOIA) cases where the government resists production of documents on "national security" grounds.

But it is not just the uniformity of the ultimate result that is revealing. It is also what the courts do *not* do in the course of deciding these cases.

Courts do not look behind government officials' assertions of national security harm. While a court's job *is* to decide individual cases, it is striking to see the narrow lens the courts use to examine secrecy cases. Courts pay no attention to the fundamental importance of openness to American democracy. And they pay no attention to the long-lasting and overwhelming evidence that secrecy has been overused and misused.

• • •

There is overwhelming evidence about secrecy 's overuse. While there are genuine secrets that must be defended, it is clear that far too much government information is kept secret.

For decades, bipartisan blue ribbon commissions and experts from both political parties have concluded that much more is classified than should be classified. And then is kept classified for much too long.

Estimates of overclassification made by top ranking military and intelligence professionals range from 50 percent to 90 percent.

Yet courts do not refer to this huge body of evidence when they supinely accept executive branch secrecy claims.

There is also ample evidence of classification being used to hide embarrassment and illegality.

• • •

So what explains the courts being so lax? Fear. Fear that the courts might turn out to be wrong. Fear that the courts may lack the competence to evaluate secrecy claims. In addition, there may be some institutional reasons relating to courts and judges themselves that help explain why judges tend to tilt toward secrecy.

Openness is a key to our democracy. It is unfortunate that the courts do not seem to appreciate this. Sometimes Congress also does not. But at times, it does.

So let me conclude with some congressional rhetoric of which I am rather proud. The Church Committee proclaimed its belief that America would benefit from hearing the truth and confronting past mistakes:

> "Despite our distaste for what we have seen, we have great faith in this country. The story is sad, but this country has the strength to hear the story and to learn from it. We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but, if we do, our future will be worthy of the best of our past."

The Committee concluded with words that ring true decades later:

> "The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make us free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes us free, is lessened."

• • •

It's Time for an NYPD Inspector General: A Proposal for Reform

Faiza Patel and Andrew Sullivan

In the wake of the terror attacks of September 11, 2001, domestic counterterror efforts elevated the NYPD into realms once reserved for the FBI and CIA. The department needs a comparable level of oversight that only an inspector general can provide.

As the nation's largest police force, the New York Police Department (NYPD) is charged with keeping New York City's diverse population safe, not only from crime but also from terrorism. The Department has been given far-reaching authority to fulfill these duties. Although New York City has seen dramatic drops in crime and has been spared a successful terrorist attack for more than a decade, questions have been raised about some of the NYPD's operations and policies in combating terrorism. One longstanding issue has been the extent to which the Department's "stop, question and frisk" policy disproportionately targets minorities. In addition, the Associated Press (AP), in a recent Pulitzer Prize-winning series of stories about the NYPD's intelligence operations, suggested that the Department was monitoring American Muslim communities even where there was no indication of suspicious activity. In both cases, questions have been raised about whether an unintended side effect of these policies and practices has been to alienate the very communities whose cooperation the police sorely needs to help keep the City safe.

Over the last decade, the New York City Police Department, like state and local law enforcement agencies around the country, has become increasingly involved in collecting counterterrorism intelligence. The NYPD's counterterrorism and intelligence-gathering operations are unique among municipal police departments, both in size and character. The magnitude of these operations vastly exceeds that of similar efforts in other major cities: In 2010, the NYPD's budget for counterterrorism and intelligence was over $100 million and the two divisions reportedly employed 1000 officers. Equally important, while New York City police cooperate with the Federal Bureau of Investigation (FBI) on counterterrorism matters, they also conduct intelligence operations and investigations completely separate from those involving federal authorities. The creation of this stand-alone capability was a stated goal of Police Commissioner Raymond W. Kelly, and it is an accomplishment frequently trumpeted by the Department.

Excerpted from *A Proposal for an NYPD Inspector General,* October 2012.

Unlike the FBI and other national intelligence agencies, the NYPD's sizable counterterrorism and intelligence operations function largely free from independent oversight. Currently, oversight of the NYPD — as conducted by the Department's Internal Affairs Bureau, the Commission to Combat Police Corruption, and the Civilian Complaint Review Board — focuses almost exclusively on police corruption and individual police misconduct. The City-wide Department of Investigation similarly focuses on corruption, incompetence, and misconduct in 300 municipal agencies and, in any event, does not cover the police. The City Council has supervisory jurisdiction over the police, but has rarely examined its intelligence operations. Control mechanisms established by a 1980s consent decree largely have been eliminated.

In the federal system, congressional supervision informed by reports from independent inspectors general has been a crucial tool for increasing transparency, accountability, and effectiveness in the realm of intelligence and counterterrorism. This oversight system was developed in the wake of the 1970s congressional investigations into the FBI's and the Central Intelligence Agency's (CIA) illegal collection of intelligence about Americans, and both agencies have operated for decades under its strictures. Even after the September 11th attacks, this system continues to function well and has, in fact, been strengthened. The FBI, in particular, has benefitted from a robust inspector general who has contributed to the effectiveness of its counterterrorism programs through reviews of issues ranging from the need for the Bureau to develop a comprehensive risk assessment of the terrorist threat to its use of the new intelligence techniques that have been authorized over the last decade.

Given that the NYPD has built an intelligence and counterterrorism capability more in line with the FBI than a traditional urban police force, it is time to build an oversight structure that is appropriate for its size and functions. An independent inspector general should be established for the NYPD. This would be an enormous step forward for police accountability and oversight for several reasons:

- Ensuring Transparency – The inspector general would be in a position to make policing more transparent, thus allowing the Mayor and the City Council to better exercise their oversight responsibilities and increase public confidence in policing. Reliable information about how policies and legal constraints are implemented is especially important in the context of intelligence operations, the specifics of which are often necessarily concealed.

- Protecting Civil Liberties – As the NYPD continues its important work of keeping New Yorkers safe, the inspector general would have the mandate, expertise, and perspective to make sure that it does so consistent with our constitutionally guaranteed liberties.

- Reforming From Within – The inspector general would be in a position to work with the police cooperatively to address any problems in the Department's operations and to keep track of progress.

The New York Police Commissioner and a host of law enforcement officials often say it is critical that police departments build relationships of trust with the communities they serve. An NYPD inspector general would contribute to improved relations by increasing transparency, promoting confidence, ensuring accountability and efficiency, and demonstrating the NYPD has nothing to hide.

The President's Record on National Security Policies

Daniel Klaidman

In 2008, Barack Obama vowed to reform the nation's war on terror and roll back the excesses of the previous administration. In remarks at the Center, "Kill or Capture" author and Newsweek Special Correspondent Daniel Klaidman offered a behind-the-scenes look at why Obama found it difficult to follow through on good intentions.

Barack Obama inherited an economy that was teetering on the brink of a possible depression if the administration didn't find a way to break the trend. This isn't to excuse him, but it's to try to understand his mindset a little bit. I think Obama genuinely did want to do the things that he set out to do. For instance, I think he really believed that closing Guantánamo was important and doing civilian trials for the 9/11 defendants was the right thing to do. He thought that those civilian trials would be more effective than military commissions. In the end, on a lot of these issues, he lost his nerve. He flinched. That sounds harsh, and I'd like to think of myself as an empathetic reporter, I'm trying to find that line between empathy and detachment. But I think he did. The reasons are in some ways understandable.

You have to consider of hothouse atmosphere of any White House, and particularly a White House that was being run by Rahm Emanuel. He was very effective at framing presidential choices in a kind of zero sum game. Obama had to practice what the White House called triage, basically prioritizing all the various things they were trying to get done. So much of it in that first year was about saving the economy. It was about getting a stimulus package through, rescuing the banks, and bailing out Detroit. These counterterrorism issues would pop up, and they were always very difficult legally, substantively, and politically. Guantánamo detainees did not have a constituency other than civil rights advocates like you. Obama didn't really have the ability to rally the American people around these issues, because frankly, if you looked at the polling, closing Guantánamo was not a high priority for the American people.

This was Obama's Achilles heel. If you watched how he dealt with these issues inside the White House, it was enormously impressive. He led constitutional seminars with his advisors. He personally helped craft a lot of the legal briefs that basically became the legal architecture for his war on terror. He was very engaged. But when it came to actually engaging Congress, he didn't have the temperament. He didn't have the jawboning and arm-twisting skills. And ultimately, he was persuaded by Rahm and by people on the political team that he didn't have the political capital to do all of the things he wanted to do. Reforming the war on terror fell by the wayside because it didn't have a

Daniel Klaidman delivered remarks at the Center on November 28, 2012.

constituency, and at the end of the day, as much as the criticism from the left and from civil libertarians genuinely stung him, Obama decided that he was not going to use his political capital to make it happen.

I don't subscribe to the idea that Obama simply perpetuated George Bush's war on terror. That was a meme that became very popular. Jack Goldsmith was the first one to write about it in *The New Republic*. Yes, Guantánamo is still open. But there were complications to closing it that would have been hard to get around anyway. For instance, there were roughly 100 Yemenis who had not been charged. Many of them had associations with Al-Qaida or the affiliate organization in Yemen, what was to become AQAP. Yemen was obviously in a state of chaos. If we had sent them back, the central government had no way of ensuring that these people would be incarcerated and held. So there was a legitimate fear about sending those people back to Yemen. And there were other issues.

When the administration came in, even during the transition, people were beginning to look at who was in Guantánamo and what would happen to them if we closed the prison down. They realized that the only way to do it was to persuade our allies to take some of the prisoners, a lot of them. Well how are we going to persuade the Germans and the French and the Brits and the Australians and whoever else to take detainees? We would have to step up to the plate ourselves.

And so they looked at the population to see which detainees we would be able to take — that our politics would tolerate — and they quickly identified a group of roughly 100 Chinese dissidents called the Uighurs from the far reaches of Central Asia. They ended up at Guantánamo, even though they had no connection to Al-Qaida and were not in any real sense a threat to the United States. Their beef was not with America; it was with China. A secret plan was hatched to bring a very small number of these Uighurs to Northern Virginia where a small population already lived.

The plan leaked. A member of Congress from Virginia immediately sends a letter to the president calling the plan an outrage. He gives a speech on the House floor, telling members these terrorists were coming to their neighborhoods. There was a rebellion in Congress — Republicans and Democrats alike. Obama caved. He was furious. He felt he'd been sandbagged. He asked himself, "Why am I going to potentially sacrifice my domestic agenda for a small group of Chinese dissidents?" From a purely political perspective, you can sort of understand that.

But I think wrongly he made the judgment that he couldn't walk and chew gum at the same time. The same thing was true with indefinite detention, where Obama for all of the first year, and some of the second year, couldn't make a decision. His advisors were telling him that you had to accept indefinite detention, at least for those detainees who were still in Guantánamo who they said could not be released and could not be tried. But he didn't want to do it, so he stalled and vacillated and played for time. Ultimately, he caved there as well. He didn't want to, but he did. This was a pattern that was repeated throughout those first couple of years. Then you had the underwear-bombing attempt on Christmas day (in 2009), and at that point, there was really not a whole lot that Obama could do on these issues because of the mood of the country and in Congress.

Unchecked and Unbalanced

Elizabeth Goitein

In a review of Jack Goldsmith's book on domestic counterterrorism policies, Liza Goitein argues that consensus about excessive executive powers does not mean they are effective, legal, or right.

At the outset of his new book, "Power and Constraint", Harvard law professor Jack Goldsmith makes the case that President Obama has continued many of his predecessor's most controversial counterterrorism policies. From preventive detention to the state secrets privilege to military commissions, Goldsmith asserts, Obama has adopted practices that he criticized in his presidential campaign.

This claim of continuity rankles Obama supporters who believe that the president's approach to counterterrorism evinces a respect for the rule of law that his predecessor lacked. But the claim is not a new one. It has been put forward both by conservatives who consider the continuity a validation of President Bush's approach and by liberals who consider it a betrayal. Indeed, even Obama's staunchest defenders acknowledge some unexpected similarities between the two administrations in national security matters.

More provocative is Goldsmith's argument about why this is the case. He contends that, contrary to conventional wisdom, the Bush era was one of unparalleled oversight and accountability. After 9/11 the executive branch initially assumed broad and intrusive powers, which it exercised largely in secret. The media, aided by Freedom of Information Act requests from NGOs, uncovered these secret acts. Congress, the courts, and internal agency watchdogs then pushed back and trimmed the president's powers. By the time Obama took office, existing policies reflected a rigorous application of the constitutional system of checks and balances. By continuing those policies, Obama did not abandon the reformist commitments he made during his campaign, as some believe. The policies already had been reformed, and whether they ended up in the "right" place is, Goldsmith asserts, beside the point.

Goldsmith is no mere observer of the events he describes. In his brief tenure as the head of the Justice Department's Office of Legal Counsel (OLC), Goldsmith made the unprecedented decision to withdraw two standing OLC opinions: the "torture memos" authored by John Yoo. The memos, he found, provided a flimsy legal justification for subjecting terrorist suspects to

This review was originally published in the September / October issue of *The Boston Review.*

Despite strong evidence that the government has broadly collected both domestic and international communications, basic information remains unavailable to the public.

"enhanced interrogation techniques" that included waterboarding, shackling suspects in "stress positions," confining them in small boxes, subjecting them to extreme temperatures, and preventing them from sleeping. With the exception of waterboarding, however, Goldsmith did not dispute the legality of the practices — only the quality of the memos authorizing them — and so allowed them to continue.

A conservative who occasionally deviates from the party line, Goldsmith approaches his subject with his usual civility and willingness to acknowledge merits on both sides of an argument. Moreover, the material is exhaustively researched. It is difficult to take issue with any of the facts he presents, with one significant caveat: His information about still-secret executive practices necessarily comes from interviews with anonymous officials, whose motives and biases are unknown and whose statements are not verifiable. Nonetheless, taking all of Goldsmith's facts as true, do they support his contention that our constitutional system of checks and balances led us to a genuine place of compromise and consensus, and is that where we should be? Here, one can — and should — take issue.

• • •

Goldsmith first takes on the popular conception that the Bush administration's notorious secrecy scuttled any meaningful oversight. He acknowledges that the administration did its best to conceal many counterterrorism activities. He nonetheless contends that these efforts foundered on an "ecology of transparency" (a term coined by legal scholar Seth Kreimer) in which leaks are commonplace, a wealth of public information can be used to deduce secret information, and the news media's investigative forces are magnified by bloggers and other citizen journalists. News outlets accordingly exposed highly secret programs including undisclosed CIA prisons, enhanced interrogation techniques, and warrantless wiretapping by the National Security Agency (NSA).

Goldsmith's observations are accurate, as far as they go. For instance, it's true that *The New York Times* wrote about the NSA's warrantless wiretapping in 2005, albeit long after the practice's inception. The coverage prompted the government to release some details about its Terrorist Surveillance Program, which targeted communications between people in the United States and suspected terrorists abroad. But it failed to pry loose official information about other NSA surveillance activities referred to, but not described, in the unclassified version of a 2009 joint inspectors general report. Despite strong evidence that the government has broadly collected both domestic and international communications, basic information remains unavailable to the public, including how many Americans have been affected and whether the government is merely studying communications traffic patterns or is mining actual content. On this issue of overriding public importance, there are still more questions than answers.

On other issues, journalists' best efforts have failed to uncover even rudimentary information. Under Section 215 of the Patriot Act, the government may secure

an order from a secret court to obtain "any tangible thing" in a terrorism investigation. For years, some members of the congressional intelligence committees have sounded the alarm that the government is relying on a twisted interpretation of Section 215 to conduct a secret intelligence program that contravenes any reasonable understanding of the law. These members cannot divulge what they know; indeed, most members of Congress are not privy to the information. But they maintain that Americans would be "stunned" and "angry" (in Sen. Ron Wyden's words) if they knew the truth. That truth continues to elude frustrated reporters.

Then there are the criteria our government uses to target individuals for drone strikes — yet more critical information that seemingly resides outside the ecology of transparency. Attorney General Eric Holder and top counterterrorism official John Brennan recently summarized the government's legal justification for targeting U.S. citizens and its criteria for targeting "specific al-Qa'ida terrorists." But in a little-noticed turn of phrase, Holder said citizens could be targeted in "at least" the circumstances he identified — meaning that the government may target citizens under other, unspecified circumstances as well. And Brennan pointedly limited his remarks to the targeting of "specific" terrorists, sidestepping a journalist's question about the reported use of "signature strikes" to attack unidentified individuals whose behavior raises suspicions. We still do not know the full parameters of the government's targeted killing operation.

These and other "known unknowns" — such as the extent and nature of the government's rendition practices and proxy detentions by other nations on the CIA's behalf — suggest that the ecology of transparency is not equal to the task it faces. And, of course, there is no way to assess the universe of "unknown unknowns." Journalists have revealed some information about some government activities, but there may be others about which the public still knows nothing.

Goldsmith is right to point out that the media scored important victories against the executive branch's efforts to conduct the war on terrorism entirely in secret. Those victories are perhaps insufficiently acknowledged by open-government advocates. But the executive branch scored wins of its own. The exact tally matters less than the fact that much key information remains unavailable, preventing the constitutional system of checks and balances from operating at all — let alone with the success that Goldsmith attributes to it.

• • •

In Goldsmith's account Congress effectively fulfilled its oversight function in the years after 9/11. He acknowledges that, under the auspices of the National Security Act, only a few members — a "Gang of Eight" — were informed about the government's interrogation and warrantless wiretapping programs. The CIA's interrogation program was disclosed to an even smaller "Gang of Four." He nonetheless argues that these few members could have taken measures on their own to stop the programs. They merely chose not to.

In fact, Goldsmith's handful of historical examples notwithstanding, individual members can do little to rein in the administration and its agencies. Even when the executive branch briefs the full intelligence committees, a meaningful response often entails a wider vote, which is why the National Security Act specifies that the committees should alert other members of Congress to matters requiring their attention. The executive branch, however, has required members of the "gangs" who serve on the committees to forfeit this reporting authority as a precondition for learning classified information, and they have obliged.

Moreover, Goldsmith admits that pushback by the intelligence committees is rare, noting that "perverse political incentives usually keep them from serving [their oversight] function well." As he explains, there are few political rewards to secret battles with the administration, and members "tend not to like responsibility for national security decisions," particularly controversial ones. But Goldsmith nonetheless assumes, "Even

dysfunctional oversight has important 'before-the-fact' disciplining and accountability effects...spark[ing] valuable deliberation and care inside the executive branch." This is a rare weak moment in the book. Executive branch officials are rational actors: they do not respond to anemic oversight with vigorous self-checking. Far from engaging in "valuable deliberation and care," the Bush administration notoriously limited discussions about its interrogation and warrantless wiretapping programs to those officials who were likely to go along with them. Only one handpicked OLC attorney was informed about the wiretapping program, and lawyers for the State Department and the NSA were not allowed to see OLC opinions on interrogation and wiretapping.

Nor does the record support Goldsmith's claim that post-9/11 legislation represented robust pushback. Almost every time it emerged that the executive branch was violating a statute, Congress rushed to legalize the infraction. When the Supreme Court ruled that the government violated Guantánamo detainees' statutory right to judicial review of their detention — habeas corpus — Congress rescinded habeas through the Detainee Treatment Act. When the Supreme Court ruled that Bush's military commissions were inconsistent with the Uniform Code of Military Justice, Congress dutifully changed the Code. When news broke that the NSA violated the Foreign Intelligence Surveillance Act (FISA) by wiretapping citizens' international communications without warrants, Congress amended FISA to allow the practice to continue. Beyond these legislative validations, Congress provided the FBI with breathtaking new powers through the Patriot Act and repeatedly extended them despite clear evidence of abuse compiled by the Justice Department's inspector general.

Goldsmith relies on a handful of legislative provisions to proclaim the glass half full. His strongest example is Sen. John McCain's amendment to the Detainee Treatment Act. The amendment reaffirmed the prohibition on "cruel, inhuman and degrading treatment" established in international law. But it did not prohibit the CIA's use of any specific interrogation techniques that had been reported, including waterboarding. Nor did it establish the same prohibition by limiting the CIA to the techniques available to the Department of Defense. Further, the statute stripped the courts of jurisdiction over detainees' claims, making the McCain amendment essentially unenforceable.

Congress provided the FBI with breathtaking new powers through the Patriot Act and repeatedly extended them despite clear evidence of abuse compiled by the Justice Department's Inspector General.

The statute thus left the administration plenty of wiggle room. Indeed, as Goldsmith notes, the Justice Department had already "concluded that the program was consistent with language similar to the McCain amendment." And, for good measure, Bush issued a signing statement declaring his authority to ignore the legislation — an authority he willingly exercised in other contexts. Goldsmith correctly points out that the administration decided to scale back the CIA's interrogation program, but it is difficult to accept his claim that Congress forced this result.

Moreover, the Detainee Treatment Act provided interrogators with a defense against prosecution for past acts of torture if they did not know that their actions were unlawful and they reasonably relied on the Justice Department's

advice. This was a stark repudiation of the government's obligation under international law to prosecute acts of torture regardless of the circumstances under which the torture occurred. Goldsmith argues that the provision of a legal defense itself represented meaningful pushback because the executive branch had sought absolute immunity. But as a former Justice Department official, Goldsmith surely knows that the Department does not prosecute people who have a plausible statutory defense. Congress thus effectively granted the requested immunity to those interrogators who stayed within the permissive bounds approved by the Justice Department.

• • •

Goldsmith credits the courts with dramatically reshaping the executive branch's post-9/11 policies, focusing on the handful of Supreme Court decisions involving Guantánamo detainees. These decisions were indeed bright spots in an otherwise bleak landscape of executive impunity, but subsequent developments have limited their effect.

The lack of accountability for torture is striking.

Most notably the Court held that Guantánamo detainees could invoke habeas corpus to challenge their detentions in court. Under procedural rules fashioned by trial court judges, about half of the detainees who sought habeas prevailed. Yet many of these detainees remain in captivity or under watch today.

In some cases the government transferred the detainees to other countries but reportedly exacted promises that they would be imprisoned or monitored there. In others the government could not find a suitable country to accept the detainees and refused to release them in the United States. Although this refusal amounted to a violation of the trial court's orders, the Supreme Court failed to intervene. In still others the government appealed to the D.C. Circuit Court of Appeals, which has sided with the government in almost every case and has rewritten the rules to make it nearly impossible for any detainee to obtain release. Again the Supreme Court has declined to step in to enforce its own rulings.

Goldsmith's focus on the Supreme Court's Guantánamo decisions also obscures the far greater number of cases in which courts refrained or were prevented from exercising their oversight role. The NSA's warrantless wiretapping unquestionably violated the law, which provides criminal and civil sanctions for the government officials and telecommunications companies that colluded in the violations. Yet not a single government official was prosecuted, and the only civil case against the government that has been litigated to its conclusion was dismissed because the judges ruled that plaintiffs couldn't prove their standing to sue without revealing state secrets. Lawsuits against the telecommunications companies were dismissed after Congress granted the companies retroactive immunity.

A court also declined to exercise oversight in the case of a U.S. citizen living in Yemen, Anwar al-Awlaki, whom the government planned to kill. Al-Awlaki's father sued to require that the government demonstrate that his son was a threat. The judge ruled that whether the executive branch may

unilaterally execute a citizen far from any battlefield is a "political question" that a court cannot answer. He also ruled that al-Awlaki's father had no standing to sue because he would not be injured by the killing of his son. Nine months later al-Awlaki and his own 16-year-old son were killed in separate CIA drone attacks.

The courts similarly have refused to hear any cases involving torture by or at the direction of U.S. officials. In three cases challenging extraordinary rendition — the practice of kidnapping terrorist suspects and sending them to other countries to be tortured — the government argued that the litigation would expose state secrets. Even though each material fact in those cases already had been revealed through reporting or the plaintiffs' complaints, the cases were dismissed. Judges also ruled that U.S. officials could not be sued for approving or implementing torture because it did not violate any clearly established rights.

The lack of accountability for torture is striking. The Convention against Torture, to which the U.S. is a party, requires parties to prosecute acts of torture without regard to any claim of "exceptional circumstances" or reliance on a supervisor's orders. The obligation to prosecute acts of torture in armed conflict — considered among the worst of war crimes — is so fundamental that it has attained the status of "customary international law," which makes it binding on all nations. Yet nearly a decade after the revelation that CIA interrogators implemented a program of torture (to debate whether techniques such as waterboarding constitute torture is absurd), the Justice Department has not prosecuted any CIA official in connection with the program, and Congress has passed legislation (the Detainee Treatment Act) that dooms any such prosecution to failure.

Goldsmith — who wants us to believe that systems of oversight, accountability, and checks and balances are intact — is quite comfortable with this result. In a particularly revealing part of the book, he argues that the individuals who developed, facilitated, and implemented the CIA's torture program have suffered enough. After all, while the Justice Department refused even to censure John Yoo and Jay Bybee — two OLC attorneys who mangled the law in their memoranda justifying the program — a top-level Justice Department official "was critical of Yoo and Bybee, and the two lawyers' reputations were damaged." These two reputationally-damaged lawyers are now a tenured professor at a top law school (Yoo) and a federal court of appeals judge (Bybee).

Goldsmith similarly decries the fact that the Justice Department investigated on two separate occasions (but, except for one contractor who beat a detainee to death, did not prosecute) interrogators who went beyond even the draconian techniques of the CIA's program. He describes the launching of a second investigation as "unprecedented and demoralizing," forcing individuals who believed they were in the clear "to go through the distracting and psychologically draining process of lawyering up, spending dozens of hours refreshing their memories . . . and preparing for and facing a grand jury under oath." He also observes that the CIA convened "Accountability Boards" that resulted in a few officials being demoted or paid less, although others were promoted. It should go without saying that demoralization, distraction, and demotion do not constitute accountability for torture.

• • •

Goldsmith places great faith in oversight mechanisms within the executive branch. Of course, internal oversight is not evidence that the constitutional system of checks and balances is alive and well. The Founders never intended that the executive branch check itself. But even accepting the potential utility of executive self-policing, there is little reason to conclude that it operated effectively in the Bush administration.

Goldsmith relies heavily on the presence of scores of lawyers in the military and intelligence agencies who weren't there several decades ago. He quotes officials, some named and some unnamed, who say that the lawyers inspire caution and care — perhaps too much — in the conduct of war.

The proliferation of military and intelligence lawyers in recent decades is not surprising, not only because the law of war has undergone significant development over the same period, but because lawyers have multiplied in every walk of American life. On its own, this tells us little. The Mafia has a bevy of lawyers, and not because it values accountability. Lawyers may serve as an organization's conscience, but they also may serve as its enablers, depending on context and on the pressures they face.

"The obvious danger in this secret environment," Goldsmith observes, "is that the [government] lawyers will identify too closely with their clients' missions and not provide sufficiently detached legal advice." Notwithstanding notable instances of pushback by military lawyers, the "danger" Goldsmith cites is more of a certainty. After all, White House and agency attorneys generally act as their clients' agents, not objective analysts of the law. They are expected and professionally obligated to serve their employers. Goldsmith nonetheless concludes, "CIA lawyers have learned from bitter experience that poor legal advice will lead to scrutiny and calumny." Nothing in the book supports the notion that lawyers who give their bosses the answers they want to hear fare worse than those who do not.

Nearly a decade after the revelation that CIA interrogators implemented a program of torture, the Justice Department has not prosecuted any CIA official in connection with the program, and Congress has passed legislation that dooms any such prosecution to failure.

Goldsmith also focuses on the agencies' inspectors general, who investigate potential misconduct and report their findings to the agencies and to Congress. To varying degrees inspectors general have succeeded — some quite remarkably — in exposing executive misconduct. But oversight is not the same as accountability. The inspector general's role is to tee up issues for administrative and legislative action. Regarding torture, the administrative and legislative responses to the CIA inspector general's revelations have fallen woefully short of what international law and basic principles of accountability demand. Regarding FBI surveillance, the DOJ inspector general's reports of abuse and negligence prompted some procedural changes at the Bureau, but the Justice Department has successfully pressured Congress to preserve intact the legal powers that were abused.

Goldsmith leaves out a particularly notable expansion of executive power — one that the executive branch conferred on itself and that neither Congress nor the courts have confronted, let alone curtailed. Before 9/11 Justice Department guidelines attempted to safeguard First Amendment freedoms by barring FBI agents from monitoring political or religious organizations unless they had reason to suspect wrongdoing. A similar "factual predicate" was required before agents used certain intrusive techniques, including round-the-clock physical surveillance, informants, and interviews of a person's friends and associates under false pretenses. The Justice Department twice amended its guidelines after 9/11 to eliminate these constraints.

The factual predicate requirement operated as a check against using race, ethnicity, religion, or political beliefs as bases for law enforcement scrutiny. Since the requirement was eliminated, former FBI informants have testified in court that they were sent to mosques not to pursue leads about particular people or plots, but to eavesdrop on conversations indiscriminately. Internal FBI guidance, obtained through Freedom of Information Act requests, directs agents to collect information about "concentrated ethnic communities."

Unchecked by internal or external forces, such practices are even more widespread today than they were in the early post-9/11 years, despite substantial evidence that religious and ethnic profiling are ineffective and could actually harm security by reducing cooperation between the targeted communities and law enforcement.

Particularly in today's polarized political environment, it is natural to celebrate any deviation from the extreme and to view the result as a sign of appropriate moderation. Mere movement toward the center should not be confused with centrism, however; nor should the outcome be applauded apart from its merits. Goldsmith makes both mistakes.

In assessing how far we've moved, he reads much into the fact that all of the people he interviewed, no matter what perspective they represented, "believed that they were on the losing end of the stick in trying to influence U.S. counterterrorism policies." He gives a series of examples, such as: "The CIA believes it spends way too much time reporting to and responding to investigations by politicized congressional intelligence committees," while "the intelligence committees believe the CIA underreports its activities and cannot be trusted." The implication is that the truth must be in the middle.

Unchecked by internal or external forces, religious and ethnic profiling are even more widespread today than they were in the early post-9/11 years.

But that simply doesn't follow. In a "he said, she said" situation, one doesn't reach the truth through triangulation. To be sure, executive branch officials did not get everything they wanted — and for that reason alone, it's not surprising they believe they "lost." The administration's position after 9/11 was an all-or-nothing one: The president's authority is absolute when he acts as commander in chief to defend the nation. Even the smallest incursion on executive authority would signal defeat.

The truth is that counterterrorism policies at the end of the Bush administration looked much more like they did right after 9/11 than like those advocated by critics. A notable change was the abandonment of waterboarding and other disgraceful elements of the CIA's interrogation program (although some of the original enhanced interrogation techniques continued). But even here there is little evidence that the change resulted from governmental oversight and enforcement, as opposed to the political impossibility of openly engaging in a universally condemned war crime. Another theoretically significant change was the establishment of judicial review for preventive detention, but the promise of that change is ebbing under appellate court rulings and the government's failure to release detainees granted habeas.

Many of the Bush administration's early policies were unchanged — or little changed — when Obama took office. Procedures surrounding preventive detention evolved, but the practice itself continued, despite the controversy it generated. Military commissions continued under legislative rules that borrowed heavily from Bush's proposal to Congress. Extraordinary rendition continued with increased involvement by foreign partners. Warrantless wiretapping of international communications proceeded with Congress's blessing and the judiciary's role reduced to a cameo appearance by a secret court. The collection of domestic communications, as far as we know, went on. The sweeping legislative authorities granted to the FBI remained in place, and

the Justice Department's rules for the FBI grew more permissive rather than less. The targeted killing program continued (and expanded under Obama). The prison at Guantánamo Bay remained open.

Many of the Bush administration's early policies were unchanged — or little changed — when Obama took office.

Goldsmith sees a more balanced outcome in part because he conflates novelty with significance. For instance, he portrays Congress's 2006 military commissions legislation as an instance of aggressive oversight because Congress had never before prescribed detailed rules for military commissions. He ignores the fact that, notwithstanding a few important changes on which Sens. McCain and Lindsey Graham insisted, there were more similarities than differences between the legislation the president proposed to Congress and the bill Congress passed.

Precedent is a particularly useless guide when dealing with unprecedented claims of power. Congress may not previously have prescribed those commission rules, but the government also has not previously established a system of commissions with rules that differ markedly from those of courts martial. Internal agency watchdogs may not previously have scrutinized the government's techniques for interrogating prisoners of war, but the executive branch also has not in modern history embarked on a program of torturing captured enemies. The Supreme Court may not previously have recognized enemy combatants' right to file habeas petitions, but the government also has not previously detained members of loosely defined non-state forces — many captured in non-belligerent countries — on territory that was under the sole jurisdiction of the United States. That the reactions were unprecedented in these cases says more about the aggressiveness of the powers asserted than about the aggressiveness of the responses to them.

At times Goldsmith appears to concede that forces outside the executive branch did very little to rein it in. He tells us, "The bitter reality" for those who oppose the "unusual executive powers" exercised by the Bush administration "is that the courts, Congress, and the American people do not share their outlook, and the United States is in a place at the end of 2011 where they desperately do not want it to be." Having considered whether the president could exercise these extraordinary prerogatives, the other branches of government, "with caveats, told the President he could." But these admissions are not entirely consistent with his central thesis of vigorous pushback and "bruising separation-of-powers battles."

• • •

Goldsmith pointedly disclaims any intent to pass judgment on whether the government's counterterrorism policies are the "right" ones, whether they succeed in preventing terrorist attacks "while at the same time preserving other values as much as possible." But one cannot evaluate how well the system of checks and balances functioned without evaluating the result. If current policies violate individual rights enshrined in the Constitution, allow the executive branch to crowd Congress and the judiciary out of their rightful spheres, or betray core constitutional values that we proclaim to the world, then we cannot say that the system of checks and balances has

worked. The mere fact that Congress passed some legislation and the courts decided some cases doesn't prove otherwise.

Goldsmith, however, equates "consensus" — the supposed buy-in of Congress, the courts, and the public — with "legitimacy," two terms he often uses together. The linkage is puzzling, as he acknowledges that the executive branch has often overreached during wartime, intruding on constitutionally guaranteed liberties with the acquiescence of the other branches of government and the public. History has not treated the resulting policies as legitimate simply because they were widely accepted when implemented. To the contrary, as Goldsmith explains, the pendulum tends to swing back when the war is over and the "lessons learned" inform the next conflict. That is one of the most frightening aspects of the potentially endless war we are now fighting: The time of reckoning is forever pushed back, and we are locked into a state of permanent executive overreach accompanied by legislative, judicial, and public acquiescence.

The unprecedented claims of power asserted by the executive branch since 9/11 are particularly troubling given that even traditional wartime powers arguably go too far in this non-traditional conflict. For instance, it is not clear that preventive detention is appropriate in a potentially endless war against non-state actors. The sole purpose of wartime detention is to prevent soldiers from returning to battle. In the current war, it is exceedingly difficult to define, let alone identify, who is a "soldier," and a mistake can mean a life sentence. Moreover, soldiers in traditional wars are almost certain to return to battle — desertion is illegal — whereas the government's own statistics suggest that most released Guantánamo detainees do not re-engage. Finally, in the current non-traditional war, there is an alternative to preventive detention: Anyone who engages in or materially supports terrorism can be dealt with through the criminal law.

Despite Goldsmith's promise to forgo judgment on where executive powers ended up — and despite the generally measured and respectful tone of the book — he occasionally betrays his own bias. He describes the CIA inspector general's review of the agency's torture program as "menacing." He characterizes the well-documented fact that many Guantánamo detainees were innocent or abused (or both) as a "narrative" that NGOs, detainee lawyers, and journalists "worked… to develop." He calls the human rights community "alarmist" and its charges "strident." He describes the group of detainees remaining at Guantánamo as "dangerous terrorists" and deems their continued detention an "extraordinary accomplishment," despite the fact that most of them were long ago cleared for release by the executive branch or the courts but are stuck in permanent and horrifying limbo.

Goldsmith claims to be satisfied with the status quo because everyone is equally frustrated by it or because it represents consensus — mutually exclusive assertions, although he presents them as the same — and it is therefore legitimate. But only someone comfortable with the expansive model of executive power that has emerged since 9/11 could see either widespread frustration or widespread accord as sufficient to establish its legitimacy. If Goldsmith believed this model to be dangerous and constitutionally suspect, he would refuse so low a standard. And he would be right to do so.

Getting Away With Murder

Faiza Patel

As an expert member of the United Nations Working Group on Mercenaries, Faiza Patel argues that it is time to bring the rule of law to the new actors in major world conflicts — private contractors — who operate without oversight or repercussions in war torn Iraq and Afghanistan.

As the U.S. winds down its nine-year military presence in Iraq, the world risks forgetting a critical lesson. The widespread use of private military and security contractors without proper controls was one of the war's costliest mistakes. Contractors are likely to remain a feature of both war and peace, diversifying into markets ranging from guarding ships in the Indian Ocean to spying in East Africa. Private companies guard diplomats from around the world, a trend that will likely only accelerate with incidents like the tragic killing of the U.S. ambassador to Libya. We must strengthen our legal systems to account for these new forces.

Experience with security contractors in Iraq and Afghanistan has shown that their personnel often lack discipline and can commit violent crimes. But the international community lacks the tools and political will to control them or bring them to book when they abuse human rights.

Five years ago, security guards from Blackwater shot and killed 17 civilians in Baghdad's Nisoor Square, setting off a wave of international condemnation. A criminal prosecution is pending in American courts, stymied by the government's failure to collect evidence properly. Serious crimes by other contractors, including killings and sex trafficking, have simply not been pursued. The U.S. Justice Department, for example, has declined to prosecute nearly 80 percent of contractor abuse cases referred to it.

Private actions have fared badly too. The U.S. Army concluded that contractors were involved in torturing prisoners at Iraq's Abu Ghraib prison, but not one has been held responsible. Courts dismiss these civil suits because they wrongly liken contractors to soldiers in battle or the government asserts that litigation would compromise national security. An important avenue for victims to find justice may close if the U.S. Supreme Court finds (in an upcoming case involving Royal Dutch Petroleum and Shell) that corporations cannot be held liable for gross human rights violations abroad.

The impact of these cases extends far beyond the individuals concerned.

Last year, when I went to Iraq as an independent expert member of the United Nations Working Group on Mercenaries, government officials and ordinary citizens told me how contractors had mistreated civilians in ways both big and small and never held accountable. Their sense of injustice was palpable. A few months later, negotiations aimed at keeping U.S. troops in Iraq fell apart because the Iraqis — embittered by Nisoor Square and similar incidents — were unwilling to grant immunity to American troops. In Afghanistan, President Karzai has repeatedly tried to banish foreign security companies. And of course, absent any civil or criminal sanctions, nothing prevents governments from

This op-ed was originally published on the Office of the High Commissioner for Human Rights at the United Nations website on September 5, 2012.

awarding new contracts to companies accused of violating human rights. Even the promise of cost savings through privatization rings hollow. Estimates are that the American government lost between $31 and $60 billion through contractor waste and fraud in Iraq and Afghanistan.

The widespread use of private military and security contractors without proper controls was one of the war's costliest mistakes.

There has been some notable reform. The past two National Defense Authorization Acts passed by the U.S. Congress contained tighter fiscal controls. Contractors supporting the U.S. Defense Department now fall under criminal jurisdiction. Switzerland is considering a new law on private military and security companies. South Africa has long had such a law.

Yet much more is required, and not just for security contractors working for the U.S., but those hired by other nations as well. These firms — many based in the U.S. or Western Europe — operate like any business. If the market dries up in Iraq or Afghanistan, they move to the U.A.E. or Sudan. Col. Gaddafi reportedly tried to engage a private company to smuggle him out of Libya. Tottering regimes may resort to contractors when the military is either unable or unwilling to suppress civilian unrest. Nations where these companies are based will suffer incalculable damage should contractors add to their record of human rights abuses in the volatile context of the Arab Spring.

Throughout history, the use of private military and security contractors has ebbed and flowed. For much of the modern era, their use was deemed unacceptable. But the U.S. revived contractors' legitimacy during the Iraq war and the industry has grown exponentially. Today, the contractor issue is transnational, and requires a transnational solution. Companies easily change headquarters, names, and corporate forms. They recruit from around the world and operate around the world. No one country can regulate this business.

The United Nations Working Group on Mercenaries has developed a new treaty that would ban contractors from core military functions. All nations would be required to license and register contractors. Every country would have to establish jurisdiction over them and pledge to prosecute when they commit serious crimes. A modest international body would oversee these efforts. While by no means a panacea, this pact would increase oversight of military and security companies and put an end to their de facto impunity.

Multilateral treaties are not popular these days. Indeed, some countries that are home to military and security contractors oppose this reform. However, the stakes are too high to cling to ritual recalcitrance. It is time to seriously engage in the global effort to bring the rule of law to these new actors in the world's conflicts.

Need to Know? Secrecy, Security, and Self-Government

Barton Gellman

National security secrecy presents a conflict of core values — between self-government and self-defense. Who gets to decide what the public needs to know?

My premise for you today is that the government has no private claim to secrecy; its secrets are held on our behalf. That means, I claim, that any talk of a "right" to secrecy held by the government, or held by officials in the government, when applied to the work of government, is inconsistent in principle with our core constitutional values. Any analysis of secrecy has to begin with the foundational words of our foundational document: "We the people..." And the rights and interests at issue, in any debate over the hard questions of government secrecy, are exclusively those held by the citizens of the United States.

Let's consider the scale of secrecy. Peter Galison, a professor at Harvard, found that as of 2001, one trillion net pages were classified — 250 million new classified pages added. In general, the system has nearly tripled in size since 9/11.

Looking at more recent numbers, there were 76 million classification decisions in the 2010 fiscal year — up 8.6 million from 2001. There are 2,400 "original classification authorities," which is an official authorized to create a classified secret. Some of them may delegate. There are 4.2 million people with security clearances.

There are also more than 100 categories of "sensitive but unclassified" information. Categories include FOUO (For Official Use Only), LIMDIS (Limited Dissemination), SSI (Sensitive Security Information), and LES (Law Enforcement Sensitive).

It would not be easy to find a government official who did not acknowledge rampant overclassification. Blue ribbon panels since the 1950s, not long after the modern secrecy apparatus was established by the National Security Act of 1947, have been describing the problem as pervasive.

It's expensive to keep so many secrets — to lock them in hundreds of thousands of Mosler safes, read them in tens of thousands of sensitive compartmented information facilities, maintain a special apparatus for collecting and shredding and burning them, and so on. It's also inefficient, because it keeps information

---

Barton Gellman is the two-time Pulitzer Prize-winning author of "Angler: The Cheney Vice Presidency," which was named *New York Times* Best Book of 2008. He joined the Center as a fellow in September 2011. These remarks were excerpted from a presentation Gellman gave at the Hoover Institution at Stanford University, as part of the Task Force on National Security and Law on January 9, 2013.

away from people who need it to do their jobs or are in a position to clarify, expand upon, or rebut it.

How Do You Like Your Leaks?

We could start with a few of the baseline views about secrecy and government. These are much too simple, but they get us started. For reasons I can explain, I don't like the leak metaphor. But I'll adopt the popular term that secrets are spilled by "leaks."

The stereotype would have it that there's a government view — here's the military version — that says, if national security is involved, if there's any plausible potential for harm, the thing should be secret. Formally, officially, in the world of classified information, that is the beginning and end of it.

Official information is usually well intended, often accurate, and reasonably impartial, but perhaps equally often, in my experience, deliberately misleading in its selection and characterization of facts.

But it's not the beginning and end of it. Government as we know it simply could not operate without unauthorized, or informally authorized, disclosures of ostensibly secret information. A cynic would hold that this view of information control is best captured in an old *New Yorker* cartoon. In the cartoon, a man is shown being congratulated by two colleagues. The caption reads, "Congratulations, Dave! I don't think I've read a more beautifully evasive and subtly misleading public statement in all my years in government." Official information is usually well intended, often accurate, and reasonably impartial, but perhaps equally often, in my experience, deliberately misleading in its selection and characterization of facts. Sometimes it crosses the line into deception, and occasionally into outright black-and-white lies. But as some have pointed out, the selective leak of sensitive and classified information in all these modes of spokesmanship (naturally, on a not-for-quotation basis) is absolutely commonplace.

Then there's the stereotypical view of mainstream journalism, in which reporters and editors say, let's just go out there and publish everything we can find. That is not correct, as I'll try to persuade you, but it is certainly the opening presumption that we are meant to go and find things out and tell our readers and viewers what we find.

And of course, there's the new-style, digitally enabled publication model, which really does come close to saying, let's publish everything. Even here we find some willingness, sometimes, to hold back, but that is very much on the margins.

Here's how I work. When the government stamps something classified, I take it seriously. I treat it as a yellow light, but not a red light. I draw lines, and my editors draw lines, but we draw those lines ourselves. Now, you might be thinking, "Who elected you to decide what secrets to spill?"

Self-Government, Self-Defense

National security secrecy presents a conflict of core values — self-government and self-defense. Information is central to both. If we don't know what our government is doing, we can't hold it accountable. If we do know, our enemies

know too. That's our predicament. Wartime heightens the case for secrecy because the value of security is at its peak — even though, as I'll try to show you, secrecy is NOT a good proxy for security. But secrecy, also, is never more damaging to self-government than in wartime, because making war is the paradigm of an important political choice, and there are few things more important on which to hold our leaders accountable.

So there are two core values here when weighing the rights and interests of "We the people." You can tell me all this is obvious, but there are very, very few discussions of national security secrecy that give serious consideration to both sides of that predicament.

For example, Bill Bennett, a former education secretary under President Ronald Reagan, said the following after *The New York Times* disclosed the so-called Terrorist Surveillance Program and the *Washington Post* disclosed the existence of secret prisons in CIA black sites in Eastern Europe.

> [Reporters] took classified information, secret information, published it in their newspapers, against the wishes of the President... I don't think what they did was worthy of an award — I think what they did is worthy of jail.

Gabriel Schoenfeld of the Hudson Institute, who agrees with Bennett, offered a novel framework for understanding unauthorized disclosures in his book, "Necessary Secrets."

> Along with the public's "right to know"... there is also... the public's right not to know...When it comes to certain sensitive subjects in the realm of security, the American people have voluntarily chosen to keep themselves uninformed about what their elected government is doing in their name.

While testifying before the House in 2010, Schoenfeld also stated, "When journalists reveal secrets necessary to secure the American people from external enemies...journalists are not surrogates for the public but usurpers of the public's powers and rights. . ."

Schoenfeld can be slippery about his definition of secrets "necessary" for security. In two visits to my Princeton class, he acknowledged that some information is needlessly classified, even for self-interested political reasons, but he made clear that he draws a black-and-white line: If it's classified, it's stipulated as national security information.

Schoenfeld acknowledges that there is a lot of misclassification and overclassification, and admits, "Secrecy can facilitate renegade governmental activity... and... corruption." But nonetheless, he states that "with civil disobedience must come consequences," and journalists who publish classified information should be "subject to criminal prosecution."

He spends surprisingly little time describing the roots of the "right not to know." Some of this I extracted from Schoenfeld in two visits to my class. His arguments prove far too much, and are entirely incompatible with his hand waving in the direction that "openness is an essential prerequisite of self-governance" and that democracy "depends upon the free flow of information, particularly information about the workings of government, to make considered choices about policies and the political leaders who will carry them out."

His first premise is correct: Voters know presidents keep secrets. That elections therefore entrust unlimited presidential discretion over secrecy is a poor syllogism. The only way to defend it is with a model of representation that is based entirely on "authorization," as even Edmund Burke did not. One might as easily say voters are therefore conscious of the need to watch the president closely.

Breaching a presidential secret is "an assault on democratic self-governance." This syllogism is worse, and is indifferent to accountability.

I asked Schoenfeld for any constitutional support. He cited closed sessions of Congress. This requires us to accept that the description of a permissible procedure for Congress in some cases entails broad public right, on the part of individual citizens, that the executive's secrecy choices must always be obeyed.

Need to Know

Another security-minded approach came from William Colby in "Intelligence and a Free Society." Here he applies the classic need-to-know formula of access to secrets inside government to the relationship between government and the people:

> A new theory of secrecy can begin by... defining what needs to be exposed rather than what needs to be kept secret. It is too easy to say that "everything" should be known unless there is a good reason for its secrecy... The executive branch thus must inform the Congress and the public.

There are two categories of problems with this approach: One is defining what the public needs to know. The other is who gets to make that definition.

So who is the decider? The president? Congress? The courts? Me?

I claim that no one on that list, or any other list, has a legitimate claim to decide these hard questions categorically. No individual, and no institution, can be trusted to draw the line for us — as a general proposition, across categories of secrets — when the fundamental interests of security and self-government collide. That includes the people with the classified stamps. Journalists, bloggers, and even professors are not competent to judge the needs of national security, and more importantly they are not accountable in any formal way to their fellow citizens for their choices. Political leaders, on the other hand, are accountable — but they cannot be *allowed* to decide for us what we need to know, as their sovereigns, to judge their performance. There are a wide variety of views in the political philosophy of representation and accountability, but I do not believe you can find a plausible one that allows the president to say, "You may judge me on this and only this information, and the rest is none of your business."

It seems I have painted myself deep in a corner. I have posed a question, declared its cosmic importance, and found no one competent to resolve it. But there is an answer, I think. At one level it seems obviously unsatisfying and maybe even unprincipled. At another, it describes a status quo that commands a quite broad consensus, and which, in fact, no one has tried to challenge fundamentally for decades.

No one institution actually makes the secrecy-or-disclosure decisions today. There is no guiding hand.

Instead there is something like an invisible hand. There is an information marketplace, it tends toward equilibrium, and the equilibrium has been remarkably stable for at least 30 years. In practice today, the flow of information is regulated by a process of struggle. The government tries to keep its secrets, and people like me try to find them out. Intermediaries, with a variety of motives, perform the arbitrage. Despite the recent uptick in prosecutions, no one effectively exerts coercive authority at the boundary. And that's a good thing.

It makes no more sense to ask how dare I decide to publish a secret than to ask a grocer how dare he appoint himself to set the price of milk. I don't claim to be in charge of deciding what secrets are spilled, in general. The battle is fought hundreds of times a day, one secret at a time.

ENDING MASS INCARCERATION

Mass Incarceration: Bad Economics

Inimai Chettiar

Far too often, we treat prison as a drug treatment program. Imprisoning substance users and probation violators not only squanders human capital, it depletes communities and takes a large, untold economic and societal toll. One way to reboot: tie federal funding to policies that get results.

Any business run like the federal criminal justice system would fail. Businesses understand that survival depends on generating a return on investment. However, a new report released today by the Urban Institute Justice Policy Center reveals that the federal criminal justice system has a massive resource allocation problem.

The Bureau of Prison's (BOP) budget is swelling. President Obama's FY 2013 budget requests $6.9 billion for BOP — over a quarter of the total Department of Justice budget. This massive spending will house over 217,000 federal prisoners — a number expected to continue to rise.

Actual treatment instead of prison for anyone with drug addiction problems is far more effective, from a public safety, cost, and human perspective.

A primary driver of this bloated budget lies with the use of prison as a drug treatment program. The federal government spends between $21,000 and $33,000 on each prisoner per year, and about half of federal prisoners are behind bars for drug offenses. Clearly, actual treatment instead of prison for anyone with drug addiction problems is far more effective, from a public safety, cost, and human perspective. It's more effective because the cost of incarceration per prisoner does not include the loss of productivity to the economy, the damage to the quality and quantity of the labor force, the loss of tax revenue, the missed opportunity for government funds to be spent elsewhere, and the large societal effects of deleting many people from their community.

The report also confirms what most criminal justice advocates already know: Sending people back to prison for technical violations of supervision conditions is another driver of the growing population. At least 15 percent of annual federal prison admissions are for violations of release conditions — anything as minor as forgetting to update a mailing address to committing a new crime. When probation supervision costs an annual average of only $3,433, the most effective and efficient remedy for minor violations is not re-incarceration, but other types of sanctions like more intense supervision or perhaps education and training programs to help ensure a prisoner's successful re-entry.

One fix to the problem of massive spending on ineffective policies is to enact performance incentive funding for all criminal justice spending — at the federal level and in states. Tying funding to a set of meaningful metrics will help ensure that government funds are used on programs and policies that get results. For example, if funding for probation programs was conditioned on how many

This blog was posted on *The Hill's* "Congress Blog," December 12, 2012.

prisoners are successfully reintegrated into society and do not return to prison — fulfilling a public safety, economic, and societal good — probation officers would not be so quick to send those who violate supervision conditions back to prison. Several states have implemented performance incentive funding for some part of their criminal justice system, but none have done so on a system-wide basis.

Governments should never spend money on programs that do not achieve their intended goal. Especially at a time when every penny counts, policy makers should think about the wisdom of instituting efficient spending of criminal justice funds across the board. Such policies that improve the rationality, efficiency, and effectiveness of the criminal justice system ought to be the norm. This would be a win for public safety, affected populations, and the country.

How New York State Reduced Mass Incarceration: A Model for Change?

James Austin and Michael Jacobson
Foreword by Inimai Chettiar

How did New York State reduce its prison population — not to mention parole and probation? Two of the nation's top criminologists posit that policing practices in NYC — especially "broken windows" policing — played a surprising role.

Several remarkable things have happened in New York's crime and crime policy over the past 20 years. Some of these changes have been very visible, and others less so.

As in the rest of the country, crime and violence in the state plummeted dramatically. New York City reported the largest decline in crime. Meanwhile, independent of these trends, the New York Police Department shifted its policing practices beginning in the 1990s, starting with the implementation of "broken windows" policing and morphing into the now infamous "stop-and-frisk" practices. These practices focus law enforcement resources on petty crimes or violations.

During this same time period, the entire incarcerated and correctional population of the City — the number of people in jails and prisons, and on probation and parole — dropped markedly. New York City sending fewer people into the justice system reduced mass incarceration in the entire state. This change was much less publicly noticed but just as noteworthy as the other two shifts. Though other states have decreased their prison populations, New York is the first state documented to have decreased its entire correctional population.

Are there connections between these three shifts — a decrease in crime, a decrease in the correctional population, and a sharp increase in controversial police practices? If so, what factors contributed to these shifts? What about the costs of these shifts? Have they been evaluated and weighed against the benefits?

In this report, leading criminologists James Austin and Michael Jacobson take a rigorous and empirical look at these powerful social changes and their interconnections. Examining data from 1985 to 2008, they discover that New York City's "broken windows" policy did something no one expected: it reduced the entire correctional population of the state. As the NYPD focused on low-level arrests, it devoted fewer resources to felony arrests. At the same time, a lowered crime rate — as an independent factor — meant that fewer people were committing felonies.

Excerpted from *How New York City Reduced Mass Incarceration: A Model for Change?*, published with the Vera Institute of Justice and the JFA Institute, January 2013.

This combination led to fewer felony arrests and therefore fewer people entering the correctional system. Other policies — like programs that stopped punishing people with prison if not necessary — also caused this population drop.

New York's drop in the correctional population was almost derailed in 1994 when the federal government paid states to create laws increasing prison sentences. Congress used the power of the purse to pull states in this direction in spite of evidence showing that increased prison time does not decrease crime or recidivism. Austin and Jacobson conclude that the drop in New York's corrections population would have occurred more quickly had the state not enacted such laws and increased prison stays.

This report poses a host of difficult questions for those who defend "broken windows" policing as well as those who find fault with it. Though New York's strategy has benefits, it also has costs. Focusing police resources on petty crimes, predominantly in neighborhoods of color, creates a host of economic and social costs for those arrested and their families. At the same time, this move actually contributed to a decrease in mass incarceration.

The data in this report tells us a lot, but there are still more questions. The *increase* in low-level arrests did not bring down the correctional population; rather, the *decrease* in felony arrests did. Had the City reduced misdemeanor arrests, the correctional population would have declined more steeply. To what extent New York City's policing strategy contributed to the drop in the crime rate is a complex question unanswered by the data in this report.

This report also does not evaluate the NYPD's "stop-and-frisk" policy. It analyzes data in years before the recent practice became systemic. It also does not analyze the effects of the reforms to the notorious Rockefeller drug laws, since those reforms were enacted after the documented drop in correctional population.

Austin and Jacobson's study comes at a critical juncture, when the United States is starting to reconsider its addiction to incarceration. With 2.3 million people behind bars and more than 25 percent of the country with criminal records, mass incarceration has become a national epidemic. Half of the people in state prisons are there for nonviolent offenses; half the people in federal prisons are there for drug offenses. At least 30 percent of new prison admissions are for violations of parole; and more than 20 percent of those incarcerated have not been convicted and simply held as they await trial.

In a policy area historically marked by rancor and recrimination, Austin and Jacobson offer something vital to lawmakers and advocates: facts. As state and federal lawmakers begin to discuss how to reduce their incarcerated populations, this report offers empirical data to evaluate a new model for change. The New York experience provides some vital lessons:

- Theories abound about why the national crime rate dropped, but the New York experience shows that mass incarceration is not necessary to decrease crime.

- Police practices have a monumental impact on mass incarceration. The police are almost always the first point of contact between an individual and the criminal justice system.

- Ending mass incarceration entails more than simply reducing prison populations. It requires reducing the entire correctional population — meaning the number of people arrested, in jails awaiting trial, in prisons serving sentences, and on probation and parole.

- Federal, state, and local policies can work together — or against each other — to create a drop in corrections populations. Federal funding streams can be a key mechanism affecting the size of state correctional systems.

- All criminal justice policies have costs and benefits that should be fully identified and weighed before implementation. This practice would be a marked shift from typical policymaking.

We hope this report will help lawmakers and advocates develop rational and effective criminal justice policies that keep Americans safe while shrinking the widening net of mass incarceration.

In Budget Cuts, the Scalpel Not the Axe

Nicole Austin-Hillery and Inimai Chettiar

As lawmakers girded for battle, the Center urged the Justice Department and OMB to avoid across-the-board budget cuts. Instead of automatically slashing needed work, we should use an evidence-based approach to fund criminal justice programs that work.

As federal agencies prepare for automatic budget cuts mandated by the Budget Control Act of 2011 ("BCA"), we write to urge the Department of Justice ("DOJ") and the Office of Management and Budget to approach budgeting for criminal justice programs by prioritizing evidence-based programs that protect public safety and use federal resources wisely. We recognize the difficulty involved in deciding how to implement these sequester cuts. We write to propose a basic framework to determine how those cuts would be distributed within the agency.

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on improving the systems of democracy and justice. One of our primary goals is to ensure that criminal justice policymaking is rational, efficient, fair, and achieves legitimate public safety goals.

Rather than implementing sequester cuts in an across-the-board fashion or focusing on cost savings alone, we urge DOJ to take a rational, data-based, and economically rigorous approach. DOJ should reduce funding for programs that do not effectively achieve legitimate public safety goals and preserve funding for programs that do. In this way, DOJ can methodically ensure that programs that work continue to improve the country.

DOJ faces impending funding cuts to many of its discretionary budget items. For example, DOJ faces a total $1.042 billion in cuts to programs like the State and Local Law Enforcement Assistance Fund; Juvenile Justice Programs; Community Oriented Police Services; salaries and expenses for United States Attorneys; salaries and expenses for the Drug Enforcement Administration; salaries and expenses for the federal prison system; and the Office of Justice Programs research, evaluation, and statistics budget. Some of these programs achieve legitimate criminal justice goals and some do not.

Excerpted from a letter sent to Acting Director Jeffrey Zients of the Office of Management and Budget, and to the Hon. Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, December 19, 2012.

We provide several non-exhaustive examples of how to implement this framework:

- DOJ should preserve successful state performance incentive funding programs. For example, DOJ provides funds for the Adult Redeploy Illinois program through the Edward Byrne Memorial Justice Assistance Grant Program and the American Recovery and Reinvestment Act of 2009. In FY 2011 and 2012, Adult Redeploy received 100 percent of its funding from federal sources, a total of $4 million. Adult Redeploy incentivizes local probation officers to reduce the number of probationers returned to prison by allocating a portion of the savings generated by reduced incarceration rates to these probation offices. In its first three years, the Illinois' Juvenile Redeploy Program reduced the number youths sent to the Department of Juvenile Justice by 51 percent, saving the state nearly $19 million. Federal funding for this program is scheduled to end soon however. Such effective programs should not be cut. All DOJ grants to states should fund programs with Adult Redeploy's attributes: namely, they are worth their return on investment from a cost, public safety, and fairness perspective. In this vein, DOJ should adopt a policy mandating that all state and local grant funding decisions are tied to the capability of a proposed project to meet legitimate public safety goals.

- The Bureau of Prisons ("BOP") has the discretion to grant early release to prisoners who have committed nonviolent offenses and successfully completed Residential Drug Abuse Treatment Programs ("RDAP"). Investing in RDAP leads to the safe release of more prisoners, resulting in a net savings to BOP and DOJ while improving public safety. Providing treatment to prisoners increases their ability to reintegrate, increasing productivity in the economy and decreasing the likelihood of future crime. For example, according to a BOP study, male participants are 16 percent less likely to recidivate and 15 percent less likely to relapse for up to three years after release than male prisoners who do not participate in RDAP. Programs like RDAP should not be cut.

- The BOP has the power to reduce prison terms for elderly and sick prisoners, but exercises this authority infrequently. Elderly prisoners generally do not pose public safety threats, but still require significant resources to incarcerate. Releasing these prisoners will allow funds to be put to a more productive use within BOP.

- When determining how to implement salary cuts, DOJ should use these principles to make those cuts. Specifically, it should determine whether staff work within programs and execute responsibilities that effectively further public safety goals. DOJ should reallocate, shift, or cut staff to achieve the best allocation so that staff are prioritized to work on effective programs.

Although this letter is prompted by the BCA's sequestration provisions, we recognize the possibility that Congress will intervene before or after sequestration takes effect. Regardless of whether sequestration takes effect, however, DOJ has limited resources and has an ongoing mandate to use its resources productively to achieve its mission. We encourage DOJ to take this evidence-based approach during all budgeting cycles and for all future cuts. By doing so, DOJ can use its limited resources wisely to help create a rational, efficient, and fair criminal justice system that achieves legitimate public safety goals.

We welcome the opportunity to meet with your office in person to discuss these issues further, especially as we are pursuing rigorous research to improve criminal justice funding structures.

Using Economics and Science to End Mass Incarceration

Inimai Chettiar and Jim Lyons

Ending mass incarceration is not just a racial justice issue, it's an economic one.

New York City has an end-of-year ritual almost as avidly watched by the locals as the ball descending in Times Square. It is the announcement, usually by the mayor, of the drop in the city's crime rate. As of December 27, New York had 414 homicides last year — the fewest since the city began counting in 1963. "The essence of civilization is that you can walk down the street without having to look over your shoulder," said Mayor Michael Bloomberg.

New Yorkers are as proud of their safe city as they are of the Yankees. When the numbers were revealed, editorial writers at the tabloid *Daily News* were poised and ready. They applauded the low total and then attacked critics of the New York Police Department's controversial stop-and-frisk policy. The initiative detains people who have not been accused of breaking any law, but rather are suspected of having committed or are "about to commit" an illegal act. Extending the city's peak homicide number of 2,245 in 1990 and matching it against the actual annual murder totals in the ensuing 22 years, the *News* said the city has been "spared 30,300 fatalities." But, the *News* proclaimed

> [T]the department's relentless critics see the cops not as protectors of life and limb, but as civil rights cowboys. They portray the NYPD's program of stopping, questioning and sometimes frisking people who are suspected of criminality as rife with abuse...They are dangerously misguided. They should imagine that 30,300 of the people around them had perished in bloodshed. And then they should give thanks for all the NYPD has done.

Without realizing it, the *News* did the *last* thing the criminal justice system needs these days: data manipulation to propel ideological jabs.

Perhaps stop-and-frisk has played a role in lowering the homicide rate. With 1.63 million stops between 2010 and 2012, it's a safe bet that at least a few murders were prevented, if for no other reason than a potential assailant was distracted from completing their intended act. The policy casts such a wide and sweeping net that it's bound to inadvertently stop would-be murderers.

But there is no evidence that the policy has been the primary driving actually *causing* the "spared 30,300 fatalities." If there were the sort of one-to-one correspondence the *News* implies, then one would expect that as the number of stop-and-frisks grew by about 600 percent between 2002 and 2011, the number of people shot (a more useful measure of violence) would decline accordingly. It didn't. The annual total was relatively consistent throughout, never varying more than 10 percent during the entire period.

What makes the *News* editorial truly disheartening is not the sloppy arithmetic or the lack of understanding the difference between causation

As of this printing, this essay was slated to be published in *The Champion*, the journal of the National Association of Criminal Defense Lawyers, January 2013.

and correlation, but rather the polarizing emotionalism accompanying its reporting. The language is especially inopportune because, for the first time in five decades, there is an opportunity for a bipartisan consensus on criminal justice policy. Now, finally, after spending at least $2 trillion fighting crime since 1970 (or about 13 percent of current U.S. GDP), pragmatism is starting to drive the debate, instead of raw emotion. In a time of constrained budgets from Washington, D.C. to the smallest hamlet, it has simply grown too expensive to perpetuate a system in which incarceration is the primary means of crime control.

Elected officials know something is out of line when they are forced to choose between funding prisons or funding schools.

There is a growing mountain of evidence that there are less expensive and equally effective alternatives to tossing humans into steel cages. Incarceration is doubtless necessary for some, and has a deterrent effect on others. It is difficult to determine the ideal level of detention — sufficient for punishment and maximum deterrence, but no more. However, it is a certainty that the nation has long since past the point of diminishing returns. There is also now the possibility of starting to treat the worst stain on the body politic since slavery: the system's appalling racial inequities. The fact that one in three black males will spend some portion of their lives in confinement is widely acknowledged, but also widely ignored. Mass incarceration has completely depressed the economic earnings and political power of communities of color by keeping swarms of men of color fenced out of economic prosperity (and all its benefits) because of a criminal record or a prison sentence.

Elected officials know something is out of line when they are forced to choose between funding prisons or funding schools. That's not hyperbole: The U.S. spends an average of $11,000 per year per pupil in public elementary and secondary schools and about $31,000 per year per inmate. (In 2007, Connecticut, Delaware, Michigan, Oregon, and Vermont spent more on corrections than higher education.) If "education is the investment our generation makes in the future," as Mitt Romney once said, one does not need a Harvard MBA to recognize it's time to rebalance the portfolio.

Ending mass incarceration is not only a racial justice issue, it's also an economic one. Viewing the problem through both lenses will bring us more clarity of solutions and help us work in coalition with those who may not be primarily driven by the injustice of racial inequality. The late Professor Derrick Bell identified this phenomenon years ago with his theory of "interest convergence." Those who wield power don't yield because it may be morally correct; they do it out of self-interest. Appeals to "justice" or "fairness" are not likely to fuel reform when the majority is content that they can let their kids play outside without fear of getting shot. For example, it wasn't morality that led Texas to overhaul its criminal justice system in 2007; it was simple economics. As the state was running record deficits, the Department of Corrections requested an additional $2 billion for prison construction to house more inmates.

"We moved the issue from one of being soft on criminals to one of being smart over the use of money," Texas state House Rep. Jerry Madden told the London newspaper *The Observer*. As the Republican chairman of the Corrections Committee, Madden was a key architect in changing the state's approach, shifting money from prisons to drug treatment, mental health, and job training services for those on parole or probation. "If you are keeping people in prison who do not need to be there, then that is a waste of taxpayers' money. We call it the department of corrections, so we should try our best to correct people, not just incarcerate them."

The nation will be paying the tab for its 40-year "tough on crime" policy for generations. The same children whose parents were relieved that they could safely play outside will be less wealthy, and their children less wealthy, because of senseless policies such as the War on Drugs. (Even tough-talking GOP leaders such as New Jersey Gov. Chris Christie, a former U.S. attorney, now concede that the effort "has been a failure.")

When depression in lifetime earnings is considered, and its disproportionate effect on people of color, "rehabilitation," no matter how elusive, is a fairly modest goal compared to economic restoration. For instance, a study by the Council on Economic and Policy Priorities found the higher unemployment of the formerly incarcerated cost the economy $65 billion in lost productivity in 2008 alone, even accounting for the fact that ex-prisoners earn far less than those with identical skills without a record. The number is roughly equivalent to Florida's state budget.

The Pew Center on the States conducted a similar reckoning. The numbers are stunning when race is taken into account; especially considering that as the huge prison population declines, the ranks of the formerly incarcerated swell. Before serving time, about two-thirds of male prisoners were employed and were their children's primary means of economic support. As it is, about 1 in 9 African-American children, 1 in 28 Hispanic children, and 1 in 57 white children have an incarcerated parent.

Presumably, once someone has paid the penalty of separation from society for their transgression, they should have the same opportunities as anyone else. That is not the case, of course. By age 48, the typical former inmate will earn a total of $179,000 less than if they had never been behind bars, *not* including earnings lost while behind bars. The earnings reductions are sufficiently substantial to reverberate through the *entire* community of employed black and Latino men. Total earnings of *all* Latino males are reduced by 6 percent because of incarceration and 9 percent for *all* black males. An admittedly hyperbolic way of looking at it is this: Every working black male takes nearly a 10 percent pay cut because of the lost wages of his previously incarcerated brethren.

At least 14 other states have followed Texas's lead in enacting criminal justice reform, representing 43 percent of the nation's population. These measures generally passed with little partisan rancor. Money, or more precisely, the lack of it, has launched the nation to rethink whether mass incarceration is a benefit or a cost to the country. As of 2011, 1 in every 33 adults was under some form of judicial supervision (imprisonment, probation, or parole), but the incarcerated accounted for only 30 percent of the total, according to the Justice Center of the Council of State Governments. As states seek to curb their corrections costs — the second-fastest growing portion of budgets after Medicaid — by either releasing more prisoners or not confining them in the first place, or both, the ranks of the "walking convicted" will only grow.

These reforms enacted in states merely chip away at the edges of the incarcerated population. This movement is a divisive change in course from previous legislation that actually increased the population, but can serve to be stronger. As long as leading Democrats stay silent or do not advocate for the cause, what states will enact as seemingly "bipartisan" reforms will in actuality be much further to the right than the compromise that could have been struck had leaders on the left engaged in the political process.

Policymakers must be especially rational and clear-eyed when allocating resources. First and foremost, lawmakers should take up reforms that are proven to deliver more benefits than costs — in terms of their fiscal, economic, public safety, and societal impacts. The exclusive focus on cost savings to the state is misguided; legislatures should replace that lens with one that analyzes "return on investment." Is government spending money on programs that actually achieve their intended goals? Legislators are often misled by what is commonly considered the gold standard for measuring ex-offender programs: recidivism rates. Stanford Law School Prof. Joan Petersilia is one of the foremost experts on corrections. A former president of the American Society of Criminology and co-chair of California's Expert Panel on Rehabilitation Programs, Petersilia spoke at a National Institute of Justice conference last June and noted, "We need to urge that when we start measuring performance, we aren't just talking about recidivism... I can get that down. Let's just decide we are going to let people fail three or four times and not [incarcerate] them. I can get your arrest rates down. I can get a lot of things down."

Washington state has been a leader in this area. Faced with the possibility of opening three new prisons by 2030, state legislators directed the

Washington State Institute for Public Policy (WSIPP) to explore less expensive, proven alternatives that produce societal and economic benefits that outweigh their costs. They reviewed more than 500 studies in the U.S. and overseas, and, as a result of their findings, the state enacted a variety of reforms. But the WSIPP continues to monitor programs, providing robust analysis. For instance, in July 2011 the WSIPP evaluated a program for juveniles on probation known as Family Functional Therapy (FFT). The program costs about $3,200 per participant and immediately saves taxpayers about $8,500, primarily due to reduced juvenile crime. But the benefits do not end there. There are labor market and health care gains because of increased high school graduation rates. Overall, the net present value savings for each person in the program is $34,500. "The internal rate of return on investment is an astounding 641 percent. [W]hen we performed a risk analysis of our estimated bottom line for FFT, we found that the program has a 99 percent chance of producing benefits that exceed costs," the WSIPP wrote.

Sadly, not every state is as foresighted. Kansas, which passed reform measures in 2003 and 2007, has now backtracked. Faced with severe budget shortfalls, offender drug treatment services were slashed by more than 60 percent in 2010, purportedly saving $7 million. Yet, in January, the state reopened a prison with a $4 million annual budget. Even Texas's prison population has begun to creep back up.

As is true with all tragedies, they are far easier to create than repair. There are no easy choices, no quick-fixes. The most recent innovation — so-called "social justice bonds," where private sector investors receive higher rates of return dependent upon outcomes instead of finances — are promising, but untested. The most valuable lesson from the first experiment in crime control is that decisions should not rest on fear or temporary public sentiment. Lawmakers should not enact laws based on fear that are ineffective in crime control (have little benefit), meanwhile creating more problems (have high costs). Policymakers should take up the task of ending mass incarceration — the greatest civil rights crisis of our time — with an eye toward data-driven reforms and economic analysis of the consequences of those reforms, while also equalizing the ghastly racial disparities in the system. By demanding legislative solutions that actually work to solve the identified problem, the country can move forward while guarding against repeating mistakes of the past.

The Shackles of Criminal Justice Debt

Roopal Patel and Meghna Philip

Is debtor's prison still a reality? More than we'd like to acknowledge. Every year men and women are incarcerated simply because they cannot pay a court fine. The Brennan Center has recommendations to rid the system of this archaic and counterproductive form of punishment.

In 2008, the Rhode Island Family Life Center conducted interviews of people managing court debt and facing debt-based incarceration. Harold Brooks, a 58-year-old veteran, was arrested and jailed for 10 days after falling behind on payments of court fines. At the time, Mr. Brooks was receiving Supplemental Security Income disability payments because of cancer and heart problems. He had faced a long series of incarcerations over the course of more than three decades, due solely to his inability to keep up with criminal justice debt payments.

"My court fees started in the '70s, and to get rid of them took over 30 years," Mr. Brooks said in an interview. "In my life, I'd say I was in prison for court fines more than five times... enough that when I get a court date for a court fine and I know that I haven't got the funds to pay it, I get really shaky when it comes to that time."

Mr. Brooks' problem is becoming disturbingly common. As states have become increasingly strapped for funds, some have looked to a most unlikely revenue source: the disproportionately poor people involved in the criminal justice system. Despite decades-old Supreme Court cases ruling that incarceration solely for debt is unconstitutional, a 2010 Brennan Center report, *Criminal Justice Debt: A Barrier to Reentry,* uncovered existing modern-day debtor's prisons. Now, although some states are creating more fiscally sound and fair policies, increasing numbers of states are creating new pathways to imprisonment based solely on criminal justice debt.

Criminal justice fees, applied without consideration of a person's ability to pay, create enormous costs for states, communities, and the individuals ensnared in the criminal justice system. In an increasing number of jurisdictions, people are faced with a complex and extensive array of fees at every stage of criminal processing: fees for public defenders, jail fees, prison fees, court administrative fees, prosecution fees, probation fees, and parole fees. Estimates are that at least 80 percent of people going through the criminal justice system are eligible for appointed counsel, indicating that the majority of the people in the criminal justice system have had a judicial determination of indigency. Poor

Excerpted from *Criminal Justice Debt: A Toolkit for Action,* July 2012.

to begin with, and often lacking even a high school diploma, it is difficult for people going through the criminal justice system to find the sort of employment that would enable them to re-pay their financial debt. Sociological studies have indicated that criminal justice fees and fines can lead to criminal behaviors as people try in vain to make payments, and discourage people from contact with authorities, including obtaining necessary medical assistance and reporting to the police when they themselves are victimized.

Criminal justice debt policies vary from state to state, but our research reveals common themes and trends. Many states are failing to consider financial, structural, and social costs as they create fees and enforce their collection. This limited perspective results in senseless policies that punish people for being poor, rather than generate revenue. Also, several practices may violate fundamental constitutional protections.

Regardless of jurisdictional variations, advocates face many similar challenges and would benefit from having tools to assist their work. Intelligent reform efforts, whether broad or incremental, should call for proof that creating more criminal justice debt will actually provide revenue and square with fundamental principles of fairness and justice.

The Brennan Center has identified five core recommendations for successful advocacy against the rise of modern day debtors' prisons:

1. **Conduct Impact Analysis of Proposed and Existing Fees**. Such studies can show lawmakers that the imposition and enforcement of fees and fines has both financial and social costs, and that these laws fail to generate revenue.

2. **Create and Enforce Exemptions for Indigence.** The most effective way to break the cycle of debt and poverty that criminal justice debt perpetuates is to create exemptions for indigent people and effectively enforce them.

3. **Eliminate Unnecessary Interest, Late Fees, and Collateral Consequences.** Where exemptions are not possible, other policies can reduce the onerous burden of debt. Eliminating interest and late fees makes debt more manageable. Collateral punishments, such as suspending driver's licenses, only make it more difficult for people to obtain the employment necessary to make payments.

4. **End Incarceration and Supervision for Non-Willful Failure to Pay.** Criminal justice debt ensures that people who are no threat to public safety remain enmeshed in the system. Often people facing the possibility of re-incarceration or further supervision have no right to counsel. Such practices raise constitutional questions, are costly to states, and decrease public safety as court and criminal justice resources are diverted.

5. **Focus on Rehabilitation Through Meaningful Workforce Development.** Offering optional community service as a means for paying criminal justice debt has the potential to improve the long-term job prospects for those who enroll, improving re-entry prospects and providing states with an alternative means to collect debt.

Criminal Justice Debt: A Barrier to Reentry proposed a number of reforms to criminal justice debt policies. Several of the Brennan Center's recommendations have been successfully implemented. Further, advocacy organizations around the country have successfully challenged shortsighted and unjust criminal justice debt practices.

This year's report, with its Toolkit, examines the issues created by criminal justice debt collection policies and also profiles positive examples of reform efforts from around the country. These success stories will assist advocates as they decide upon their advocacy efforts. The Toolkit also provides statutory language, sample campaign pieces, and a step-by-step guide for a successful campaign. Since the intricacies of criminal justice debt differ from state to state, advocates should adapt models and initiatives to best fit their jurisdictions.

Public Defenders Go on the Offense

Thomas Giovanni

Across the nation, public defender offices are devising new ways to cope with increasingly limited resources and address the dire need to develop more individualized tactics to help indigent clients. By developing a Community Oriented Defense approach, several are managing to lay the foundation for necessary broader reforms.

Over 50 years of legislative budgetary neglect from all levels of government have created an underfunded public defense system where inadequate investigations, abbreviated case preparation, and inadequate court advocacy are the norm. This has led to major deficiencies in the criminal justice system, such as unnecessary and expensive pre-trial detention and wrongful convictions.

In many jurisdictions, the deficiencies of public defender systems may actually constitute forms of malpractice. If the term "malpractice" seems an exaggeration, consider the following:

- The average amount of time spent by a public defender at arraignment is often less than six minutes per case. And that is when counsel is present and allowed to give information, which is not always the case. In many large jurisdictions, over half of all cases are "disposed of" (a fairly non-holistic term).

- One set of workload recommendations for public defenders suggests that handling150 felony cases or 400 misdemeanor cases per year is about all a public defender can handle effectively. Yet, most jurisdictions across the country exceed these recommendations. In some jurisdictions, public defenders may be forced to handle more than 300 cases *simultaneously*. With such high workloads, it is impossible to represent individual clients while adhering to even minimal standards of professionalism.

- The situation is so dire that public debate about the criminal justice system no longer centers on whether repairs are necessary but rather has moved on to which repairs would be most effective at addressing the inadequacies. Holistic defense practices, which focus on the immediate and long-term needs of clients and deal with clients as individuals not case numbers, are an important improvement to public defense service delivery, and the Community-Oriented Defender (COD) Network works to spread those practices.

Excerpted from *Community-Oriented Defense: Start Now,* July 2012.

The Brennan Center founded the Community-Oriented Defender Network to support defenders and their allies who seek more effective ways to fix the broken defense system. Members of the Network advocate for comprehensive representation, community engagement, and systemic reform. They help communities become healthier by reducing the criminal justice system involvement of community members.

The Network's mission is to make holistic defense practices the normal standard for indigent defense in this country. Holistic defenders believe their mission is not only to defend, but also to assist clients — both in the immediate case, and in the long term.

The defenders' services can be as varied as the clients' needs, including pre-arrest services; multi-forum representation; accessing community-based treatment programs; and many other innovative means of service delivery.

In cases from *Padilla* to *Lafler* to *Frye,* the U.S. Supreme Court is in the process of recognizing the need to expand indigent defense beyond traditional limits. Throughout the country, service providers are utilizing holistic defense practices to create and implement innovative projects as they attempt to defend their clients and strengthen their clients' communities.

Although there are reasons to be hopeful that the holistic defense practices will continue to spread, it is unlikely that funding sources for public defenders will provide resources for full-scale, jurisdiction-wide renovations in the more than 3,100 counties in the country. But funding sources for improvements on smaller scales are becoming more available, and even with little or no money, change is possible.

Offices and individual attorneys can implement many holistic defense practices at minimal costs in resources or time. Starting now, offices can begin the process of transforming practices. This will benefit clients, the clients' neighborhoods, and the larger community as a whole. The projects highlighted in this report demonstrate that by starting small, offices can lay the foundation for broader reforms, and can attract greater resources.

This report gives real-life examples of innovative holistic defense practices that defender offices across the country have implemented in the past year.

Some of the practices produce objectively verifiable measures of success over a relatively short time period. Results from these practices could be used to seek greater funding for expanded versions of successful projects. Even where the practices do not produce objectively verifiable results, they are not merely cosmetic. They are intended to have positive consequences for the offices and attorneys implementing them, from improved court performance, to better morale among staff and leadership.

The Brennan Center developed the Ten Principles of Community-Oriented Defense in partnership with leaders of the Community-Oriented Defense movement in order to provide a blueprint that defenders can use to strengthen their client-service programs and improve policies affecting clients' communities. This Start Now report uses the COD Ten Principles as a structure to present the innovative work that Network members have been involved in over the past year, with the expectation it can be successfully replicated in districts throughout the country.

THE CONSTITUTION AND THE COURTS

Escape from the Mire of the Second Amendment

Burt Neuborne

The renewed debate about gun control in the wake of the school shooting in Newtown, Conn., makes a lecture last year by Brennan Center founding legal director Burt Neuborne at New York City's Cooper Union more timely than ever. Neuborne addressed constitutional issues in several talks as part of the school's John Jay Iselin Memorial Lecture Series. In the excerpts below, Neuborne calls for a new reading of the Second Amendment ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed").

Unfortunately, the Second Amendment is currently mired in unsatisfactory readings — both Republican and Democratic — that mask its true Madisonian structural meaning. One reading — the so-called "federalism reading" — treats the Second Amendment as an anachronistic relic of pre-Civil War federalism, designed to protect autonomous state militias against the regulatory powers granted to Congress.

• • •

A second reading — the so-called "communitarian" reading — is the reading currently embraced by the four current Democratic Justices. The communitarian reading treats the Second Amendment as a means to assure the continued existence of a powerful armed citizens' militia capable of checkmating any effort by a national "standing army" to stage a military coup. Under the communitarian reading, a well-armed citizenry provides the raw material for an organized citizens' militia capable of deterring takeover by the nation's military organs...A right to gun ownership is treated as simply a means to assure the raw material for a well ordered citizens' militia capable of resisting military takeover. However, whatever the deterrent power such an armed citizens' militia might have exercised in the 18th century when everyone fought with muskets, the type of weaponry needed today to deter military takeover would require a right to assemble a terrifying private arsenal. No one seriously suggests a right to own tactical nuclear weapons, or, even, conventional artillery or machine guns.

• • •

In the fall of 2012, as part of the John Jay Iselin Memorial Lecture Series at Cooper Union in New York City, New York University Law's Inez Milholland Professor of Civil Liberties and Brennan Center Board Member Burt Neuborne delivered, "Three Constitutions: Republican, Democratic and Consensus." This lecture, entitled "The Second Amendment: A Modern Reading of the Right to Keep and Bear Arms," was delivered on November 8, 2012.

The third reading — the so-called "individual rights" reading of the Second Amendment — is the reading embraced by the five current Republican Justices. The individual rights reading construes the Second Amendment as a broad guarantee of a personal right to own firearms; an individual right having nothing to do with membership in an organized armed force of citizens designed to deter military takeover.

• • •

Fortunately, a fourth reading exists — what I call the "egalitarian" reading — that...gives real meaning to the Second Amendment in today's world, and coincides precisely to Madison's purpose in giving the Second Amendment such a prominent place in his poem to democracy and freedom.

• • •

Properly construed, therefore, the Second Amendment "right to keep and bear arms" is not the right to own a gun as an autonomous armed island, or the right to die heroically in a hopelessly outgunned resistance to a military coup, but the right of every American to "keep and bear arms" equally by participating in the common defense of the community through equal access to service in the nation's institutions of armed coercion.

• • •

In a real sense, the citizens' army and the democratic police force became the universal citizens' militia in random microcosm. Originally conceived as a check on unrepresentative organs of coercion, the militia's theoretical role atrophied when the very institutions of coercion it was designed to check evolved into a democratically representative citizens' army and a professional, democratically accountable police force, leaving the Second Amendment entangled in its ruins. Despite, the demise of the militia concept, however, the modern Second Amendment retains its importance as one of the most important structural protections in the Bill of Rights. Read structurally, it continues to provide a critical bulwark against the emergence of a dangerous imbalance between armed forces and the people by assuring all citizens — blacks, women, gays, Sikhs, Muslims, and atheists — an equal right to serve in the armed forces and the police.

• • •

Unfortunately, none of the current Supreme Court Justices appear to recognize Madison's structural plan. In *Heller v. District of Columbia*, a five-Justice Republican majority invalidated a flat ban on the possession of handguns in the District of Columbia, reading the Second Amendment as creating a free-standing individual right to possess weapons. The four Democratic Justices dissented, reading the Second Amendment as an anachronistic protection of the long-abandoned 18th century citizen's militia. None of the Justices espoused an egalitarian reading. All nine Justices in *Heller* relied heavily on history in an effort to discover the original intent of the Founders...[M]assive historical research by both sides produced the usual historical tie, which was necessarily broken by the Justices' values...The very idea of using an 18th century mindset to set the legal parameters for gun ownership in the 21st century borders on the absurd.

• • •

A Madisonian structural reading of the Second Amendment...reveals a very different, deeply egalitarian Second Amendment that is neither a bed-time story about free men and women heroically defending themselves with small arms fire against the massive armed might of the state, nor an anachronistic vision of a wholly meaningless Second Amendment bypassed by history. A structural reading would recognize that the deep purpose of the Second Amendment was to ensure that the entire body of the people —

Protestants, Catholics, Jews, Muslims, Hindus, Sikhs, and atheists — retains the right to keep and bear arms as part of the modern versions of the citizens militia — the citizens' army and the community's police force. Recapturing the crucial egalitarian role the Founders envisioned for the Second Amendment as a prophylactic against the development of a dangerous disconnect between the organs of armed coercion and the people — especially potentially disfavored segments of the people — is one of the benefits of reading the Bill of Rights poetically.

The decline and eventual disappearance of the universal citizens militia was premised on one critical assumption — that the representative nature of the newly emerging organs of armed coercion would render the citizens' militia unnecessary. But if, as has been the case at every stage of our national existence, our organs of armed coercion are not representative because segments of the population are systematically denied the right to serve, the ominous gap between force and freedom re-emerges, at least for the excluded groups. It is at this critical point that the "right to keep and bear arms" in the modern Second Amendment plays its contemporary role by enforcing the promise of universal access to service in the contemporary citizens' militia — the police and the military. The surprising, deeply egalitarian structural protection of the Second Amendment is that no group, not blacks, not women, not gays, can be excluded from "the right to keep and bear arms" as equal participants in our contemporary institutions of armed coercion without risking the ominous imbalance between the "people" and the wielders of organized armed force that Madison identified as the most serious threat to the First Amendment's ideal commonwealth.

Thus, the failure to permit gays to serve in the military and the police violates the Second Amendment. The failure to include women in the military violates the Second Amendment. Indeed, any rule that excludes a qualified segment of the citizenry from equal service in the nation's armed organs of coercion creates precisely the ominous imbalance between force and freedom that Madison's Second Amendment is designed to prevent.

Building a Progressive Legal Infrastructure

John F. Kowal

What can progressive lawyers learn from the legal and public opinion strategies that ultimately resulted in the Supreme Court's blockbuster decision in Citizens United?

Over the past four decades, conservative legal groups — funded by a handful of allied foundations and individual and corporate donors — have mounted a strategic effort to win social and policy change through the legal system. And those patient, long-term efforts have begun to bear fruit. In just the past few years, the courts have moved decisively to the right, upending long-settled law in cases involving gun rights, affirmative action, and the power of Congress to pass laws protecting workers and the environment.

Perhaps their most striking success in recent years was the Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission.* A closely divided court held that the First Amendment prohibited the government from restricting independent political expenditures by corporations and unions. In striking down a key provision of the Bipartisan Campaign Reform Act of 2002 (commonly known as McCain-Feingold), the court tossed aside a longstanding ban on corporate spending in election campaigns. The court also ruled that independent expenditures by corporations would not lead to corruption — or even the appearance of corruption. That conclusion, stated as a matter of law, unloosed a torrent of secret political money, and gave rise to the Super PACs that helped make the 2012 election campaign the most expensive in American history.

How did conservatives achieve these successes? They did it by spurring innovative thinking about the law, by mobilizing their constituencies around a concrete legal vision, and by moving those ideas into the public discourse.

Specifically, conservatives deployed five interlocking strategies to reshape understanding of the law and achieve concrete policy victories.

1. **They supported legal policy centers and think tanks** to develop ideas to shape public discourse on legal topics and judicial decision making. These organizations provided a platform for the movement's public intellectuals and future leaders, whether fellows, academics, or judges. By publishing their books and magazine articles, these organizations positioned them as credible experts in the press.

This article appeared in the Winter 2012 issue of *Responsive Philanthropy.*

How did conservatives achieve these successes? They did it by spurring innovative thinking about the law, by mobilizing their constituencies around a concrete legal vision, and by moving those ideas into the public discourse.

2. **They commissioned innovative legal scholarship and social science research** to reframe the debate within the academy, shape judicial decisions, and advance their campaigns on strategically chosen issues of public policy.

3. **They established effective networks** to unite the conservative legal community around a shared vision of the law. The best known of these groups is the Federalist Society. These networks created vital personal connections and served as a training ground and pipeline for future leaders. They also provided a safe haven for judges and professors to connect to the world of activism.

4. **They developed coordinated litigation and advocacy strategies** to advance conservative legal theories, spearheaded by conservative legal foundations and public interest law firms.

5. **They focused on judges,** working tirelessly to populate the federal and state judiciaries with ideologically reliable nominees through Federalist Society vetting of federal judicial nominees during Republican administrations and sustained corporate investment in state judicial races to elect "business-friendly" jurists.

It is important to note that conservative legal groups don't merely advance their ideas below the radar through slow-moving court challenges. They partner with a sophisticated policy/media apparatus to identify a relatively small number of focus group-tested legal issues that resonate viscerally with their core constituencies.

Given this patient, long-term focus, it's no surprise that the courts — and the law — have moved steadily in a conservative direction. This threatens to constrain the ability of progressive foundations and nonprofits to advance their social justice missions. But how can the progressive community respond most effectively?

Again, *Citizens United* provides an illuminating case history as well as some signposts for the path forward.

Citizens United was no bolt out of the blue. It was the culmination of a careful, well-funded, decades-long effort to allow unlimited campaign spending by corporations and moneyed interests. As Eric Lichtblau reported in *The New York Times,* "The opening of the floodgates has been many years in the making, the result of a carefully waged campaign ... to roll back Watergate-era campaign finance restrictions through attacks in Congress, in the courts, at the Federal Election Commission and in the court of public opinion." Brad Smith, former chair of the Federal Election Commission and co-founder of the Center for Competitive Politics, described it as "long-term ideological combat."

The campaign finance litigation effort, including the *Citizens United* case itself, was led by James Bopp Jr. of the James Madison Center for Free

Speech in Terre Haute, Ind. Bopp has the backing of powerful allies, including the U.S. Chamber of Commerce, the Republican National Committee, the Right to Life Committee, and the National Organization for Marriage. These organizations, along with other donors, contributed millions to the effort. And in the background, key conservative legal groups and scholars developed the legal theories and the public arguments to support a dramatic change in the law.

From the day it was issued, the *Citizens United* ruling has faced withering criticism. The decision is unpopular with the public, spurring outrage about how the system has been corrupted by special interests. Even lower court judges have piled on. The highly respected federal appeals judge Guido Calabresi, a former dean of Yale Law School, predicts *Citizen United* will not stand long: "Whether this will happen through a constitutional amendment or through changes in Supreme Court doctrine, I do not know. But it will happen."

Some believe the challenges *Citizens United* poses require an extraordinary response — amending the U.S. Constitution to reverse the court's ruling. But the constitutional amendment route is an arduous one, requiring two-thirds of Congress and three-quarters of state legislatures for passage. In the current, highly polarized political climate, this will be no simple undertaking.

In the meantime, there are other promising strategies to mitigate the threat of excessive corporate political spending, such as reforming campaign finance and corporate governance rules to increase transparency of corporate political donations and giving shareholders a greater voice in business political activity. The Brennan Center for Justice and Democracy 21 also have offered a plan to boost the voice of small donors in federal elections through a public financing system based on New York City's successful small donor matching fund.

But those concerned about *Citizens United*'s destructive impact should take a page from the conservatives' playbook. Conservatives have long understood the value of investing in legal infrastructure for the longer term. Progressives can do the same.

A handful of foundations and individual donors have already helped to lead the way, supporting an emerging infrastructure of progressive legal organizations over the past decade. They fueled the rapid growth of the American Constitution Society, a progressive counterpart to the Federalist Society, and legal policy centers like the Brennan Center, Equal Justice Society, and Constitutional Accountability Center.

Perhaps the simplest and most effective way to overturn the Citizens United *ruling is to commit to a multi-year effort to replace it with a new legal framework that paves the way for necessary reforms to be enacted — and stay on the books.*

The Way Forward

Perhaps the simplest and most effective way to overturn the *Citizens United* ruling is to commit to a multi-year effort to replace it with a new legal framework that paves the way for necessary reforms to be enacted — and stay on the books.

The Brennan Center launched such an effort in the weeks following *Citizens United*. We convened the country's top constitutional legal scholars to launch a

jurisprudential drive to roll back *Citizens United*. This initiative will serve as the nucleus of an ambitious new effort to develop and articulate a compelling progressive jurisprudence for the 21st century. Many of these scholars have already published law review articles pursuing these new legal theories.

We will enlist their participation in active cases before the courts, both to defend current campaign finance rules from continued assault and to chip away at the tottering edifice of *Citizens United*. And we have partnered with the Open Society Foundations to convene social scientists to compile the needed research to refute the court's naïve assumption that expenditures made by supposedly independent Super PACs pose no risk of corruption.

Put another way, the Brennan Center is working to "reverse engineer" the winning legal and factual case to convince the court to overturn *Citizens United* in the next few years.

The lesson for funders is that legal advocacy does not just happen in the courtroom. First, there needs to be funding for think tanks and scholars to incubate the ideas and policies necessary to persuade the courts, lawmakers, and the public. Second, there needs to be support for the establishment of networking organizations so that ideas can be exchanged and personal ties formed. Third, there must be backing to craft a communications strategy that uses the media to not only confer legitimacy on ideas, but to broadcast them to the public. Fourth, there must be backing for efforts to ensure that sympathetic jurists and lawmakers are placed in office.

Nothing will happen overnight. But, as conservatives have shown in *Citizens United*, a sustained multipronged effort can bring about substantial change. It would be the most delicious of ironies if the true legacy of *Citizens United* was not a permanent distortion in politics due to big money, but as an inspiration for a successful counteroffensive.

Citizens United Echoes for Big Sky Country Judicial Contests

Matthew Menendez, Alicia Bannon, and David Earley

Since 1935, Montana has selected its judges through nonpartisan elections. In fact, it is illegal for political parties to endorse or spend on behalf of candidates for the bench. A party committee challenged this law last year, and a three judge panel overturned it, citing Citizens United. *The Center urged the full 9th Circuit to review the decision.*

The question whether Montana may constitutionally prohibit partisan involvement in its nonpartisan judicial elections is an issue of exceptional importance. Empirical research...over the last dozen years in states around the country that select judges in partisan and nonpartisan elections suggests that political party involvement in judicial elections can have a transformative — and negative — effect on these races.

• • •

In states where judges are elected, partisan involvement in judicial elections is characterized by dramatically higher spending on campaign advertisements and a more partisan and negative tenor in campaign advertising. This is so even in states such as Michigan and Ohio where party affiliation is not permitted to appear on the ballot, but where political parties may endorse candidates and make independent expenditures in support of their election. The nature of political parties as conduits of special interest money and influence and their uniquely close ties to the political branches of government mean that their involvement in judicial races poses a singular risk for the independence and impartiality of elected judges.

• • •

Although high court judges face elections in 38 states, only six states elect Supreme Court justices in partisan elections: Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia. In addition, in Michigan and Ohio, the ballots are nonpartisan, but the nominees are selected by the political parties, and parties are permitted to endorse and make independent expenditures in support of judicial candidates. Strikingly, Supreme Court elections in these eight states have consistently been characterized by significantly higher campaign spending than in states with nonpartisan elections.

The Brennan Center filed this amicus brief with the U.S. Court of Appeals for the Ninth Circuit on November 13, 2012.

From 2000-2009, among states that elect Supreme Court justices, all eight of these partisan states were among the 10 highest states for total Supreme Court fundraising. Indeed, from 2000-2009, candidates in 13 nonpartisan states raised $50.9 million, approximately 25 percent of the total amount raised in Supreme Court races, compared to nearly $153.8 million raised by candidates in the eight partisan states plus New Mexico (which holds partisan retention elections for appointed supreme court justices), approximately 75 percent of the total. Likewise, between 1990 and 2004, the eight partisan states were the eight most expensive states in average spending per Supreme Court campaign. During this period, average campaign spending in nonpartisan races doubled, from approximately $300,000 to $600,000, while average campaign spending in partisan races increased more than 250 percent, from approximately $425,000 to $1.5 million.

• • •

The prominence of negative and misleading advertisements in judicial races risks a loss of public confidence in judges' impartiality and commitment to the law, threatening the integrity of the judicial branch.

[I]n a 2001 poll of more than 2,400 state judges, 46 percent agreed that campaign donations influence judicial decisions. [An] empirical study of judicial decisions involving campaign contributors, found that judges facing election in partisan elections were statistically significantly more likely to rule in favor of their campaign contributors, while with "judges [who] are serving their last term before mandatory retirement, their favoring of business litigants [who contributed to the judges' campaigns] essentially disappears." In the words of Ohio Supreme Court Justice Paul E. Pfeifer, "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race.... Everyone interested in contributing has very specific interests... They mean to be buying a vote."

• • •

Even if judicial campaign contributions did not actually influence judges' decision-making, runaway spending in judicial races undeniably affects public confidence in a fair and impartial judiciary, itself a core principle of due process. For example, in a 2011 national survey, 83 percent of respondents stated that they worry campaign contributions influenced judges' decisions. A mere 3 percent believed contributions had no influence.

• • •

The prominence of negative and misleading advertisements in states with party involvement in judicial races risks a loss of public confidence in judges' impartiality and commitment to the law, threatening the integrity of the judicial branch. For example, a 2011 Wisconsin survey found that 88 percent of respondents were concerned that high spending and negative and misleading advertisements in Supreme Court races will compromise the fairness and impartiality of the courts.

Nor is the harm from partisan involvement in judicial campaigns limited to negative advertisements. As a committee of the American Bar Association that was convened "to study, report and make recommendations to ensure

fairness, impartiality and accountability in state judiciaries" found, "The net effect [of partisan elections] is to further blur, if not obliterate, the distinction between judges and other elected officials in the public's mind by conveying the impression that the decision making of judges, like that of legislators and governors, is driven by allegiance to party, rather than to law."

Indeed, a close relationship between political parties and judicial candidates can threaten the independence of state courts from the political branches of government, one of the motivating factors for the move by most states to elected judges and away from an appointment system.

• • •

It is beyond dispute that states have a fundamental interest in preserving a functional separation of powers, including a judiciary that is independent from the political branches. Indeed, the U.S. Supreme Court has held that the government may lawfully curtail political activity by even minor government employees in order to preserve the appearance that laws are not being administered in partisan fashion, which is "critical" to public confidence in our system of government.

Montana's decision to bar partisan involvement in its races is wholly consistent with this approach. Data from across the country suggest that party involvement in judicial races corresponds with increased negativity and politicization of judicial campaigns that risk undermining public confidence in the impartiality of judges and the independence of judges from the political branches.

Halting Foreclosures is a Good Investment

Mark Ladov and Meghna Philip

Legislators in 15 states — including Arizona — are diverting funds away from much-needed foreclosure-prevention programs in order to balance the budget. But this is a short-sighted measure, as the personal and public costs of a family losing a home are staggering.

The government recently negotiated a $25 billion settlement with the nation's largest banks over "robo-signing" and other foreclosure abuses. At the heart of this settlement is the promise of $2.5 billion in funding for new state foreclosure-prevention efforts.

But legislators in some 15 states — Arizona among them — are breaking this promise by diverting some or all of these funds to other uses. Experience shows that foreclosure prevention is a smart investment in our hardest-hit communities, which will lift state budgets and our national economy.

Gov. Jan Brewer, having signed the state budget, should work with the Attorney General's Office to ensure that settlement money is used, as intended, for foreclosure prevention.

The final state budget sweeps $50 million from the foreclosure settlement into the state's general fund. This is despite the fact that Arizona posted the highest foreclosure rate in the nation in March, with an astonishing one out of every 300 housing units receiving a foreclosure notice.

Republican lawmakers have defended the use of settlement funds to balance the state's budget, explaining that money for new services has to come from somewhere. But this argument is short-sighted, because the evidence shows that foreclosure prevention more than pays for itself.

The personal and public costs of foreclosure are staggering. A study of 140 ZIP codes in 13 states found that foreclosure can cause property values within 300 feet to drop by 1.3 percent. This means that a foreclosed home is not only losing its own value — it's also dragging down neighborhood values by thousands of dollars.

Evidence shows that foreclosure prevention more than pays for itself.

Preventing a family from losing its home saves significant dislocation costs, such as the need for children to move to new (and often lower-performing) schools. And foreclosure prevention is also proven to decrease crime and policing costs. According to one study, a single vacant foreclosed home on a block can lead to a startling 5.7 percent increase in violent crime.

All of these costs to lenders, homeowners, neighbors, and government add up — to nearly $80,000 per foreclosed home, according to a 2007 study by the U.S. Senate Joint Economic Committee. With the cost of foreclosure so high, it is no wonder that prevention saves money. In New York, for example, a statewide network of legal services and housing-counseling providers has saved over 14,000 homes from foreclosure — avoiding an estimated loss of $3.4 billion in property value and tax base.

This op-ed appeared in *The Arizona Republic* on May 12, 2012.

The benefits in Arizona could be comparable. The Arizona Housing Alliance estimates that $50 million could provide 75,000 troubled homeowners with housing counseling and 10,000 homeowners with legal assistance. That investment would more than pay for itself by strengthening communities, boosting property values, and helping to restore the state's economic health.

Arizona's action defies the spirit of the foreclosure settlement, which ordered banks to pay these funds to prevent unnecessary foreclosures, help struggling families, and deter predatory lending practices. But even worse, Arizona is violating the legal terms of the agreement, which unequivocally directs that the state "shall" use the funds for foreclosure-related purposes only.

Instead of misappropriating settlement funds, Arizona should follow the lead of states finding creative and cost-effective ways to invest in foreclosure prevention. States like Colorado and New Mexico are using their funds to support loan-modification programs, to expand free legal services and housing counseling, and to increase access to affordable housing.

Gov. Brewer should work with state officials to make sure that Arizona truly invests in foreclosure-prevention efforts. This will provide relief to distressed homeowners — and it will also pay off in huge dividends for all Arizonans.

BRENNAN CENTER STAFF

Vishal Agraharkar
Counsel, Democracy Program

Molly Alarcon
Policy Associate

Nicole Austin-Hillery
Director & Counsel, D.C. Office

Jonathan Backer
Research Associate, Democracy Program

Alicia Bannon
Counsel, Democracy Program

Christina Bernard
Web Assistant, Communications & Strategy

Rachel Bloom
Voting Rights Strategist

Jonathan Brater
Counsel, Democracy Program

John Anthony Butler
V.P., Chief Operating Officer

Jeremy Carp
Research Associate, Liberty & National Security Program

Inimai Chettiar
Director, Justice Program

Anna Coe
Development Coordinator

Antonio Dell'Agli
IT Director

Tim Domini
Controller

John Donahue
Receptionist/ Operations Assistant

David Earley
Counsel, Democracy Program

Amanda Evans
Executive Assistant, Democracy Program

Christopher Famighetti
Voting Rights Researcher

Keesha Gaskins
Senior Counsel, Democracy Program

Barton Gellman
Fellow, Liberty & National Security Program

Thomas Giovanni
Counsel, Justice Program/ Director, COD Network

Liza Goitein
Co-Director, Liberty & National Security Program

Emily Harris
Executive Assistant to the Vice President for Programs

Seth Hoy
Coordinator, Communications & Strategy

Sundeep Iyer
Principal Quantitative Analyst

Diana Kasdan
Counsel, Democracy Program

Jaemin Kim
Grants Manager

Bridgett King
Voting Rights Researcher

John Kowal
Vice President for Programs

Mark Ladov
Counsel, Justice Program

Rachel Levinson-Waldman
Counsel, Liberty & National Security Program

Jade Lim
Accountant

Kimberly Lubrano
Associate, Communications & Strategy

Jim Lyons
Senior Editor

Holly Maluk
Voting Rights Researcher

Jan Erik Marquez
Human Resources & Accounting Assistant

Amanda Melillo
Research Associate, Democracy Program

Matthew Menendez
Counsel, Democracy Program

Lawrence Norden
Deputy Director, Democracy Program

Charles Ombwa
Development Associate

Erik Opsal
Senior Coordinator, Communications & Strategy

Faiza Patel
Co-Director, Liberty & National Security Program

Roopal Patel
Counsel/Katz Fellow, Justice Program

Myrna Pérez
Senior Counsel, Democracy Program

Meghna Philip
Research Associate, Justice Program

Jeanine Plant-Chirlin
Director, Communications & Strategy

Michael Price
Counsel, Liberty & National Security Program

Lianna Reagan
Research Associate, Democracy Program

Desiree Ramos Reiner
Deputy Director, Communications & Strategy

Sidney Rosdeitcher
Senior Policy Advisor

Lee Rowland
Counsel, Democracy Program

Frederick A.O. "Fritz" Schwarz, Jr.
Chief Counsel

Adam Skaggs
Senior Counsel, Democracy Program

Gabriel Solis
Research Associate, Justice Program

Amos Toh
Legal Fellow

Jafreen Uddin
Special Events Coordinator

Ian Vandewalker
Counsel, Democracy Program

Michael Waldman
President

Vivien Watts
Director of Development

Lori Wedge
Director of Human Resources & Office Administration

Wendy Weiser
Director, Democracy Program

Jennifer Weiss-Wolf
Deputy Director of Development

Carson Whitelemons
Research Associate, Democracy Program

Kelly Williams
Corporate General Counsel

Poy Winichakul
Special Assistant to the President

Monica Youn
Brennan Center Constitutional Fellow

Syed Zaidi
Research Associate, Democracy Program

Lucy Zhou
Research Associate, Democracy Program

**February 2013*

2012 BRENNAN CENTER PUBLICATIONS

Curbing Filibuster Abuse
Mimi Marziani, Jonathan Backer, and Diana Kasdan

Election 2012 Recounts
Lawrence Norden

Voting Law Changes: Election Update
Wendy Weiser and Diana Kasdan

Redistricting and Congressional Control: A First Look
Sundeep Iyer and Keesha Gaskins

Election Spending 2012: 25 Toss-Up House Races
Sundeep Iyer

A Proposal for an NYPD Inspector General
Faiza Patel and Andrew Sullivan

Voter Challengers
Nicolas Riley

Ballot Security and Voter Suppression
Wendy Weiser and Vishal Agraharkar

Empowering Small Donors in Federal Elections
Adam Skaggs and Fred Wertheimer

State Restrictions on Voter Registration Drives
Diana Kasdan

Transparency for Corporate Political Spending: A Federal Solution
David Earley and Ian Vandewalker

Better Design, Better Elections
Lawrence Norden with Whitney Quesenbery and David C. Kimball

Community-Oriented Defense: Start Now
Thomas Giovanni

The Challenge of Obtaining Voter Identification
Keesha Gaskins and Sundeep Iyer

Criminal Justice Debt: A Toolkit for Action
Roopal Patel and Meghna Philip

Donor Diversity Through Public Matching Funds
Elisabeth Genn, Sundeep Iyer, Michael J. Malbin, and Brendan Glavin

*The Brennan Center would like to thank those who so generously supported our work in 2012, with special recognition of the following leaders:**

BENEFACTORS

($500,000 - $1,000,000+)
The Atlantic Philanthropies
Ford Foundation
The Kohlberg Foundation
Open Society Foundations

($250,000 - $499,999)
The Bauman Foundation
The Joyce Foundation
The JPB Foundation
The John D. and
Catherine T. MacArthur Foundation
Piper Fund, a Proteus Fund initiative

($100,000 - $249,999)
Bohemian Foundation
Anne Gumowitz
The Mai Family Foundation
Mertz Gilmore Foundation
The John and Wendy Neu Foundation
Partridge Foundation, a John and Polly Guth
Charitable Fund
Rockefeller Brothers Fund
Jennifer and Jonathan Allan Soros Foundation
State Infrastructure Fund
Vital Projects Fund

($50,000 - $99,999)
Patricia Bauman and
the Hon. John Landrum Bryant
CS Fund / Warsh-Mott Legacy
Educational Foundation of America
The Ralph and Fanny Ellison Charitable Trust
Ernst & Young LLP
Fund For the Future of Tides Foundation
Gail Furman
Irving Harris Foundation
Gloria Jarecki, The Brightwater Fund
Latham & Watkins LLP
Morrison & Foerster LLP
The Overbrook Foundation
Public Welfare Foundation
Gerald Rosenfeld & Judith Zarin
The Schooner Foundation
Stephen Silberstein
Wachtell, Lipton, Rosen & Katz
Wallace Global Fund
Winston & Strawn LLP

($25,000 - $49,999)
Arkay Foundation
Arnold & Porter LLP
Bartlit Beck Herman Palenchar & Scott LLP
William C. Bullitt Foundation
The Clements Family
craigslist Charitable Fund
Davis Polk & Wardwell LLP
Quinn Delaney and Wayne Jordan
Sean Eldridge and Chris Hughes
FJC – A Foundation of Philanthropic Funds
Katrina vanden Heuvel
Hughes Hubbard & Reed LLP
The Charles Evans Hughes Memorial Foundation
Craig Kaplan and Anne Hess
King & Spalding LLP
Ruth Lazarus and Michael Feldberg
Peter B. Lewis
Weston Milliken
Lawrence B. Pedowitz
Rockefeller Family Fund
Paul Rudd
Howard Shapiro Foundation
Skadden, Arps, Slate, Meagher & Flom LLP
Emily Spitzer and Eric Lewis
Scott and Christy Wallace
William B. Wiener, Jr. Foundation
Wilmer Cutler Pickering Hale and Dorr LLP

($10,000 - $24,999)
AJG Foundation
Akin Gump Strauss Hauer & Feld LLP
Allen & Overy LLP
Avon Products, Inc.
The Anne Bartley Fund
Belvue Fund of Tides Foundation
The Herb Block Foundation

* Foundation funding levels may reflect a multi-year commitment.

Zachary W. Carter
John Cogan
The Committee for Economic Development
Tom and Noel Congdon
Cornerstone Research
Theodore Cross Family Charitable Foundation
CrossCurrents Foundation
Crowell & Moring LLP
Louise Hirschfeld Cullman and Lewis B. Cullman
Joan K. Davidson (The J.M. Kaplan Fund)
Debevoise & Plimpton LLP
DecisionQuest
desJardins/Blachman Fund, an advised Fund of Silicon Valley Community Foundation
The Strachan Donnelley Charitable Trust
Edwards Family Fund, an advised Fund of Silicon Valley Community Foundation
Jay W. Eisenhofer
Freshfields Bruckhaus Deringer LLP
Fried, Frank, Harris, Shriver & Jacobson LLP
Susan Sachs Goldman
Hogan Lovells US LLP
Hollingsworth LLP
James E. Johnson
Kaye Scholer LLP
Daniel F. Kolb
Elaine and Ken Langone
The Lehman-Stamm Family Fund
Mayer Brown LLP
Nancy Meyer and Marc Weiss
Ken Miller and Lybess Sweezy
Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.
Orrick, Herrington & Sutcliffe LLP
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Pillsbury Winthrop Shaw Pittman LLP
Steven Alan Reiss
Richards Kibbe & Orbe LLP
Hon. Stephen C. Robinson
Larry and Wendy Rockefeller
Fran and Charles Rodgers
Schulte Roth & Zabel LLP
Frederick A.O. Schwarz, Jr.
Security & Rights Collaborative, a Proteus Fund initiative
Sidley Austin LLP
Simpson Thacher & Bartlett LLP
Sony Corporation of America
David and Liz Ehrenfest Steinglass
Sandor and Faye Straus
Sung-Hee Suh and Peter Dolotta
Sullivan & Cromwell LLP
Steve and Ellen Susman
The Vervane Foundation
Philippe and Kate Villers
Weil, Gotshal & Manges LLP
White & Case LLP
Williams & Connolly LLP
The Winkler Family Foundation

($5,000 - $9,999)
Alec Baldwin
Francis P. Barron
Jeff Benjamin
Bernstein Litowitz Berger & Grossmann LLP
Bingham McCutchen LLP
BNY Mellon
Davis Wright Tremaine LLP
Dechert LLP
Franklin Philanthropic Foundation
J. Rex Fuqua
Goldman Sachs Group, Inc.
Grossman Roth, P.A.
Stacey Herzing
JK Irwin Foundation
Thomas and Mary Anne Jorde
JPMorgan Chase
Michael S. Klein
Daniel Kramer and Judith Mogul
Lankler Siffert & Wohl LLP
Lashof Family Giving Account
Paul and Karen Lightfoot
William Michaelcheck
Roger and Margot Milliken
Morris and Barbara Pearl
Sidney and Linda Rosdeitcher
Josh and Sydney Rosenkranz
Jane C. Sherburne and Robert Van Heuvelen
Ian T. Simmons
The Ungar Foundation

Special Thanks
Special thanks to the Democracy Alliance Partners for all their support and commitment to our work.

2012 PRO BONO FIRMS

Arnold & Porter LLP
Bottomly, Eddy & Sandler PLLP
Bryan Cave LLP
Cuti Hecker Wang LLP
Crowell & Moring LLP
Davis Polk & Wardwell LLP
Debevoise & Plimpton LLP
Dechert LLP
Dewey & LeBoeuf LLP
Emery Celli Brinckerhoff & Abady LLP
Genova Burns Giantomasi & Webster
Gibbons P.C.
Hogan Lovells US LLP
Holland & Hart LLP
Jenner & Block LLP
K&L Gates LLP
Milbank, Tweed, Hadley & McCloy LLP
Morvillo, Abramowitz, Grand, Iason,
Anello & Bohrer, P.C.
Nelson Mullins Riley & Scarborough LLP
O'Melveny & Myers LLP
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Proskauer Rose LLP
Ropes & Gray LLP
Schulte Roth & Zabel LLP
Sidley Austin LLP
Simpson Thacher & Bartlett LLP
Sullivan & Cromwell LLP
Wilmer Cutler Pickering Hale and Dorr LLP

BOARD OF DIRECTORS AND OFFICERS

Patricia Bauman,
Co-Chair

Lawrence B. Pedowitz,
Co-Chair

Nancy Brennan
Zachary W. Carter
Adam B. Cox
John Ferejohn
Gail Furman
Susan Sachs Goldman
Helen Hershkoff
James E. Johnson
Thomas M. Jorde
Daniel F. Kolb
Ruth Lazarus

Paul Lightfoot,
Treasurer
Wendy Neu
Steven A. Reiss,
General Counsel
Richard Revesz
Hon. Stephen C.
Robinson
Gerald Rosenfeld
Stephen Schulhofer
John Sexton, *ex officio*

Christine A. Varney
Michael Waldman
President, Brennan
Center for Justice
Scott Wallace
Adam Winkler

Burt Neuborne
Founding Legal Director

PROGRAM ADVISORY BOARD

Robert A. Atkins
Alec Baldwin
Michele Balfour
David Barrett
Jeff Benjamin
Sheila L. Birnbaum
Robert E. Bostrom
Richard Cotton
Charles Dutton
Peter B. Edelman
Samuel P. Fried

Max Gitter
Gary B. Glass
Beth L. Golden
Mark Green
Matthew J. Hiltzik
Arianna Huffington
David A. Isaac
Elaine Kamarck
Brad S. Karp
Peggy Kuo
Edward Labaton

Theodore A. Levine
Roland Poindexter
Roy L. Reardon
Lee Richards
Larry Rockefeller
Charles A. Stillman
Charles R. Wall
Paul Washington

BRENNAN
CENTER
FOR JUSTICE

at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
www.brennancenter.org